# MISSISSIPPI CODE 1972

*Annotated*

## Volume 1

## Rules of Civil Procedure
## Rules of Criminal Procedure
## Rules of Evidence

**COURT RULES**

# MISSISSIPPI CODE

# 1972

*ANNOTATED*

ADOPTED AS THE OFFICIAL CODE OF THE
STATE OF MISSISSIPPI
BY THE
1972 SESSION OF THE LEGISLATURE

# COURT RULES

## 2022 Edition

## Volume 1

***Prepared by the Editorial Staff of the Publisher***

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# PREFACE

**Use of 2022 Edition; format.**

The 2022 Edition of the Mississippi Court Rules Annotated two-volume set is a publication of LexisNexis. It has been edited, annotated and indexed by the staff of the publishers. It is published in soft cover and is replaced annually. All changes and additions to the Rules, the official Comments and Notes, and the Forms are reflected in each year's edition and the annotations are reviewed and updated, providing the user with the most current and useful information.

Volume 1 of the two-volume set includes the Rules of Civil Procedure, Rules of Criminal Procedure and Rules of Evidence. Volume 2 includes the remaining State and local court rules and the rules of the federal courts in and for the State of Mississippi. The Table of Contents in this edition contains a complete listing of all of the Rules. In addition, each set of Rules contains its own table of contents and index.

The Court Rules are intended to accompany the Mississippi Code of 1972 Annotated. The format and style of the Code has been adhered to as closely as possible for purposes of consistency and for the convenience of the users of the Rules.

**Scope of rules and annotations.**

Rules Volumes 1 and 2 include all changes and additions to the Rules, the official Comments and Notes, and the Forms that have taken place since their initial issuance up to and including amendments received by the publisher through September 12, 2022. In addition, notes construing the Rules have been taken from the reports of decisions of the local and federal courts in cases arising in Mississippi since the issuance of the Rules.

To better serve our customers by making our annotations more current, LexisNexis has changed the sources that are read to create annotations for this publication. Rather than waiting for cases to appear in printed reporters, we now read court decisions as they are released by the courts. A consequence of this more current reading of cases, as they are posted online on LexisNexis, is that the most recent cases annotated may not yet have print reporter citations. These will be provided as they become available through later publications.

This publication contains annotations taken from decisions of the Mississippi Supreme Court and Court of Appeals and decisions of the appropriate federal courts. These cases will be printed in the following reporters:

Southern Reporter, 3rd Series
United States Supreme Court Reports
Supreme Court Reporter
United States Supreme Court Reports, Lawyers' Edition, 2nd Series
Federal Reporter, 4th Series
Federal Supplement, 3rd Series
Federal Rules Decisions
Bankruptcy Reporter

Additionally, annotations have been taken from the following sources:

- American Law Reports, 6th Series
- American Law Reports, Federal Series
- Mississippi College Law Review
- Mississippi Law Journal

Finally, published opinions of the Attorney General and opinions of the Ethics Commission have been examined for annotations.

Among the annotations are Editor's notes inserted by the publisher's editorial staff to explain references, call attention to obvious errors, inconsistencies or ambiguities in the Rules, the official Comments, Notes, and Forms, and to alert users to suggested new rules and introduce major changes. Also, when necessary brackets have been inserted around material in the text to correct misspellings, punctuation or language errors and incorrect references to the Rules, sections of the Code, titles of positions, or names of institutions.

**Amendments, additions, changes, and revisions of rules.**

Amendments, additions, changes, and revisions received since the March 2022 Supplement of the Mississippi Court Rules are to the following:

There are no changes to the Mississippi Rules since the March supplement.

**Information, suggestions, comments, and questions.**

Visit the LexisNexis website at http://www.lexisnexis.com for an online bookstore, technical support, customer service, and other company information.

For further information or assistance, please call us toll free at (800) 833-9844, fax us toll free at (800) 643-1280, email us at customer.support@bender.com, or write to: Mississippi Editor, LexisNexis, 9443 Springboro Pike, Miamisburg, OH 45342.

October 2022 LexisNexis

# USER'S GUIDE

This guide is designed to help both lawyer and layperson get the most out of the Mississippi Court Rules Annotated. Information about key features of the Court Rules and suggestions for their more effective use are given under the following headings:

—General Information
—Analyses
—Attorney General Opinions
—Cross References
—Editor's Notes
—Index
—Judicial Decisions
—Research and Practice References

If you have a question not addressed by the User's Guide, or comments about the Court Rules, you may contact us by calling us toll free at (800) 833-9844, faxing us toll free at (800) 643-1280, e-mailing us at customer.support@bender.com, or writing to Mississippi Editor, LexisNexis, 9443 Springboro Pike, Miamisburg, OH 45342.

## GENERAL INFORMATION

The Mississippi Court Rules are published by LexisNexis in a fully-annotated softcover two-volume set, which is replaced annually and supplemented semi-annually.

Volume 1 of the two-volume set includes the Rules of Civil Procedure, Rules of Criminal Procedure and Rules of Evidence. Volume 2 includes the remaining State court rules, the local rules of the United States district courts and bankruptcy courts for Mississippi, and the rules of the United States Court of Appeals for the Fifth Circuit. Rules are received from the courts and are edited only for stylistic consistency.

## ANALYSES

Each set of rules is preceded by an analysis. The analysis details the scope of the set and enables the user to see at a glance the content of the unit without resorting to a page-by-page examination of the Rules volume or supplement.

## ATTORNEY GENERAL OPINIONS

Opinions of the attorney general for the state of Mississippi have been read for constructions of Mississippi law. Notes describing the subject matter of the opinions have been placed under relevant rules under the heading "Attorney General Opinions." The citation at the end of each note includes the name of the person requesting the opinion, the date of the opinion, and the opinion number.

## CROSS REFERENCES

Cross references refer the user to other statutes or rules that may affect a rule or give it context. Cross references do not cite all related rules, as these can be identified by using the indexes following each set of rules.

## EDITOR'S NOTES

Editor's notes are notes prepared by the Publisher that contain information about important or unusual features of a rule not apparent from the rule's text, or special circumstances surrounding enactment or amendment of the rule.

## INDEX

Each set of rules is immediately followed by an index. As accurate and thorough as the indexes are, there is no such thing as an index that is affordable, convenient, and perfect. Your best defense against index wild goose chases is familiarity with indexing techniques. To that end, an explanatory foreword to the index appears in the first volume of the Index to the Mississippi Code of 1972 Annotated.

## JUDICIAL DECISIONS

Every reported case from the Supreme Court of Mississippi, the Court of Appeals of Mississippi, federal district courts for Mississippi, the federal Fifth Circuit Court of Appeals and the United States Supreme Court has been read for constructions of Mississippi law. These constructions are noted under pertinent rules, under the heading "Judicial Decisions." Where a decision has been reviewed by a higher court, subsequent judicial history and disposition is noted in the case note if such disposition has any bearing on the annotated material. Where two or more decisions state the same rule of law, the case citations may be cumulated under one case note.

Case notes are grouped together under headings called "catchlines." The catchlines identify the basic subject matter of the case notes and assist the user in locating pertinent notes.

## RESEARCH AND PRACTICE REFERENCES

Citations to references in American Jurisprudence, American Jurisprudence Pleading and Practice, American Jurisprudence Proof of Facts, American Jurisprudence Trials, American Law Reports, First through Sixth Series, ALR Federal, Corpus Juris Secundum, various treatises and practice guides, and Mississippi law journals are given under this heading, wherever the references appear to discuss the rule under which the citation appears, or a topic related to the rule.

These citations are intended only as a starting point for library research. The Mississippi law journals include Mississippi Law Journal and Mississippi College Law Review.

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# MISSISSIPPI RULES OF CIVIL PROCEDURE

## ADOPTED EFFECTIVE JANUARY 1, 1982

Rule
ORDER ADOPTING THE MISSISSIPPI RULES OF CIVIL PROCEDURE.

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**Cross References —** Practice and procedure provisions common to courts, see Mississippi Code of 1972 § 11-1-1 et seq.

## RESEARCH REFERENCES

**Practice References.**

USCS Federal Rules of Civil Procedure Set (Michie).

Steven S. Gensler, Moore's Federal Practice, The Amendments to the Federal Rules of Civil Procedure (Matthew Bender Elite Products).

Glen Weissenberger, A. J. Stephani, Weissenberger's Federal Civil Procedure Litigation Manual (Anderson Publishing).

## ORDER ADOPTING THE MISSISSIPPI RULES OF CIVIL PROCEDURE.

### SUPREME COURT OF MISSISSIPPI

Pursuant to the inherent authority vested in this Court by the Constitution of the State of Mississippi, as discussed in *Cecil Newell, Jr. v. State of Mississippi*, 308 So.2d 71 (Miss. 1975), to promote justice, uniformity, and the efficiency of courts, the rules attached hereto are adopted and promulgated as Rules of Practice and Procedure in all Chancery, Circuit, and County Courts of this State in all civil actions filed on and after January 1, 1982, any and all statutes and court rules previously adopted to the contrary notwithstanding, and in the event of a conflict between these rules and any statute or court rule previously adopted these rules shall control.

The Clerk of this Court is authorized and directed to spread this order and the rules attached hereto at large on the minutes of the Court, and the Clerk is further authorized and directed to forward a certified copy thereof to West Publishing Company for publication in a forthcoming edition of Southern Reporter, Mississippi Cases, the official publication of decisions of this Court.

ORDERED, this the 26th day of May, 1981.

FOR THE COURT
Neville Patterson,
Chief Justice

## ORDER REPEALING COMMENTS TO THE MISSISSIPPI RULES OF CIVIL PROCEDURE

### SUPREME COURT OF MISSISSIPPI

This matter is before the en banc Court on the Motion for the Amendment of Comments to the Mississippi Rules of Civil Procedure filed by the Supreme Court Rules Advisory Committee. As created by order of this Court originally dated November 9, 1983, the Committee is composed of members who represent the bench, bar, and the law schools of this state. In keeping with its responsibilities and for the purpose of assisting the bench and bar, the Committee has promulgated the notes that follow the Court's rules. These notes, while not official comments of the Supreme Court, are the product of extensive research and review and have been vetted by the members of the Committee as well as other trial judges and practicing members of the bar. The Court expresses its sincere appreciation for the Committee's commitment, diligence, and hard work. Having carefully considered the motion and its attachments, the en banc Court finds that the motion should be granted to the extent provided in this order.

IT IS, THEREFORE, ORDERED that the current Comments to the Mississippi Rules of Civil Procedure are repealed effective July 1, 2014.

IT IS FURTHER ORDERED that the Advisory Committee Notes to the Mississippi Rules of Civil Procedure as contained in Exhibit "A" are approved for publication with the Mississippi Rules of Civil Procedure effective July 1, 2014.

IT IS FURTHER ORDERED that the Clerk of this Court shall spread this order upon the minutes of the Court and shall forthwith forward a true certified copy hereof to West Publishing Company for publication as soon as practical in the advance sheets of Southern Reporter, Third Series (Mississippi Edition) and in the next edition of Mississippi Rules of Court.

SO ORDERED, this the 9th day of June, 2014.

William L. Waller, Jr.,
Chief Justice
FOR THE COURT

# CHAPTER I. SCOPE OF RULES–ONE FORM OF ACTION

## Rule 1. Scope of rules.

These rules govern procedure in the circuit courts, chancery courts, and county courts in all suits of a civil nature, whether cognizable as cases at law or in equity, subject to certain limitations enumerated in Rule 81; however, even those enumerated proceedings are still subject to these rules where no statute applicable to the proceedings provides otherwise or sets forth procedures inconsistent with these rules. These rules shall be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action.

**HISTORY: Comments repealed and Advisory Committee Notes amended effective July 1, 2014; amended rule, added advisory committee historical note and amended advisory committee note, effective July 1, 2020.**

### ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 2020, Rule 1 was amended to emphasize that the parties share responsibility with the court to employ the rules so as to secure the just, speedy and inexpensive resolution of every action. XX So. 3d XX (Miss.).

### ADVISORY COMMITTEE NOTE

These rules are to be applied as liberally to civil actions as is judicially feasible, whether in actions at law or in equity. However, nothing in the rules should be interpreted as abridging or modifying the traditional separations of jurisdiction between the law courts and equity courts in Mississippi.

The salient provision of Rule 1 is the statement that "These rules shall be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action." There probably is no provision in these rules more important than this mandate; it reflects the spirit in which the rules were conceived and written and in which they should be interpreted. The primary purpose of procedural rules is to promote the ends of justice; these rules reflect the view that this goal can best be accomplished by the establishment of a single form of action, known as a "civil action," thereby uniting the procedures in law and equity through a simplified procedure that minimizes technicalities and places considerable discretion in the trial judge for construing the rules in a manner that will secure their objectives.

[Advisory Committee Note adopted effective July 1, 2014: amended effective July 1, 2020.]

**Editor's Note** — See also M.R.C.P. 81, which compliments Rule 1 by specifying which civil actions are governed only partially, or not at all, by the provisions of the M.R.C.P.

## JUDICIAL DECISIONS

### ANALYSIS

In general.
Applicability.

**In general.**

Circuit court judge erred by unilaterally and non-randomly reassigning a case to herself as she was not the judge to whom the case was assigned, and the reasons for the reassignment, which were articulated in the reassignment order, clearly contradicted and were in opposition to the reasons given for the special-master order. Safeco Ins. Co. of Am. v. State ex rel. Hood, — So. 3d —, 2019 Miss. LEXIS 296 (Miss. Aug. 22, 2019).

Orders are effective upon filing, and such a rule will secure the just, speedy, and inexpensive determination of every action; a party should be responsible for timely filing a motion, ensuring that the judge rules on the motion, and making certain that the resulting order is timely filed with the clerk. Graceland Care Ctr. of New Albany, LLC v. Hamlet ex rel. Kinard, 236 So. 3d 1, 2017 Miss. LEXIS 430 (Miss. 2017).

Chancery court properly entered final judgment in favor of appellee because appellant never pleaded a claim for damages; appellant's motion to reconsider was not sufficient as a pleading since it did not assert a demand for judgment, and at the time of filling, appellant did not intend for its motion to reconsider to be treated as a pleading for damages. RSL Funding, LLC v. Saucier (In re Transfer of Structured Settlement Payment Rights by Benny Ray Saucier), 207 So. 3d 689, 2016 Miss. App. LEXIS 801 (Miss. Ct. App. 2016).

Rule on sanctions not only empowers, but specifically grants trial courts the authority to dismiss a case with prejudice as may be just; any attempt to subvert the judicial process, as in this case, cuts against the very core of promoting the ends of justice and the ascertainment of the truth. Ashmore v. Miss. Auth. on Educ. TV, 148 So. 3d 977, 2014 Miss. LEXIS 407 (Miss. 2014).

Mississippi Rules of Civil Procedure were not mere suggestions or recommendations. Compliance was a requirement toward the end of securing the just, speedy, and inexpensive determination of every action. Ensuring compliance with the rules was necessary, as a rule which is not enforced is no rule. Therefore, the suit of a widow who took no action of record for seven years was required to be dismissed under Miss. R. Civ. P. 41(d). Ill. Cent. R.R. Co. v. Moore, 994 So. 2d 723, 2008 Miss. LEXIS 422 (Miss. 2008).

Because the Mississippi Employment Security Commission (MESC) was not a circuit, chancery or county court, the Mississippi Rules of Civil Procedure, particularly Miss. R. Civ. P. 6(e), were not applicable to its administrative hearings or appeals. Miss. Empl. Sec. Comm'n v. Parker, 903 So. 2d 42, 2005 Miss. LEXIS 58 (Miss. 2005).

In an action relating to waste disposal, a transfer to a chancery court was improper because equitable claims were not added until after the transfer, and the action had been pending in the circuit court for five years before the transfer was requested. Georgia-Pacific Corp. v. Mooney, 909 So. 2d 1081, 2005 Miss. LEXIS 73 (Miss. 2005).

Parties agreed that under the trial court's method of computation, service was complete on third party defendant one on day 130, and on third party defendant two on day 131. However, the appellate court found that although there was no good cause shown for the delay in service, the delay was relatively slight, and there was good cause for allowing the litigation to proceed; on the specific facts of the case, that was enough, and the trial court properly denied the third party defendants' motions to dismiss. Tunek v. Windham, 897 So. 2d 186, 2004 Miss. App. LEXIS 652 (Miss. Ct. App. 2004), cert. denied, 896 So. 2d 373, 2005 Miss. LEXIS 197 (Miss. 2005).

The Mississippi Rules of Civil Procedure do not apply to administrative proceedings. Mississippi Real Estate Appraiser Licensing & Certification Bd. v. James, 730 So. 2d 1135, 1999 Miss. LEXIS 3 (Miss. 1999).

**Applicability.**

As the rules of civil procedure applied in all courts, and the rules controlled in the event of a conflict between a rule of procedure and a statute, the appellate court did not err in holding that a special master appointed under Miss. R. Civ. P. 53 was not subject to the oath in Miss. Code Ann. § 11-21-17. Dunaway v. Morgan, 918 So. 2d 872, 2006 Miss. App. LEXIS 9 (Miss. Ct. App. 2006).

When complaint seeking equitable relief was filed by the heirs of the original plaintiff more than 60 years after a chancellor's decree determined that the original plaintiff and his partner each owned a one-half interest in the land, and the heirs alleged that the original decree was a mistake or accident under Miss. R. Civ. P. 60(b)(2), the heirs' complaint was time-barred. R. N. Turnbow Oil Invs. v. McIntosh, 873 So. 2d 960, 2004 Miss. LEXIS 259 (Miss. 2004).

Rules of civil procedure did not apply to proceedings before the State Oil & Gas Board. State Oil & Gas Bd. v. McGowan, 542 So. 2d 244, 1989 Miss. LEXIS 184 (Miss. 1989).

Proceedings in an election contest before a political party's executive committee are not civil proceedings in a court of record, and hence Rules of Civil Procedure have no application; with respect to proceedings before special tribunal, Rules of Civil Procedure control only to extent that governing statute is silent. Shannon v. Henson, 499 So. 2d 758, 1986 Miss. LEXIS 2883 (Miss. 1986).

## Rule 2. One form of action.

There shall be one form of action to be known as "civil action."

**HISTORY: Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

### ADVISORY COMMITTEE NOTE

Rule 2 does not affect the various remedies that previously have been available in the courts of Mississippi. The abolition of the forms of action furnishes a single, uniform procedure by which a litigant may present a claim in an orderly manner to a court empowered to give whatever relief is appropriate and just; the substantive and remedial principles that applied prior to the advent of these rules are not changed. What was an action at law before these rules is still a civil action founded on legal principles and what was a bill in equity before these rules is still a civil action founded upon equitable principles.

### JUDICIAL DECISIONS

**In general.**

Chancery court did not err in denying a motion filed by the mother of a decedent's child to set aside or amend an order disbursing funds, including attorneys' fees, from the settlement of a wrongful death action because the chancery court lacked jurisdiction to hear the motion; because the matter was not brought by complain but merely by a motion contested among the attorneys of the minor parties in the underlying action, it would have been inappropriate procedurally for the chancellor to transfer the issue of attorneys' fees to the circuit court. In re Estate of Williams, 40 So. 3d 1282, 2010 Miss. App. LEXIS 322 (Miss. Ct. App. 2010).

In determining if a suit was barred by res judicata, identity of the cause of action was examined in light of Miss. R. Civ. P. 2, which required the court to look past the legal bases asserted and rely more on the factual and transactional relationship between the original action and the subsequent action. Parties and courts were to distinguish between what body of fact constituted a claim and what legal theories attached to that body of fact. Hill v. Carroll County, 17 So. 3d 1081, 2009 Miss. LEXIS 443 (Miss. 2009).

## CHAPTER II. COMMENCEMENT OF ACTION: SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

### Rule 3. Commencement of action.

(a) *Filing of complaint.* — A civil action is commenced by filing a complaint with the court. A costs deposit shall be made with the filing of the complaint, such deposit to be in the amount required by the applicable Uniform Rule governing the court in which the complaint is filed.

The amount of the required costs deposit shall become effective immediately upon promulgation of the applicable Uniform Court Rule and its approval by the Mississippi Supreme Court.

(b) *Motion for security for costs.* — The plaintiff may be required on motion of the clerk or any party to the action to give security within sixty days after an order of the court for all costs accrued or to accrue in the action. The person making such motion shall state by affidavit that the plaintiff is a nonresident of the state and has not, as affiant believes, sufficient property in this state out of which costs can be made if adjudged against him; or if the plaintiff be a resident of the state, that he has good reason to believe and does believe, that such plaintiff cannot be made to pay the costs of the action if adjudged against him. When the affidavit is made by a defendant it shall state that affiant has, as he believes, a meritorious defense and that the affidavit is not made for delay; when the affidavit is made by one not a party defendant it shall state that it is not made at the instance of a party defendant. If the security be not given, the suit shall be dismissed and execution issued for the costs that have accrued; however, the court may, for good cause shown, extend the time for giving such security.

(c) *Proceeding in forma pauperis.* — If a pauper's affidavit is filed in the action the costs deposit and security for costs may be waived. The court may, however, on the motion of any party, on the motion of the clerk of the court, or on its own initiative, examine the affiant as to the facts and circumstances of his pauperism.

(d) *Accounting for costs.* — Within sixty days of the conclusion of an action, whether by dismissal or by final judgment, the clerk shall prepare an itemized statement of costs incurred in the action and shall submit the statement to the parties or, if represented, to their attorneys. If a refund of costs deposit is due, the clerk shall include payment with the statement; if additional costs are due, a bill for same shall accompany the statement.

**HISTORY: Amended effective September 1, 1987; amended effective June 24,**

**1992; Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective June 24, 1992, Rule 3(a) was amended to provide that before they are effective, the amounts of required costs deposits must be promulgated by Uniform Court Rule and approved by the Mississippi Supreme Court. 598-602 So. 2d XXI (West Miss. Cas. 1992).

Effective September 1, 1987, Rule 3(e) was amended by providing that the amount required as a deposit for filing suit shall be the amount required by the Uniform Rule governing the court in which the action is filed. 508-511 So. 2d XXV (West Miss. Cas. 1988).

## ADVISORY COMMITTEE NOTE

Rule 3(a) establishes a precise date for fixing the commencement of a civil action. The first step in a civil action is the filing of the complaint with the clerk or judge. Service of process upon the defendant is not essential to commencement of the action, but Rule 4(h) does require service of the summons and complaint within 120 days after the filing of the complaint.

Ascertaining the precise date of commencement is important in determining whether an action has been brought prematurely; whether it is barred by a statute of limitations; and which of two or more courts in which actions involving the same parties and issues have been instituted should retain the case for disposition, absent special considerations.

The provisions in Rule 3 pertaining to costs are intended to make uniform the assessing, accounting for, and funding of costs.

Rule 3(c) allows indigents to sue without depositing security for costs; however, the indigent affiant may be examined as to affiant's financial condition and the court may, if the allegation of indigency is false, dismiss the action.

## JUDICIAL DECISIONS

### ANALYSIS

In general.
Applicability.
Parties.

**In general.**

Chancery court did not err in denying a motion filed by the mother of a decedent's child to set aside or amend an order disbursing funds, including attorneys' fees, from the settlement of a wrongful death action because the chancery court lacked jurisdiction to hear the motion; because the matter was not brought by complain but merely by a motion contested among the attorneys of the minor parties in the underlying action, tit would have been inappropriate procedurally for the chancellor to transfer the issue of attorneys' fees to the circuit court. In re Estate of Williams, 40 So. 3d 1282, 2010 Miss. App. LEXIS 322 (Miss. Ct. App. 2010).

Appellant inmate's attempt to assert a claim under 42 U.S.C.S. § 1983 was without merit because he never filed any such complaint or any corresponding summons; he only filed various motions and documents, and under Miss. R. Civ. P. 3(a), a party had to file a complaint to institute an action. Dobbs v. State, 6 So. 3d 1088, 2008 Miss. App. LEXIS 354 (Miss. Ct. App. 2008), rev'd, 6 So. 3d 1085, 2009 Miss. LEXIS 165 (Miss. 2009).

Where an attorney appealed the denial of unemployment benefits, it was error to find that the attorney's appeal was untimely based on the failure to include a civil cover sheet, because the attorney demonstrated good cause for an extension of the filing deadline since the cover sheet requirement did not bar the otherwise timely notice of appeal. Cummings v. Miss. Dep't of Empl. Sec., 980 So. 2d 340, 2008 Miss. App. LEXIS 251 (Miss. Ct. App. 2008).

Defendants' removal motion was timely filed because service of process was not an absolute prerequisite for removal and the notice of removal was filed after the complaint. Bell v. Am. Gen. Fin., Inc., 267 F. Supp. 2d 582, 2003 U.S. Dist. LEXIS 10718 (S.D. Miss. 2003).

Plaintiff's filing of complaint by mail did not extend statute of limitation on actions for assault and battery and intentional infliction of emotional distress by three days; dismissal of action on grounds of limitation was not error when the complaint was not received by the trial court clerk until after the statute of limitation had run. Slaydon v. Hansford, 830 So. 2d 686, 2002 Miss. App. LEXIS 477 (Miss. Ct. App. 2002), overruled, Blake v. Estate of Clein, 37 So. 3d 622, 2010 Miss. LEXIS 322 (Miss. 2010).

Subsection (a) of this rule and Rule 4(h) operate to the extent that the commencement date of an action is the date of filing, and that date obtains for statute of limitations purposes whenever the action is not dismissed, including those instances in which the action would have been dismissed but for an extension of time. Crumpton v. Hegwood, 740 So. 2d 292, 1999 Miss. LEXIS 251 (Miss. 1999).

**Applicability.**

Because the Mississippi Structured Settlement Protection Act, Miss. Code Ann. §§ 11-57-1 through 11-57-1-15, requires court approval of a transfer of structured settlement payment rights, a civil action is commenced by filing a complaint with the court; to obtain personal jurisdiction over an interested party, service of process is required consistent with either Miss. R. Civ. P. 4 or 81. RSL Funding, LLC v. Saucier (In re Saucier), 130 So. 3d 1108, 2013 Miss. App. LEXIS 133 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 71 (Miss. 2014), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 74 (Miss. 2014).

**Parties.**

In a dispute concerning adjoining landowners' rights to property along a river, the appellate court limited review to the chancellor's decision regarding the parties who were actually named as appellants and appellees in the notice of appeal. Comeaux v. Freeman, 918 So. 2d 780, 2005 Miss. App. LEXIS 338 (Miss. Ct. App. 2005).

## Rule 4. Summons.

(a) *Summons: issuance.* — Upon filing of the complaint, the clerk shall forthwith issue a summons.

(1) At the written election of the plaintiff or the plaintiff's attorney, the clerk shall:

(A) Deliver the summons to the plaintiff or plaintiff's attorney for service under subparagraphs (c)(1) or (c)(3) or (c)(4) or (c)(5) of this rule.

(B) Deliver the summons to the sheriff of the county in which the defendant resides or is found for service under subparagraph (c)(2) of this rule.

(C) Make service by publication under subparagraph (c)(4) of this rule.

(2) The person to whom the summons is delivered shall be responsible for prompt service of the summons and a copy of the complaint. Upon request of the plaintiff, separate or additional summons shall issue against any defendants.

(b) *Same: form.* — The summons shall be dated and signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint. Where there are multiple plaintiffs or multiple defendants, or both, the summons, except where service is made by publication, may contain, in lieu of the names of all parties, the name of the first party on each side and the name and address of the party to be served. Summons served by process server shall substantially conform to Form 1A. Summons served by sheriff shall substantially conform to Form 1AA.

(c) *Service:* —

(1) *By process server.* — A summons and complaint shall, except as provided in subparagraphs (2) and (4) of this subdivision, be served by any person who is not a party and is not less than 18 years of age. When a summons and complaint are served by process server, an amount not exceeding that statutorily allowed to the sheriff for service of process may be taxed as recoverable costs in the action.

(2) *By sheriff.* — A summons and complaint shall, at the written request of a party seeking service or such party's attorney, be served by the sheriff of the county in which the defendant resides or is found, in any manner prescribed by subdivision (d) of this rule. The sheriff shall mark on all summons the date of the receipt by him, and within thirty days of the date of such receipt of the summons the sheriff shall return the same to the clerk of the court from which it was issued.

(3) *By mail.* —

(A) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (4) of subdivision (d) of this rule by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to Form 1-B and a return envelope, postage prepaid, addressed to the sender.

(B) If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint may be made in any other manner permitted by this rule.

(C) Unless good cause is shown for not doing so, the court shall order the payment of the costs of personal service by the person served if such person does not complete and return within 20 days after mailing the notice and acknowledgment of receipt of summons.

(D) The notice and acknowledgment of receipt of summons and complaint shall be executed under oath or affirmation.

(4) *By publication.* —

(A) If the defendant in any proceeding in a chancery court, or in any proceeding in any other court where process by publication is authorized by statute, be shown by sworn complaint or sworn petition, or by a filed affidavit, to be a nonresident of this state or not to be found therein on diligent inquiry and the post office address of such defendant be stated in the complaint, petition, or affidavit, or if it be stated in such sworn complaint or petition that the post office address of the defendant is not known to the plaintiff or petitioner after diligent inquiry, or if the affidavit be made by another for the plaintiff or petitioner, that such post office address is unknown to the affiant after diligent inquiry and he believes it is unknown to the plaintiff or petitioner after diligent inquiry by the plaintiff or petitioner, the clerk, upon filing the complaint or petition, account or other commencement of a proceeding, shall promptly prepare and publish a summons to the defendant to appear and defend the suit. The summons shall be substantially in the form set forth in Form 1-C.

(B) The publication of said summons shall be made once in each week during three successive weeks in a public newspaper of the county in which the complaint or petition, account, cause or other proceeding is pending if there be such a newspaper, and where there is no newspaper in the county the notice shall be posted at the courthouse door of the county and published as above provided in a public newspaper in an adjoining county or at the seat of government of the state. Upon completion of publication, proof of the prescribed publication shall be filed in the papers in the cause. The defendant shall have thirty (30) days from the date of first publication in which to appear and defend. Where the post office address of a defendant is given, the street address, if any, shall also be stated unless the complaint, petition, or affidavit above mentioned, avers that after diligent search and inquiry said street address cannot be ascertained.

(C) It shall be the duty of the clerk to hand the summons to the plaintiff or petitioner to be published, or, at his request, and at his expense, to hand it to the publisher of the proper newspaper for publication. Where the post office address of the absent defendant is stated, it shall be the duty of the clerk to send by mail (first class mail, postage prepaid) to the address of the defendant, at his post office, a copy of the summons and complaint and to note the fact of issuing the same and mailing the copy, on the general docket, and this shall be the evidence of the summons having been mailed to the defendant.

(D) When unknown heirs are made parties defendant in any proceeding in the chancery court, upon affidavit that the names of such heirs are unknown, the plaintiff may have publication of summons for them and such proceedings shall be thereupon in all respects as are authorized in the case of a nonresident defendant. When the parties in interest are unknown, and affidavit of that fact be filed, they may be made parties by publication to them as unknown parties in interest.

(E) Where summons by publication is upon any unmarried infant, mentally incompetent person, or other person who by reason of advanced age, physical incapacity or mental weakness is incapable of managing his own estate, summons shall also be had upon such other person as shall be required to receive a copy of the summons under paragraph (2) of subdivision (d) of this rule.

(5) *Service by certified mail on person outside state.* — In addition to service by any other method provided by this rule, a summons may be served on a person outside this state by sending a copy of the summons and of the complaint to the person to be served by certified mail, return receipt requested. Where the defendant is a natural person, the envelope containing the summons and complaint shall be marked “restricted delivery.” Service by this method shall be deemed complete as of the date of delivery as evidenced by the return receipt or by the returned envelope marked “Refused.”

(d) *Summons and complaint: person to be served.* — The summons and complaint shall be served together. Service by sheriff or process server shall be made as follows:

(1) Upon an individual other than an unmarried infant or a mentally incompetent person,

(A) by delivering a copy of the summons and of the complaint to him personally or to an agent authorized by appointment or by law to receive service of process; or

(B) if service under subparagraph (1)(A) of this subdivision cannot be made with reasonable diligence, by leaving a copy of the summons and complaint at the defendant's usual place of abode with the defendant's spouse or some other person of the defendant's family above the age of sixteen years who is willing to receive service, and by thereafter mailing a copy of the summons and complaint (by first class mail, postage prepaid) to the person to be served at the place where a copy of the summons and of the complaint were left. Service of a summons in this manner is deemed complete on the 10th day after such mailing.

(2)(A) upon an unmarried infant by delivering a copy of the summons and complaint to any one of the following: the infant's mother, father, legal guardian (of either the person or the estate), or the person having care of such infant or with whom he lives, and if the infant be 12 years of age or older, by delivering a copy of the summons and complaint to both the infant and the appropriate person as designated above.

(B) upon a mentally incompetent person who is not judicially confined to an institution for the mentally ill or mentally deficient or upon any other person who by reason of advanced age, physical incapacity or mental weakness is incapable of managing his own estate by delivering a copy of the summons and complaint to such person and by delivering copies to his guardian (of either the person or the estate) or conservator (of either the person or the estate) but if such person has no guardian or conservator, then by delivering copies to him and copies to a person with whom he lives or to a person who cares for him.

(C) upon a mentally incompetent person who is judicially confined in an institution for the mentally ill or mentally retarded by delivering a copy of the summons and complaint to the incompetent person and by delivering copies to said incompetent's guardian (of either the person or the estate) if any he has. If the superintendent of said institution or similar official or person shall certify by certificate endorsed on or attached to the summons that said incompetent is mentally incapable of responding to process, service of summons and complaint on such incompetent shall not be required. Where said confined incompetent has neither guardian nor conservator, the court shall appoint a guardian ad litem for said incompetent to whom copies shall be delivered.

(D) where service of a summons is required under (A), (B) and (C) of this subparagraph to be made upon a person other than the infant, incompetent, or incapable defendant and such person is a plaintiff in the action or has an interest therein adverse to that of said defendant, then such person shall be deemed not to exist for the purpose of service and the requirement of service in (A), (B) and (C) of this subparagraph shall not be met by service upon such person.

(E) if none of the persons required to be served in (A) and (B) above exist other than the infant, incompetent or incapable defendant, then the court shall appoint a guardian ad litem for an infant defendant under the age of 12 years and may appoint a guardian ad litem for such other defendant to whom a copy of the summons and complaint shall be delivered. Delivery of a copy of the summons and complaint to such guardian ad litem shall not dispense with delivery of copies to the infant, incompetent or incapable defendant where specifically required in (A), and (B) of this subparagraph.

(3) Upon an individual confined to a penal institution of this state or of a subdivision of this state by delivering a copy of the summons and complaint to the individual, except that when the individual to be served is an unmarried infant or mentally incompetent person the provisions of subparagraph (d)(2) of this rule shall be followed.

(4) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process.

(5) Upon the State of Mississippi or any one of its departments, officers or institutions, by delivering a copy of the summons and complaint to the Attorney General of the State of Mississippi.

(6) Upon a county by delivering a copy of the summons and complaint to the president or clerk of the board of supervisors.

(7) Upon a municipal corporation by delivering a copy of the summons and complaint to the mayor or municipal clerk of said municipal corporation.

(8) Upon any governmental entity not mentioned above, by delivering a copy of the summons and complaint to the person, officer, group or body responsible for the administration of that entity or by serving the appropriate legal officer, if any, representing the entity. Service upon any person who is a member of the "group" or "body" responsible for the administration of the entity shall be sufficient.

(e) *Waiver.* — Any party defendant who is not an unmarried minor, or mentally incompetent may, without filing any pleading therein, waive the service of process or enter his or her appearance, either or both, in any action, with the same effect as if he or she had been duly served with process, in the manner required by law on the day of the date thereof. Such waiver of service or entry of appearance shall be in writing dated and signed by the defendant and duly sworn to or acknowledged by him or her, or his or her signature thereto be proven by two (2) subscribing witnesses before some officer authorized to administer oaths. Any guardian or conservator may likewise waive process on himself and/or his ward, and any executor, administrator, or trustee may likewise waive process on himself in his fiduciary capacity. However, such written waiver of service or entry of appearance must be executed after the day on which the action was commenced and be filed among the papers in the cause and noted on the general docket.

(f) *Return.* — The person serving the process shall make proof of service thereof to the court promptly. If service is made by a person other than a sheriff, such person shall make affidavit thereof. If service is made under paragraph (c)(3) of this rule, return shall be made by the sender's filing with the court the acknowledgment received pursuant to such subdivision. If service is made under paragraph (c)(5) of this rule, the return shall be made by the sender's filing with the court the return receipt or the returned envelope marked "Refused." Failure to make proof of service does not affect the validity of the service.

(g) *Amendment.* — At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process is issued.

(h) *Summons: time limit for service.* — If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

**HISTORY: Amended effective May 1, 1982; March 1, 1985; February 1, 1990; July 1, 1998; January 3, 2002; Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 3, 2002, Rule 4(e) was amended to delete a prohibition against waiver of service of process by one convicted of a felony. 802-804 So.2d XVII (West Miss. Cases 2002).

Effective July 1, 1998, Rule 4(f) was amended to state that the person serving process shall promptly make proof of service thereof to the court.

Effective February 1, 1990, Rule 4(c)(4)(B) was amended by striking the word "calendar" following the word and figure "thirty (30)"; Rule 4(c)(4) was amended by adding subsection (E); Rule 4(c)(5) was amended by changing the title to reflect service by certified mail; Rule 4(d)(2)(A) was amended by substituting the word "person" for "individual" in reference to the one having care of the infant. 553-556 So. 2d XXXIII (West Miss. Cas. 1990).

Effective March 1, 1985, a new Rule 4 was adopted. 459-462 So. 2d XVIII (West Miss. Cas. 1985).

Effective May 1, 1982, Rule 4 was amended. 410-416 So. 2d XXI (West Miss. Cas. 1982).

## ADVISORY COMMITTEE NOTE

After a complaint is filed, the clerk is required to issue a separate summons for each defendant except in the case of summons by publication. The summons must contain the information required by Rule 4(b), which requires the summons to notify the defendant that, among other things, a failure to appear will result in a judgment by default. Although the "judgment by default will be rendered" language may be an overstatement, the strong language is intended to encourage defendants to appear to protect their interests. Forms 1A, 1AA, 1B, and 1C are provided as suggested forms for the various summonses.

The summons and a copy of the complaint must then be served on each defendant. This rule provides for personal service, residence service, first-class mail and acknowledgement service, certified mail service, and publication service.

Personal service is authorized by Rule 4(d)(1)(A) and requires delivery of a copy of the complaint and the summons to the person to be served.

Residence service is authorized by Rule 4(d)(1)(B) and requires that a copy of the complaint and the summons be left at the defendant's usual place of abode with the defendant's spouse or other family member who is above the age of sixteen and who is willing to accept service. Residence service further requires that a copy of the summons and complaint be thereafter mailed to the defendant at the location where the complaint and summons were left.

Personal service and residence service may be made by a process server or the sheriff in the county where the defendant resides or can be found. A party using a process server may pay such person any amount that is agreed upon but only that amount statutorily allowed as payment to the sheriff under Mississippi Code Annotated section 25-7-19 (Supp. 2013) may be taxed as recoverable costs in the action. Summonses served by process servers should be in substantial conformity with Form 1A and summonses served by sheriffs should be in substantial conformity with Form 1AA.

First-class mail and acknowledgement service is authorized by Rule 4(c)(3). The plaintiff must mail the defendant a copy of the summons and complaint, two copies of a notice and acknowledgement conforming substantially to Form 1B, and a postage paid envelope addressed to the sender. Upon receipt, the defendant may execute the acknowledgement of service under oath or by affirmation. If the defendant fails to execute and return the acknowledgement of service in a timely fashion, the defendant may be ordered to pay the costs incurred by the plaintiff in serving the defendant by another method. This provision is intended to encourage a defendant to acknowledge service by first-class mail in order to avoid having to pay the costs that would otherwise be incurred by the plaintiff in serving that defendant. Execution and return of the acknowledgement of service does not operate as a waiver of objections to jurisdiction or venue. All jurisdictional and venue objections are preserved whether Form 1B is completed and returned from inside or outside the state. Although M.R.C.P. 4(c)(3) is modeled after Fed. R. Civ. P. 4(d), defendants who execute and return the acknowledgement of service under M.R.C.P. 4(c)(3) are acknowledging actual service, whereas defendants who execute and return the waiver under Fed. R. Civ. P. 4(d) are waiving service.

Publication service is authorized by Rule 4(c)(4) and is limited to defendants in chancery court proceedings and other proceedings where service by publication is authorized by statute. Service by publication is further limited to defendants who are nonresidents or who cannot be found within the state after diligent inquiry. The requirements for service by publication are detailed in the rule and must be strictly followed; otherwise service is ineffective. *See Caldwell v. Caldwell,* 533 So. 2d 413 (Miss. 1988).

Certified mail service is authorized by Rule 4(c)(5) and is limited to persons outside the state. The plaintiff must send a copy of the summons and complaint to the person to be served by certified mail, return receipt requested [and must thereafter mail by first-class mail, postage prepaid, a copy of the summons and complaint to the person to be served at the same address. The Proof of Service must indicate the date on which the summons and complaint were mailed by first-class mail and must also include as an attachment the signed return receipt or the return envelope marked "refused." Service upon a foreign corporation, partnership or unincorporated association is effective even if the certified mail is delivered to and signed for or refused by a person other than the addressee, if the person accepting delivery and signing or refusing delivery is an officer or employee of the defendant who is authorized to receive or who regularly receives certified mail. *See Flagstar Bank, FSB v. Danos,* 46 So. 3d 298 (Miss. 2010) (finding service by certified mail upon a foreign corporation effective where the plaintiff addressed the certified mail to the foreign corporation's registered agent for service of process and the certified mail was delivered to the proper address and signed for by the mail clerk rather than the registered agent). Service of process is not effective under Rule 4(c)(5) if the mailing is returned marked "unclaimed/refused", "unclaimed" or "undeliverable as addressed." *See Bloodgood v. Leatherwood,* 25 So. 3d 1047 (Miss. 2010).

Rule 4(d) identifies the person to be served with process when the defendant is: (i) a mentally competent married infant or a mentally competent adult; (ii) an unmarried infant; (iii) a mentally incompetent person who is not judicially confined to an institution for the mentally ill or mentally deficient; (iv) a mentally incompetent person who is judicially confined to an institution for the mentally ill or mentally deficient; (v) an individual confined to a penal institution of this state or a subdivision of this state; (vi) a domestic or foreign corporation, partnership or unincorporated association subject to a suit under a common name; (vii) the State of Mississippi or one of its departments, officers or institutions; (viii) a county; (ix) a municipal corporation; or (x) any other governmental entity

Rule 4(e) provides for waiver of service of the summons and complaint. A waiver must be executed after the day on which the action was commenced and thus may be executed without a summons having been issued.

Rule 4(f) provides that the person serving the process shall promptly file a return of service with the court. For first-class mail and acknowledgement service, proof of service is to be made by filing a copy of the executed acknowledgement of service. For certified mail service, proof of service is to be made by filing the return receipt or the envelope marked "Refused." The purpose of the requirement for prompt filing of the proof of service is to enable the defendant to verify the date of service by examining the proof of service in the court records.

Rule 4(h) provides that if service is not made upon a defendant within 120 days after the filing of the complaint, the claims against that defendant will be dismissed without prejudice absent good cause for the failure to timely serve the defendant. If service cannot be made within the 120-day period, it is clearly advisable to move the court within the original time period for an extension of time in which to serve the defendant. If the motion for extension of time is filed within the 120-day time period, the time period may be extended for "cause shown" pursuant to Rule 6(b)(1). If a motion for extension of time is filed outside of the original 120-day time period, the movant must show "good cause" for the failure to timely serve the defendant pursuant to Rule 4(h). *See Johnson v. Thomas,* 982 So. 2d 405 (Miss. 2008).

## JUDICIAL DECISIONS

### ANALYSIS

Construction.
Applicability.
Commencement of action.
Defenses.
Dismissal.
Due process.
Filing of amended complaint as summons.
Good cause.
Jurisdiction.
Notice in annexation cases.
Order, when effective.
Service of process.
Statute of limitations.
Timeliness.
Waiver.

**Construction.**

Orders are effective upon filing, and such a rule will secure the just, speedy, and inexpensive determination of every action; a party should be responsible for timely filing a motion, ensuring that the judge rules on the motion, and making certain that the resulting order is timely filed with the clerk. Graceland Care Ctr. of New Albany, LLC v. Hamlet ex rel. Kinard, 236 So. 3d 1, 2017 Miss. LEXIS 430 (Miss. 2017).

Miss. R. Civ. P. 6(b) provides that a trial judge may grant an enlargement of time, not establish a separate period of time; thus, Miss. R. Civ. P. 4(h) actually requires a good-cause showing after the expiration of the 120-day period as enlarged by any court order pursuant to Rule 6(b), not just after the expiration of 120 days. Fulgham v. Jackson, 234 So. 3d 279, 2017 Miss. LEXIS 257 (Miss. 2017).

Miss. R. Civ. P. 4(h) is not a specific rule governing a general rule because Rule 4(h) and Miss. R. Civ. P. 6(b) are in no way contradictory; if Rule 6(b) is meant to be read in conjunction with Rule 4(h), then a trial judge has discretion to grant a second (or third, fourth, fifth, etc.) enlargement of time to serve process "for cause shown" so long as the motion is made before the expiration of the period as extended by a previous order. Fulgham v. Jackson, 234 So. 3d 279, 2017 Miss. LEXIS 257 (Miss. 2017).

Miss. R. Civ. P. 4(h) states that if the 120-day period elapses without service of process being effected, the action shall be dismissed upon the court's own initiative with notice to such party or upon motion and the comments state that the complaint will be dismissed unless good cause can be shown as to why service cannot be made; the rule therefore provides that the plaintiff will have an opportunity to show good cause after the 120-day period elapses. Webster v. Webster, 834 So. 2d 26, 2002 Miss. LEXIS 306 (Miss. 2002).

Miss. R. Civ. P. 4(h) does not require that a motion for additional time for service of process be filed within 120 days of the filing of the complaint. Webster v. Webster, 834 So. 2d 26, 2002 Miss. LEXIS 306 (Miss. 2002).

It is apparent from reading the text of this rule that while the word "complaint" sometimes refers to a duplicate copy, the word "summons" means an original, not a duplicate or photocopy. Bilbo v. Thigpen, 647 So. 2d 678, 1994 Miss. LEXIS 598 (Miss. 1994).

Legislature created Public Employees' Retirement System in the juridical form of a corporation; as such, System was subject to service of process under subdivision (d)(4) of this rule as a "domestic corporation," rather than under subdivision (d)(5) as a "department" or "institution" of the State. Public Emples. Retirement System v. Dillon, 538 So. 2d 327, 1988 Miss. LEXIS 357, 1988 Miss. LEXIS 641 (Miss. 1988).

**Applicability.**

Chancellor rightfully possessed jurisdiction over the matter and committed no error in hearing and ruling upon a father's counter-petition because he properly served the mother in accordance with the procedures mandated by M.R.C.P. 81; the father sought modification of his custody arrangement with the mother, and therefore, the procedures in M.R.C.P. 4(h) did not apply. Hilton v. Harvey, 284 So. 3d 850, 2019 Miss. App. LEXIS 540 (Miss. Ct. App. 2019).

Trial court erred in denying a motion filed by an insured and its insurer (jointly, the insured) for relief from judgment because, while the parents added new claims to their products liability and personal injury lawsuit, the insured was not yet in default, the parents properly complied with the filing rules, and the insured did not had good cause for failing to answer the complaint, the insured had colorable defenses to the claims against them and the parents would not suffer prejudice. BB Buggies, Inc. v. Leon, 2014 Miss. LEXIS 372 (Miss. July 31, 2014), op. withdrawn, 2014 Miss. LEXIS 540 (Miss. Oct. 30, 2014), sub. op., 150 So. 3d 90, 2014 Miss. LEXIS 543 (Miss. 2014).

Because the Mississippi Structured Settlement Protection Act, Miss. Code Ann. §§ 11-57-1 through 11-57-1-15, requires court approval of a transfer of structured settlement payment rights, a civil action is commenced by filing a complaint with the court; to obtain personal jurisdiction over an interested party, service of process is required consistent with either Miss. R. Civ. P. 4 or 81. RSL Funding, LLC v. Saucier (In re Saucier), 130 So. 3d 1108, 2013 Miss. App. LEXIS 133 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 71 (Miss. 2014), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 74 (Miss. 2014).

In a medical malpractice action, on remand from a first appeal denying an amended complaint, the trial court granted summary judgment for defendants based on the two-year limitations period. However, upon a petition for rehearing, the appellate court held that based on the unique facts of the case, the amended complaint should have been treated as an original complaint as to the added parties; since the amended complaint was filed prior to the expiration of the statute of limitations (exactly two years after the alleged negligence), and a summons, along with the amended complaint, was served upon the added parties within the time period required by Miss. R. Civ. P. 4(h), the trial judge erred in granting summary judgment for defendants. Wilner v. White, 929 So. 2d 343, 2005 Miss. App. LEXIS 1033 (Miss. Ct. App. 2005), rev'd, 929 So. 2d 315, 2006 Miss. LEXIS 267 (Miss. 2006).

Party who is granted permission to intervene pursuant to M.R.C.P. Rule 24(b)(2) is not required to issue a summons and complaint pursuant to Rule 4; rather, service pursuant to Rule 5, of motion to intervene accompanied by complaint, is sufficient service. Breland v. Smith-Johnson, Inc., 501 So. 2d 389, 1987 Miss. LEXIS 2278 (Miss. 1987).

**Commencement of action.**

Rule 3(a) and subsection (h) of this rule operate to the extent that the commencement date of an action is the date of filing, and that date obtains for statute of limitations purposes whenever the action is not dismissed, including those instances in which the action would have been dismissed but for an extension of time. Crumpton v. Hegwood, 740 So. 2d 292, 1999 Miss. LEXIS 251 (Miss. 1999).

**Defenses.**

Trial court erred in dismissing a plaintiff's personal injury case without prejudice for insufficiency of process because the defendants waived the defense of insufficiency of process by failing to assert it in their answer, their motions to amend their answers to include the defense were filed outside the 30 days allowed for amendment as a matter of course, and, while the motions to amend the answers were not moot, it could not be said that the trial court could have exercised its discretion to grant the motion for leave to amend. Cox v. SMG, 226 So. 3d 1246, 2017 Miss. App. LEXIS 524 (Miss. Ct. App. 2017).

A moving party has a choice of making a M.R.C.P. 4(h) objection to process by filing a M.R.C.P. 12(b)(4) or (5) motion prior to filing a responsive pleading, by asserting other general affirmative defenses, or by filing them simultaneously therewith; the M.R.C.P. 4(h) defense is waived only after the filing of an answer or affirmative defenses if the defense is not asserted prior to or simultaneously within the answer. Rains v. Gardner, 731 So. 2d 1192, 1999 Miss. LEXIS 47 (Miss. 1999).

**Dismissal.**

Dismissal of a former employee's claims against former co-employees for insufficient service of process was appropriate because the employee's attempt to serve the co-employees by publication fell short of the required notice. Although the employee's attorney filed an affidavit of diligent search and inquiry, the attorney did not state the co-employees' post-office addresses in the affidavit or swear that they were indeterminable following the attorney's and the employee's diligent inquiry. Townsend v. What a Combo Inc., 281 So. 3d 43, 2019 Miss. App. LEXIS 9 (Miss. Ct. App. 2019).

Trial court properly dismissed a driver because a church volunteer and passengers failed to establish "good cause" in failing to timely serve him; the volunteer and passengers provided no evidence that the driver willfully evaded service, and they took no action as to the status of their service of process until four months after the 120-day period. Smith v. Church Mut. Ins. Co., 254 So. 3d 57, 2018 Miss. LEXIS 327 (Miss. 2018).

Circuit court properly dismissed an employee's third lawsuit against an employer because the employee violated the prohibition against duplicative actions; despite the fact that the employee admittedly had no basis to seek an extension of time to effectuate service of process, the circuit court did not dismiss the second suit until five months after the employee had filed the duplicative third suit, and thus, the second suit technically was being maintained at the time she filed her third suit. Triplett v. Southern Hens, Inc., 238 So. 3d 1128, 2018 Miss. LEXIS 130 (Miss. 2018).

Case alleging wrongful termination was properly dismissed for insufficient service of process within the 120-day deadline because a receptionist at the central office of a school system did not have the real or apparent authority to accept service of process; the school system had not authorized the receptionist to accept service of process on its behalf, she had never before accepted service of process, the process server did not ask to speak with someone in authority to accept service, and the process server never stated her intention to serve process. Anderson v. Pascagoula Sch. Dist., 218 So. 3d 296, 2017 Miss. App. LEXIS 123 (Miss. Ct. App. 2017).

Circuit court did not err in granting an employee's motion to dismiss because a customer failed to have the employee timely served with process; the circuit court did not grant an extension that the customer never requested prior to or during the hearing, particularly where the customer's own proposed order contradicted her claim that she received an extension to serve the employee. Ogunbor v. May, 204 So. 3d 840, 2016 Miss. App. LEXIS 163 (Miss. Ct. App., cert. denied, 205 So. 3d 1083, 2016 Miss. LEXIS 501 (Miss. 2016), cert. denied, 2016 Miss. LEXIS 502 (Miss. Dec. 1, 2016).

Circuit court did not err in granting an employee's motion to dismiss because a customer failed to have the employee timely served with process; a deputy served a store manager, not the employee, which was inadequate, and the customer's pro se status did not relieve her of the obligation to strictly comply with the rule. Ogunbor v. May, 204 So. 3d 840, 2016 Miss. App. LEXIS 163 (Miss. Ct. App., cert. denied, 205 So. 3d 1083, 2016 Miss. LEXIS 501 (Miss. 2016), cert. denied, 2016 Miss. LEXIS 502 (Miss. Dec. 1, 2016).

Circuit court did not err in granting an employee's motion to dismiss because a customer failed to have the employee timely served with process; because the employee's amended complaint did not raise any claims, the deadline to serve the employee related back to the original complaint, and the employee was personally served with process fifteen days beyond the deadline. Ogunbor v. May, 204 So. 3d 840, 2016 Miss. App. LEXIS 163 (Miss. Ct. App., cert. denied, 205 So. 3d 1083, 2016 Miss. LEXIS 501 (Miss. 2016), cert. denied, 2016 Miss. LEXIS 502 (Miss. Dec. 1, 2016).

Trial court did not abuse its discretion by determining that no good cause was shown by a property owner in failing to timely serve process on a county, because the owner made no attempt to obtain an extension of time to serve process on the county under Miss. Code Ann § 11-46-11. Sturdivant v. Moore Bayou Water Ass'n, 130 So. 3d 1152, 2013 Miss. App. LEXIS 493 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 578, 2014 Miss. LEXIS 81 (Miss. 2014).

As appellant failed to file a motion for extension of time to serve an estate until more than 120 days after filing the complaint, and as the statute of limitations (Miss. Code Ann. § 15-1-49) expired thereafter, the trial court did not abuse its discretion in dismissing his suit against the estate with prejudice. Covington v. McDaniel (In re Estate of Necaise), 126 So. 3d 49, 2013 Miss. App. LEXIS 108 (Miss. Ct. App.), cert. denied, 125 So. 3d 658, 2013 Miss. LEXIS 598 (Miss. 2013), cert. denied, 125 So. 3d 658, 2013 Miss. LEXIS 601 (Miss. 2013), cert. denied, 125 So. 3d 658, 2013 Miss. LEXIS 610 (Miss. 2013).

Trial court erred in dismissing a breach of contract claim in an original complaint against the prior owner of a building due to the untimely service of the current owner under Miss. R. Civ. P. 4(h) of an amended complaint as the prior owner was the real party in interest under Miss. R. Civ. P. 17(a), and the prior owner was timely served; the original complaint gave the prior owner sufficient notice of the claims and grounds upon which relief which was sought under the liberal notice pleading requirements of Miss. R. Civ. P. 8(a). Welch Roofing & Constr., Inc. v. Farina, 99 So. 3d 274, 2012 Miss. App. LEXIS 639 (Miss. Ct. App. 2012).

Dismissal of a suit seeking to enforce a construction lien was proper as: (1) the original complaint (OC) did not name the real party in interest under Miss. R. Civ. P. 17(a), the current owner (CO) of the building; (2) the prior owner had conveyed the property before the OC was filed; (3) the amended complaint (AC) was time-barred as it was not served on the CO until after the Miss. Code Ann. § 85-7-141 limitations period expired; (4) due to the lack of timely service under Miss. R. Civ. P. 4(h), the AC did not relate back to the OC's filing under Miss. R. Civ. P. 15(c); and (5) the contractor did not show good cause for the delayed service. Welch Roofing & Constr., Inc. v. Farina, 99 So. 3d 274, 2012 Miss. App. LEXIS 639 (Miss. Ct. App. 2012).

Trial judge correctly dismissed a personal injury case with prejudice because plaintiff did not show good cause for the failure to serve defendant, under Miss. R. App. P. 4(h), and, as of the date of entry of the order granting the motion to set aside the order granting additional time to serve process and dismissing the complaint with prejudice, the three-year limitations period prescribed by Miss. Code Ann. § 15-1-49 had long since passed. Johnson v. Thomas, 982 So. 2d 405, 2008 Miss. LEXIS 257 (Miss. 2008), overruled in part, Fulgham v. Jackson, 234 So. 3d 279, 2017 Miss. LEXIS 257 (Miss. 2017).

Dismissal of a medical malpractice case under Miss. R. Civ. P. 41 was appropriate where no action was taken for four years, a first doctor was not served in the time required under Miss. R. Civ. P. 4, a patient failed to use other means of service available, service was not effectuated until the statute of limitations had expired, and proof of service was not filed until after the case was dismissed; there was no need to show contumacious conduct because there was a clear record of delay, and no lesser sanctions would have better served the interests of justice since the passage of time might have altered the evidence. Hensarling v. Holly, 972 So. 2d 716, 2007 Miss. App. LEXIS 396 (Miss. Ct. App. 2007), cert. denied, 973 So. 2d 244, 2008 Miss. LEXIS 18 (Miss. 2008).

Miss. R. Civ. P. 4(h) does not state that notice be given to a party prior to a court's consideration of the dismissal of the case, only that the court notify the party of the dismissal itself; therefore, the notice provided to a patient in a medical malpractice case in an order of dismissal was enough. Hensarling v. Holly, 972 So. 2d 716, 2007 Miss. App. LEXIS 396 (Miss. Ct. App. 2007), cert. denied, 973 So. 2d 244, 2008 Miss. LEXIS 18 (Miss. 2008).

Burden is on a plaintiff to show good cause as to why service is not made within the 120 days allowed. Hensarling v. Holly, 972 So. 2d 716, 2007 Miss. App. LEXIS 396 (Miss. Ct. App. 2007), cert. denied, 973 So. 2d 244, 2008 Miss. LEXIS 18 (Miss. 2008).

Leaving a process server a two-day window to accomplish service of process without receiving some express assurance that process would in fact be served within two days leaves a plaintiff vulnerable to having the complaint dismissed if process is not timely served under Miss. R. Civ. P. 4(h). Davis v. South Sunflower County Hosp., 956 So. 2d 1103, 2007 Miss. App. LEXIS 346 (Miss. Ct. App. 2007).

Trial court properly granted an insurer's motion to dismiss plaintiff's pro se negligence action against the insurer and its insured where the record failed to confirm that plaintiff served either defendant, as plaintiff's statement alone did not satisfy Miss. R. Civ. P. 4(h); although the record contained certified mail receipts for mailings sent by plaintiff to defendants, all of the receipts were dated after the case was dismissed by the trial judge. Sanders v. Robertson, 954 So. 2d 493, 2007 Miss. App. LEXIS 239 (Miss. Ct. App. 2007).

In a multi-party suit filed by plaintiffs who alleged various silica-related personal injuries, the original complaint listed the incorrect agent for service of process for defendant; the documents were returned and plaintiffs made no further attempt to serve the complaint, and according to Miss. R. Civ. P. 4(h), dismissal of the action was required, and thus the trial court erred by denying the defendant's motion to dismiss. Bacou-Dalloz Safety, Inc. v. Hall, 938 So. 2d 820, 2006 Miss. LEXIS 470 (Miss. 2006).

Plaintiff's personal injury suit against two manufacturers was dismissed because plaintiff failed to effect service upon them within the 120-day period mandated in Miss. R. Civ. P. 4(h) while the suit was pending in a Mississippi state court prior to removal to federal court; plaintiff's service upon the manufacturers 123 days after filing the complaint was untimely, and plaintiff failed to offer any reason for the late service. Riley v. Ga. Pac. Corp., 2006 U.S. Dist. LEXIS 1440 (N.D. Miss. Jan. 5, 2006, dismissed, 2006 U.S. Dist. LEXIS 1623 (N.D. Miss. Jan. 5, 2006).

Trial court's dismissal of an action for failure to serve process as required by Miss. R. Civ. P. 4 is not a "matter of form" for purposes of the savings statute, Miss. Code Ann. § 15-1-69. Additionally, if service of process is not made upon a defendant in compliance with Miss. R. Civ. P. 4(h), the limitations period beings to run again at the end of 120 days. Owens v. Mai, 891 So. 2d 220, 2005 Miss. LEXIS 18 (Miss. 2005).

Where one defendant manufacturer was served by mail under Miss. R. Civ. P. 4(c)(5), but the process served was not addressed to any particular person as required by Miss. R. Civ. P. 4(d)(4), and an employee who signed for the delivery was not authorized to receive process; and as to a second defendant manufacturer, the postal service erroneously allowed the properly addressed certified mail to be signed for by a mail clerk who was not authorized; and the third defendant manufacturer was timely and properly served, defendants moved for relief from entry of default and default judgment on the basis that they were not properly served with process. The court concluded that service of process was not effective as to either of the defendants; the entries of default and of the default judgment are void, having been entered without jurisdiction over those parties. Brown v. Bristol-Myers Squibb Co., 2002 U.S. Dist. LEXIS 27445 (S.D. Miss. Nov. 30, 2002).

Claim of negligent operation against a 16-year-old driver was properly dismissed as plaintiffs never attempted to serve the driver's parents when they served the lawsuit on the driver. Davis v. Seymour, 868 So. 2d 1061, 2004 Miss. App. LEXIS 228 (Miss. Ct. App. 2004).

Issue on appeal was one of whether the receptionist, through custom and practice, had a de facto appointment to receive service of process for the physician, requiring a consideration of the principles of agency law; no live testimony was offered on the motion to dismiss, but the affidavit of the receptionist established that the process server never identified herself, or identified the contents of subject envelope containing the complaint and the summons, and that the receptionist's duties were simply to check patients in and out, and therefore, the evidence was insufficient to hold that the receptionist was the agent of the physician. Cooley v. Brawner, 881 So. 2d 300, 2004 Miss. App. LEXIS 279 (Miss. Ct. App.), cert. denied, 882 So. 2d 772, 2004 Miss. LEXIS 1112 (Miss. 2004).

Prisoner's suit challenging the constitutionality of an amendment to the parole statutes did not have to be dismissed due to the absence of any proof of service of process, since the State participated in the appeal, thereby waiving proper service under Miss. R. Civ. P. 4(e). McClurg v. State, 2003 Miss. App. LEXIS 592 (Miss. Ct. App. June 24, 2003), op. withdrawn, 2004 Miss. App. LEXIS 413 (Miss. Ct. App. Apr. 13, 2004), sub. op., 870 So. 2d 681, 2004 Miss. App. LEXIS 572 (Miss. Ct. App. 2004).

In a case alleging medical negligence arising from an emergency appendectomy performed by a doctor on the parents' minor child, although the doctor had actual notice of the complaint because the father had served the doctor with the parents' complaint, the trial court did not abuse its discretion in dismissing the parents' complaint for failure to serve process within 120 days in accordance with Miss. R. Civ. P. 4(h) because the parents, who were pro se litigants, had to, but failed to strictly comply with Rule 4(h). Perry v. Andy, 858 So. 2d 143, 2003 Miss. LEXIS 580 (Miss. 2003), aff'd, 2003 Miss. LEXIS 593 (Miss. Oct. 30, 2003).

By filing a motion seeking dismissal of the complaint, the defendant did not make a general appearance in the case and thus did not waive any defects in the serving of process, including its untimeliness under subsection (h). Rains v. Gardner, 719 So. 2d 768, 1998 Miss. App. LEXIS 193 (Miss. Ct. App. 1998), aff'd, 731 So. 2d 1192, 1999 Miss. LEXIS 47 (Miss. 1999).

The joinder of a statute of limitations defense in a motion to dismiss for the untimeliness of service of process under subsection (h) did not constitute a waiver of the defendant's right to pursue relief under subsection (h). Rains v. Gardner, 719 So. 2d 768, 1998 Miss. App. LEXIS 193 (Miss. Ct. App. 1998), aff'd, 731 So. 2d 1192, 1999 Miss. LEXIS 47 (Miss. 1999).

Trial court did not err in dismissing medical malpractice action, where service was made only after plaintiffs filed their amended complaint, more than a year after filing their initial complaint and well after 120-day period following initial complaint, and plaintiffs failed to show good cause for the delay. Watters v. Stripling, 675 So. 2d 1242, 1996 Miss. LEXIS 321 (Miss. 1996).

**Due process.**

Husband was denied due process by adjudication of child custody and support matters in his absence, where summons with which he was served was a M.R.C.P. Rule 4 alias summons, which did not set a time, date and place for hearing on complaint; proper procedure would have been to serve husband with motion for modification and a Rule 81 summons, setting a time and date for hearing. Powell v. Powell, 644 So. 2d 269, 1994 Miss. LEXIS 627 (Miss. 1994).

**Filing of amended complaint as summons.**

Trial court erred in dismissing, pursuant to Miss. R. Civ. P. 12, a purchaser's action to recover for defects in a mobile home; the purchaser's act of filing an amended complaint within the relevant statute of limitations, Miss. Code Ann. § 63-17-159(6), was sufficient to defeat defendants' motion to dismiss, as the amended complaint, filed pursuant to Miss. R. Civ. P. 15, provided defendants with the required notice under Miss. R. Civ. P. 4. King v. Am. RV Ctrs., Inc., 862 So. 2d 558, 2003 Miss. App. LEXIS 1195 (Miss. Ct. App. 2003), overruled in part, Wilner v. White, 929 So. 2d 315, 2006 Miss. LEXIS 267 (Miss. 2006).

**Good cause.**

Circuit court abused its discretion by failing to allow a driver an extension of time for service of process and erred by dismissing her claims because she demonstrated a sufficient showing of good cause for her failure to serve Mississippi Department of Rehabilitation Services (MDRS); when the driver served MDRS through the Attorney General's Office and filed her motion for extension she did so months before her statute of limitations under the Mississippi Tort Claims Act expired. Holland v. Miss. Dep't of Rehab. Servs., 287 So. 3d 289, 2019 Miss. App. LEXIS 340 (Miss. Ct. App. 2019).

Rules of civil procedure, including the rule about good cause, seek to ensure timely and diligent litigation, both before and after service of process, and we should not punish litigants who take steps to do just that. Holland v. Miss. Dep't of Rehab. Servs., 287 So. 3d 289, 2019 Miss. App. LEXIS 340 (Miss. Ct. App. 2019).

Circuit court abused its discretion by failing to allow a driver an extension of time for service of process and erred by dismissing her claims against the Mississippi Department of Rehabilitation Services (MDRS) because she demonstrated a sufficient showing of good cause for her failure to serve MDRS; the driver's counsel took immediate action to cure the process server's failure to serve the Attorney General by directing him to serve the Attorney General the same day the error was discovered. Holland v. Miss. Dep't of Rehab. Servs., 287 So. 3d 289, 2019 Miss. App. LEXIS 340 (Miss. Ct. App. 2019).

Plaintiff met his burden of showing good cause for failure to serve process in a timely manner. Service was attempted on six different occasions at defendant's registered agent's address provided on the Mississippi Secretary of State's website within the initial 120-day deadline. Adams v. MBA Found., 281 So. 3d 1077, 2019 Miss. App. LEXIS 251 (Miss. Ct. App. 2019).

Trial court erred in failing to consider in its analysis of good cause a complainant's four-and-a-half-year delay in pursuing his personal injury action against a police officer because the officer submitted an affidavit stating that he never authorized a police department clerk to accept service of process for him, the clerk also submitted an affidavit stating that the officer never authorized her to accept service of process on his behalf, and more than 10 years had passed since the underlying incident occurred, counsel for the officer asserted that most of the witnesses involved in the case would be unavailable, and had the complainant been diligent in pursuing the action, the officer might have learned of it before it became "stale." Edney v. Williams, 269 So. 3d 113, 2018 Miss. LEXIS 505 (Miss. 2018).

Trial court erred in denying an estate's motion to dismiss because a purchaser's suit was barred by the statute of limitations; there was nothing in the record to support a finding of good cause because during the period to serve process before the statute of limitations expired, the purchaser knew the decedent was inside his house but did not exercise all of her options to serve him. Estate of Puckett v. Clement, 238 So. 3d 1139, 2018 Miss. LEXIS 124 (Miss. 2018).

Circuit court properly granted defendants' motion to dismiss plaintiff's personal injury action for failure to serve process within 120 days of filing because not only did plaintiff fail to show good cause for delay in serving one defendant, she also failed to provide any excuse for not serving the second defendant within the allowed 120 days; the process serve sated he thought only personal service was allowed, so he did not attempt to serve the first defendant's sister. Pennington v. Crawford, 247 So. 3d 284, 2017

Miss. App. LEXIS 641 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 71, 2018 Miss. LEXIS 244 (Miss. 2018).

Circuit court properly granted defendants' motion to dismiss plaintiff's personal injury action for failure to serve process within 120 days of filing because it did not abuse its discretion in finding that plaintiff had ample opportunity to file and to have the summonses issued and served, and that she provided no good cause for failing to do so; plaintiff's attorney admitted that the delay in service was "intentional." Pennington v. Crawford, 247 So. 3d 284, 2017 Miss. App. LEXIS 641 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 71, 2018 Miss. LEXIS 244 (Miss. 2018).

Court, in its discretion, for cause shown, may enlarge the time period for service of process prior to the expiration of the initial 120-day period; there is no requirement for good cause shown when the motion for extension is timely filed. Graceland Care Ctr. of New Albany, LLC v. Hamlet, 2017 Miss. LEXIS 327 (Miss. Aug. 17, 2017), op. withdrawn, sub. op., 236 So. 3d 1, 2017 Miss. LEXIS 430 (Miss. 2017).

Appellee was not required to show good cause once she had failed to obtain an order within the original 120-day period. Graceland Care Ctr. of New Albany, LLC v. Hamlet, 2017 Miss. LEXIS 327 (Miss. Aug. 17, 2017), op. withdrawn, sub. op., 236 So. 3d 1, 2017 Miss. LEXIS 430 (Miss. 2017).

Johnson v. Thomas ex rel Polatsidis, 982 So. 2d 405 (Miss. 2008), is overruled to the extent that it requires a party to show good cause instead of "for cause shown" when a second motion for enlargement of time is filed before the expiration of the time provided under the prior enlargement. Fulgham v. Jackson, 234 So. 3d 279, 2017 Miss. LEXIS 257 (Miss. 2017).

Trial court did not abuse its discretion by finding good cause justifying a second enlargement of time because plaintiff timely sought enlargements of time to serve process and provided specific details concerning her attempts to locate defendant; plaintiff diligently inquired into defendant's whereabouts, and defendant's incarceration and movement through the prison system, coupled with the statements from the prison official upon which plaintiff relied, misdirected her ability to serve him. Fulgham v. Jackson, 234 So. 3d 279, 2017 Miss. LEXIS 257 (Miss. 2017).

Plaintiffs will be held to the "for cause shown" standard to obtain any enlargement of time, including the initial enlargement; likewise, defendants still can challenge whether "cause" was shown, and also, a trial court's determination of cause will be reviewed under an abuse-of-discretion standard as with any other fact-based finding. Fulgham v. Jackson, 234 So. 3d 279, 2017 Miss. LEXIS 257 (Miss. 2017).

To demonstrate "for cause shown" or "cause" to obtain an enlargement of time, a party must articulate a legitimate reason, made in good faith, as to why the enlargement of time should be granted; while this may not rise to the level of the "good cause" standard, it requires something constituting diligence or a legitimate reason excusing same, and each case should be left to the discretion of the trial court to look to the totality of the circumstances to determine if "cause" is being shown. Fulgham v. Jackson, 234 So. 3d 279, 2017 Miss. LEXIS 257 (Miss. 2017).

In a case where service of process on a receptionist was found to be improper, an extension of time was not granted for service because good cause was not shown; misleading information was not relied upon about the proper agent for service, and inquiries should have been made about possible defects in the service. Anderson v. Pascagoula Sch. Dist., 218 So. 3d 296, 2017 Miss. App. LEXIS 123 (Miss. Ct. App. 2017).

Trial court properly granted a motion by the defendant to dismiss for lack of jurisdiction, denied the plaintiff's motion for reconsideration and denied the plaintiff's request for additional time to serve the defendant because the defendant affirmatively asserted the issue of insufficient service of process by entering a special appearance to contest jurisdiction and by filing a motion to dismiss, the purpose of restricted delivery was to ensure that the addressee would be the actual recipient of the posted item, the defendant clearly did not sign the return receipt, there was no evidence that the person who signed the receipt had authority to do so on the defendant's behalf, and the plaintiff failed to show good cause. Long v. Vitkauskas, 228 So. 3d 383, 2016 Miss. App. LEXIS 642 (Miss. Ct. App. 2016), rev'd, 228 So. 3d 302, 2017 Miss. LEXIS 408 (Miss. 2017).

Circuit court properly dismissed an executrix's wrongful-death lawsuit as untimely because, while the court erred in setting aside its order granting the initial extension to effect service of process-the executrix only needed to show cause when service was effected within the initial 120 days)-the executrix failed to show good cause for her second extension where she and her local counsel (the only counsel of record) attempted to shift blame to her out-of-state counsel for local counsel's failure to timely effect service of process and local counsel failed to inform the circuit court of all the material facts related to the alleged conflict with the executrix's out-of-state counsel and local counsel's intent to withdraw from the case. Booth v. Williams, 200 So. 3d 1053, 2016 Miss. App. LEXIS 525 (Miss. Ct. App. 2016).

It was within the circuit court's discretion to find that the deputy's return did not qualify as good cause for failing to timely serve the employee because anyone familiar with the rule had ample reason to know that the employee had not been properly served; the return clearly stated that a store manager was served on the employee's behalf. Ogunbor v. May, 204 So. 3d 840, 2016 Miss. App. LEXIS 163 (Miss. Ct. App., cert. denied, 205 So. 3d 1083, 2016 Miss. LEXIS 501 (Miss. 2016), cert. denied, 2016 Miss. LEXIS 502 (Miss. Dec. 1, 2016).

Circuit court erred in dismissing a driver's personal injury complaint with prejudice because the driver exhibited good cause for not timely serving process on the insured where the record clearly showed that over a period of almost two years, the driver unsuccessfully attempted to locate the insured, the Secretary of State attempted to forward the summons to the insured, but it was returned unclaimed, the insured could not be located by the driver, the courts, or his own insurance carrier, and the circuit court failed to consider that the statute of limitations could be tolled. Darville v. Mejia, 184 So. 3d 312, 2016 Miss. App. LEXIS 3 (Miss. Ct. App. 2016).

Trial court properly entered a judgment of dismissal in favor of a doctor in the plaintiffs' medical malpractice action because they did not show good cause or excusable neglect where the doctor stated that he had never been served with process, the doctor's father (who was a dentist) stated that he was served with process, the plaintiffs did not seek an extension of time, and the process server should have been alerted to the possibility he was communicating with a different "doctor." Collins v. Westbrook, 188 So. 3d 1206, 2014 Miss. App. LEXIS 693 (Miss. Ct. App. 2014), rev'd, 184 So. 3d 922, 2016 Miss. LEXIS 66 (Miss. 2016).

Couple's lack of diligence was shown through their knowledge that service had not been timely completed and they were attempting to serve the wrong defendant, plus they had yet to name or serve the owner, and thus the couple's case was to be dismissed, as they failed to show good cause. Lewis Entm't, Inc. v. Brady, 142 So. 3d 396, 2014 Miss. LEXIS 322 (Miss. 2014).

Couple failed to serve process on the owner within the 120-day period, and because the statute of limitations ran the day after the 120-day period ended, refiling the complaint was not an option, and the only way for the couple to keep their case alive was to show good cause for failing to timely serve the owner with process. Lewis Entm't, Inc. v. Brady, 142 So. 3d 396, 2014 Miss. LEXIS 322 (Miss. 2014).

Insured's claims against her insurer for uninsured motorist benefits was properly dismissed because she failed to serve the insurer within the 120-day time limit of Miss. R. Civ. P. 4(h); although she filed a motion for enlargement of time, she never obtained a ruling on that motion, and she failed to show good cause for the delay. Edwards v. State Farm Mut. Ins. Co., 117 So. 3d 639, 2013 Miss. App. LEXIS 389 (Miss. Ct. App. 2013).

Ruling that no good cause had existed for a 60-day extension of the time for serving process on a limited liability company (LLC) in a wrongful eviction action was not an abuse of discretion where plaintiffs had previously been granted a 120-day extension, four years had elapsed between that extension and the 60-day extension in which it appeared plaintiffs had not taken any steps toward serving defendants, and while the LLC had failed to update the address of its registered agent, service of process via the Secretary of State had always been available under former Miss. Code Ann. § 78-29-111(2). Yarbrough v. Hiti Invs. LLC, 111 So. 3d 1270, 2013 Miss. App. LEXIS 183 (Miss. Ct. App. 2013).

Circuit court did not abuse its discretion when finding that a passenger failed to prove good cause for her failure to serve an employee within the 120 days of filing her complaint because the passenger chose to do very little in attempting to effect service of process on the employee; the passenger made two phone calls to the process server, which did not rise to the level of due diligence or good cause. Sykes v. Home Health Care Affiliates, Inc., 2012 Miss. App. LEXIS 602 (Miss. Ct. App. Oct. 2, 2012), op. withdrawn, sub. op., 125 So. 3d 107, 2013 Miss. App. LEXIS 665 (Miss. Ct. App. 2013).

Good cause existed for plaintiff's failure to make proper service on a doctor and a clinic within the 120-day limit. Although service was improperly made by a process server on a cashier at the clinic, the notarized proof of service indicated proper service, the process server had been used before without any problem, and there were indications notice was received by both the doctor and the clinic. Lewis v. Forest Family Practice Clinic, P.A., 124 So. 3d 678, 2013 Miss. App. LEXIS 41 (Miss. Ct. App.), rev'd, 124 So. 3d 654, 2013 Miss. LEXIS 575 (Miss. 2013).

In a case arising from an automobile accident, a trial court did not err in finding that plaintiff had failed to properly serve defendant and that she had not demonstrated good cause. Plaintiff failed to effectuate service of process within 120 days of filing her complaint, and her motion requesting additional time to serve was untimely filed; plaintiff unsuccessfully argued that she acted diligently and claimed defendant moving to Colorado, marrying, and changing her last name was an understandable mitigating circumstance. Shaver v. Blackwell, 43 So. 3d 1155, 2010 Miss. App. LEXIS 103 (Miss. Ct. App.), cert. denied, 49 So. 3d 106, 2010 Miss. LEXIS 481 (Miss. 2010).

Motion to quash process and dismiss under Miss. R. Civ. P. 12(b) based on a failure to comply with Miss. R. Civ. P. 4(h) was properly denied because good cause was shown where there was a diligent effort to try and effectuate service; appellee tried in vain to locate an address for appellant, and she immediately contacted the Mississippi Secretary of State after seeing appellant on television promoting a company. Jenkins v. Oswald, 3 So. 3d 746, 2009 Miss. LEXIS 105 (Miss. 2009).

Trial court properly granted a hospital's motion to dismiss a medical malpractice suit, finding no good cause for the failure of a patient's family to serve a summons upon the hospital during the 120-day time period, under Miss. R. Civ. P. 4(h), and finding that the two-year statute of limitations, under Miss. Code Ann. § 15-1-36(2), had expired. Lucas v. Baptist Mem. Hosp. - N. Miss., Inc., 997 So. 2d 226, 2008 Miss. App. LEXIS 720 (Miss. Ct. App. 2008).

In a medical malpractice/wrongful death case, defendant doctor's motion to dismiss for failure to timely effect service of process under Miss. R. Civ. P. 4(h) was properly denied because the trial court found good cause for the failure where plaintiff's counsel retained local counsel, who was to effect service of process; where local counsel failed to do so; where counsel learned of local counsel's failure on day 118, took immediate action, and effected service on day 121; and where local counsel withdrew from the case. Foss v. Williams, 993 So. 2d 378, 2008 Miss. LEXIS 448 (Miss. 2008).

Once a party has received a first extension of time under Miss. R. Civ. P. 4(h) in which to serve process, a second or subsequent extension of time to effectuate service of process may be granted by a trial court only upon a showing of good cause; in other words, once the initial 120-day period after filing the complaint has elapsed, good cause is required to avoid dismissal. While Miss. R. Civ. P. 6(b)(1) provides for an enlargement of time for cause shown, when reading the two Rules together, it is apparent that Miss. R. Civ. P. 4(h) requires good cause after the expiration of 120 days. Johnson v. Thomas, 982 So. 2d 405, 2008 Miss. LEXIS 257 (Miss. 2008), overruled in part, Fulgham v. Jackson, 234 So. 3d 279, 2017 Miss. LEXIS 257 (Miss. 2017).

Trial judge did not abuse his discretion by voiding his order granting a second extension of time to serve process because (1) Miss. R. App. P. 4(h) required good cause after the expiration of 120 days; (2) the trial judge never was given the opportunity to perform his affirmative responsibility to accord the absent party just consideration, as required by Miss. R. Prof. Conduct 3.3(d), cmt., because plaintiff's attorney did not present to the trial judge the facts known to her, such as defendant being represented by an attorney, the identity of that attorney, defendant's previous filing of a motion to dismiss, and the settlement negotiations between the attorneys; and (3) the trial judge did not have all the material facts before him when granting the second extension of time. Johnson v. Thomas, 982 So. 2d 405, 2008 Miss. LEXIS 257 (Miss. 2008), overruled in part, Fulgham v. Jackson, 234 So. 3d 279, 2017 Miss. LEXIS 257 (Miss. 2017).

Trial judge did not abuse his discretion in finding that the fact that the investigator for plaintiff's attorney was out of the office for a substantial period of time was not good cause for the failure to serve defendant, under Miss. R. App. P. 4(h). Johnson v. Thomas, 982 So. 2d 405, 2008 Miss. LEXIS 257 (Miss. 2008), overruled in part, Fulgham v. Jackson, 234 So. 3d 279, 2017 Miss. LEXIS 257 (Miss. 2017).

Dismissal of plaintiffs' medical malpractice action was reversed, and the action was remanded for trial, because the circuit court erred when it did not find good cause for plaintiffs' failure to serve the doctor within the mandated time for service of process; plaintiffs had reason to believe that the process server successfully served the doctor (the process server completed a return and indicated as much), the communications from the doctor's attorneys suggested that the doctor had notice of the suit, and because the doctor's attorneys indicated that the doctor was involved in a bankruptcy proceeding, even if they knew the process server improperly served the doctor, plaintiffs would not have taken further action due to the automatic stay involved with the doctor's bankruptcy. Spurgeon v. Egger, 989 So. 2d 901, 2007 Miss. App. LEXIS 828 (Miss. Ct. App. 2007), cert. denied, 993 So. 2d 832, 2008 Miss. LEXIS 388 (Miss. 2008).

Circuit court's judgment dismissing the hospital from the beneficiaries' wrongful death suit was supported by substantial evidence where, under Miss. R. Civ. P. 4(h), the original plaintiff did not cause process to issue for the hospital, the original plaintiff did not ask for an extension of time to serve the hospital, and the hospital did not attempt to evade process. Long v. Mem'l Hosp. at Gulfport, 969 So. 2d 35, 2007 Miss. LEXIS 570 (Miss. 2007).

Trial court properly dismissed a negligence action due to failure to effect service of process within the 120-day period set by Miss. R. Civ. P. 4(h), notwithstanding a paralegal's alleged "honest mistake" in calculating the date, because simple inadvertence or mistake of counsel constituted neither good cause nor excusable neglect. Shelton v. Lift, Inc., 967 So. 2d 1254, 2007 Miss. App. LEXIS 683 (Miss. Ct. App. 2007).

In a medical malpractice action, a patient did not show good cause why she failed to serve process on a hospital within the 120-day period outlined in Miss. R. Civ. P. 4(h); although the process server took 31 days to serve the hospital, the patient waited until 118 days after the complaint was filed to bring the documents to the process server, and thus it was largely the patient's own failure to act diligently that resulted in the untimely service. Davis v. South Sunflower County Hosp., 956 So. 2d 1103, 2007 Miss. App. LEXIS 346 (Miss. Ct. App. 2007).

In a son's negligence action against his father, the son failed to show good cause for why process was not served on the father until nine months after the expiration of the 120-day period in Miss. R. Civ. P. 4(h) where: (1) the events pertaining to the father's attempts to evade service of process arose after the 120-day period for serving process; (2) the son only attempted to serve process one time during the 120-day period; and (3) the son failed to show that he exercised due diligence by moving for additional time to effect service prior to the expiration of the 120-day period. Whitten v. Whitten, 956 So. 2d 1093, 2007 Miss. App. LEXIS 356 (Miss. Ct. App. 2007).

Mississippi supreme court has interpreted Miss. R. Civ. P. 4(h) to stand for the proposition that a plaintiff must serve a defendant with process within 120 days or show good cause why service was not made; the supreme court has held that to establish "good cause," the plaintiff must demonstrate at least as much as would be required to show excusable neglect, as to which simple inadvertence or mistake of counsel or ignorance of the rules usually does not suffice. Sanders v. Robertson, 954 So. 2d 493, 2007 Miss. App. LEXIS 239 (Miss. Ct. App. 2007).

Motion for extension of time filed after expiration of initial time under Miss. R. Civ. P. 6(b)(2) was properly denied, even though the trial court did not at first address good cause, as required by Miss. R. Civ. P. 4(h); the trial court cured its own error by finding good cause had not been shown and the statute of limitations had expired. Heard v. Remy, 937 So. 2d 939, 2006 Miss. LEXIS 367 (Miss. 2006).

Trial court did not err in dismissing complaint where plaintiffs failed to demonstrate good cause, as required by Miss. R. Civ. P. 4(h), for failing to serve process within 120 days of filing complaint where the justification offered by plaintiffs for the first extension of time, did not exactly match the justification offered on appeal, the Supreme Court of MIssissippi also found the representations of counsel to have been less than forthright with regard to the claimed reason's for the second extension, and regarding the third extension, the court was given no evidence or indication that plaintiffs used reasonable diligence to serve process prior to their attorney's death. Montgomery v. SmithKline Beecham Corp., 910 So. 2d 541, 2005 Miss. LEXIS 131 (Miss. 2005).

Where second motion to extend time in which to serve process stated that plaintiffs law firm had withdrawn but not returned the file and the firm who took the file back had no reason to know that service had not been made prior to the withdrawal, the representations of counsel were less than forthright because counsel had in fact been counsel of record since its inception, and as counsel of record, maintained all the duties and obligations to the client. Montgomery v. SmithKline Beecham Corp., 910 So. 2d 541, 2005 Miss. LEXIS 131 (Miss. 2005).

Dismissal of civil suit was reversed and remanded because the circuit court did not make a finding pertaining to whether good cause existed for the claimant's failure to serve the driver with in the 120-day rule, when the circuit court merely held that the driver's motion to dismiss was well taken and should be granted, and the claimant did make several attempts to locate and serve the driver within the 120-day period, searching through both telephone and utility directories and repeatedly engaging process servers. Page v. Crawford, 883 So. 2d 609, 2004 Miss. App. LEXIS 780 (Miss. Ct. App. 2004).

Court erred in denying a truck driver's motion to dismiss plaintiffs personal injury action because plaintiff offered no explanation or cause, good or bad, for the failure to serve the truck driver within the 120-day period required by Miss. R. Civ. P. 4(h). Triple "C" Transp., Inc. v. Dickens, 870 So. 2d 1195, 2004 Miss. LEXIS 414 (Miss. 2004).

Trial court properly granted the patient's motion for an extension of time in which to serve defendants where the trial court found good cause for why service was not made within 120 days as required by Miss. R. Civ. P. 4(h); neither physician asserted that the trial court had abused its discretion, and the record supported the trial court's findings of good cause. Medlin v. Hazlehurst Emergency Physicians, 2004 Miss. LEXIS 10 (Miss. Jan. 15, 2004), op. withdrawn, 2004 Miss. LEXIS 1297 (Miss. Sept. 23, 2004), op. withdrawn, 2004 Miss. LEXIS 1298 (Miss. Sept. 23, 2004), op. withdrawn, 2004 Miss. LEXIS 1299 (Miss. Sept. 23, 2004), op. withdrawn, 2004 Miss. LEXIS 1301 (Miss. Sept. 23, 2004), op. withdrawn, sub. op., 889 So. 2d 496, 2004 Miss. LEXIS 1196 (Miss. 2004).

The fact that a resident defendant has not been timely served with process does not justify removal by the non-resident defendants; whenever federal jurisdiction in a removal case depends upon complete diversity, the existence of diversity is determined from the fact of citizenship of the parties named and not from the fact of service. Lauderdale v. Merck & Co., 219 F. Supp. 2d 747, 2002 U.S. Dist. LEXIS 22745 (N.D. Miss. 2002).

Good faith negotiations between an injured bus passenger and a transit authority did not constitute good cause for failure to effect timely service of process on the transit authority within 120 days after the passenger filed his complaint as required by Miss. R. Civ. P. 4(h) because reliance on indefinite good faith negotiations subverted the purpose of the rule which was to bring claims to a court for judicial review in a timely manner; however, the trial court's involuntary dismissal of the case was modified to be without prejudice. Holmes v. Coast Transit Auth., 815 So. 2d 1183, 2002 Miss. LEXIS 155 (Miss. 2002).

Attorney's failure to monitor the status of the claimant's personal injury lawsuit against a casino was not good cause for the attorney's failure to effect service within 120 days; dismissal with prejudice was appropriate because the statute of limitations had run. In re Holtzman, 823 So. 2d 1180, 2002 Miss. LEXIS 253 (Miss. 2002).

Determination of whether good cause existed under subsection (h) was a discretionary ruling by the trial court and entitled to deferential review of whether the trial court had abused its discretion and whether there was substantial evidence supporting the determination. LeBlanc v. Allstate Ins. Co., 809 So. 2d 674, 2002 Miss. LEXIS 89 (Miss. 2002).

Substantial evidence supports the chancellor's finding of fact that there was no good cause for a two-year delay in service of process where the plaintiff never requested an extension of time from the court and failed to communicate with those who knew where to find the defendant. Young v. Hooker, 753 So. 2d 456, 1999 Miss. App. LEXIS 672 (Miss. Ct. App. 1999).

The plaintiff failed to show good cause for his failure to serve the defendant within 120 days after the filing of the complaint where the complaint was filed on October 25, 1996, service was not attempted until February 21, 1997 and, although it was contended that service was thwarted by the defendant and others, the plaintiff knew where to find the defendant and failed to serve him during the 120 day period. Bang v. Pittman, 749 So. 2d 47, 1999 Miss. LEXIS 280 (Miss. 1999), overruled in part, Cross Creek Prods. v. Scafidi, 911 So. 2d 958, 2005 Miss. LEXIS 834 (Miss. 2005).

**Jurisdiction.**

Father's motion for relief from the judgment terminating his parental rights was properly denied as the youth court did not lack personal jurisdiction over him because the mother properly served him by publication as she averred that the father had left the state and that, after a diligent search and inquiry, he could not be found; the publication summoned him to appear and defend against a petition filed against him; and he appeared at the June 27, 2017, hearing based on the publication. B.E.G. v. R.C., — So. 3d —, 2019 Miss. App. LEXIS 325 (Miss. Ct. App. July 16, 2019).

Miss. R. Civ. P. 4 summons served by certified mail and publication invoked a chancery court's personal jurisdiction to find a father's wrongful death beneficiaries because (1) the court did not find heirship, and (2) a wrongful death suit, which could only be brought by statutory parties, was not part of a decedent's estate. Alexander v. DeForest (In re Determination of Wrongful Death Heirs of Underhill), 262 So. 3d 1111, 2019 Miss. LEXIS 54 (Miss. 2019).

Chancery court did not err in finding that it had personal jurisdiction over appellant because although appellant was not served with Miss. R. Civ. P. 4 process, he entered an appearance when his attorney filed a responsive pleading on his behalf and was subjected to the jurisdiction of the chancery court; the responsive pleading, without a Miss. R. Civ. P. 12(b) defense asserted, waived defendant's right to contest personal jurisdiction.

Richard v. Garma-Fernandez, 121 So. 3d 929, 2013 Miss. App. LEXIS 113 (Miss. Ct. App.), cert. denied, 121 So. 3d 918, 2013 Miss. LEXIS 497 (Miss. 2013).

Husband in a divorce proceeding claimed that the chancery court lacked personal jurisdiction; however, the husband, by his conduct, was deemed to have submitted to jurisdiction. Pace v. Pace, 16 So. 3d 734, 2009 Miss. App. LEXIS 148 (Miss. Ct. App. 2009).

Chancery court had no jurisdiction to enter money judgment against husband served through notice by publication, where he made neither an answer nor a general appearance. Hamm v. Hall, 693 So. 2d 906, 1997 Miss. LEXIS 163 (Miss. 1997).

Where process was served on non-resident defendants by posting summons on door of their weekend home in Mississippi, trial court lacked jurisdiction over them due to insufficient service of process. Alpaugh v. Moore, 568 So. 2d 291, 1990 Miss. LEXIS 606 (Miss. 1990), (decided under prior version of this rule).

Issues of alimony and child support could not be considered in absence of personal service of process under subdivision (c)(5) of this rule, or defendant's general appearance. O'Neill v. O'Neill, 515 So. 2d 1208, 1987 Miss. LEXIS 2922 (Miss. 1987).

Summons issued under subdivision (c)(4)(C) of this rule was insufficient to confer personal jurisdiction over non-resident defendant, for purposes of rendering a monetary judgment against him, absent his appearance. Noble v. Noble, 502 So. 2d 317, 1987 Miss. LEXIS 2316 (Miss. 1987).

**Notice in annexation cases.**

Objectors to the annexation contended that the city failed to prove that adequate notice was given. However, in the affidavit filed by the city, the affiant specifically stated the exact locations and dates of his postings of notice of the hearings in his affidavit as required by Miss. R. Civ. P. 4(f) and Miss. Code Ann. § 21-1-15 and Miss. Code Ann. § 21-1-31; the chancellor did not commit manifest error by allowing the detailed affidavit to constitute adequate proof of notice. Weeks v. City of Clinton (In re City of Clinton), 920 So. 2d 452, 2006 Miss. LEXIS 63 (Miss. 2006).

Appellee timely obtained an extension to serve process and timely served process within that extension, such that the statute of limitations remained tolled; because appellee was the only party to the action at that time, the trial judge's order granting her motion for extension of time to serve process became effective once the order had been signed and had left the trial judge's control. Graceland Care Ctr. of New Albany, LLC v. Hamlet, 2017 Miss. LEXIS 327 (Miss. Aug. 17, 2017), op. withdrawn, sub. op., 236 So. 3d 1, 2017 Miss. LEXIS 430 (Miss. 2017).

**Order, when effective.**

In considering when an order becomes effective and grants the enlargement of time, in cases involving ex parte motions, the order becomes effective upon leaving the judge's control, but in cases where more than one party is involved and notice becomes essential, an order becomes effective once it is officially entered into the record by the court clerk; temporary restraining orders and other emergency orders are effective before filing with a clerk, and certain rulings requiring immediate action, such as those under a judge's contempt powers, would not be subject to the general rule. Graceland Care Ctr. of New Albany, LLC v. Hamlet, 2017 Miss. LEXIS 327 (Miss. Aug. 17, 2017), op. withdrawn, sub. op., 236 So. 3d 1, 2017 Miss. LEXIS 430 (Miss. 2017).

**Service of process.**

Summary judgment in favor of a community hospital due to a son's insufficient service of process also required summary judgment in favor of a doctor because as an employee of a governmental entity, the doctor could be joined in the complaint against the hospital, but she was merely a representative of the hospital and immune from personal liability. Phillips v. Delta Reg'l Med. Ctr., 290 So. 3d 386, 2020 Miss. App. LEXIS 27 (Miss. Ct. App. 2020).

Because the CEO of a community hospital, was not timely served a copy of the summons and complaint, a son failed to properly serve the hospital, which was a political subdivision of the State of Mississippi; the son's insufficient service of process on the hospital warranted the trial court's granting of summary judgment to the hospital. Phillips v. Delta Reg'l Med. Ctr., 290 So. 3d 386, 2020 Miss. App. LEXIS 27 (Miss. Ct. App. 2020).

To appeal an Administrative Remedy Program (ARP) decision to circuit court, a prisoner must, within thirty days of receiving the ARP decision, submit for mailing a written notice of appeal to the circuit court clerk accompanied by a certificate of service and provide a copy of that notice; to the extent that the court of appeals issued a decision that may be interpreted as requiring service of process under M.R.C.P. 4(h) in an ARP appeal to circuit court, it is overruled. Jobe v. State, 288 So. 3d 403, 2019 Miss. App. LEXIS 612 (Miss. Ct. App. 2019).

Inmate's petition for review was governed by URCCC 5.04 and not M.R.C.P. 4 because the petition for Administrative Remedy Program review was not a "regular civil filing" that required service of process under the rules of civil procedure; no service of process was required, and thus, the circuit court had personal jurisdiction over the Mississippi Department of Corrections to hear the inmate's petition for review of his request for treatment. Jobe v. State, 288 So. 3d 403, 2019 Miss. App. LEXIS 612 (Miss. Ct. App. 2019).

Circuit court had personal jurisdiction over an inmate's claim even though the inmate failed to serve the Mississippi Department of Corrections with service of process through the Mississippi Office of the Attorney Genera; an inmate's petition seeking review of an Administrative Remedy Program decision is not a regular civil filing requiring service of process under M.R.C.P. 4(d)(5), but a notice of appeal from an administrative agency governed by URCCC 5.04. Willis v. Westley, 287 So. 3d 1050, 2019 Miss. App. LEXIS 611 (Miss. Ct. App. 2019).

Motor vehicle accident victim did not properly serve a foreign corporation doing business in Mississippi because the only attempt to serve the corporation was via certified mail on its registered agent, which was located in Mississippi. Hadley v. FedEx Ground Package Sys., Inc., — So. 3d —, 2019 Miss. App. LEXIS 453 (Miss. Ct. App. Sept. 17, 2019).

Chancery court erred in finding that it had jurisdiction over the parties, entering a judgment of divorce and property distribution order, and denying a wife's motion to set aside the judgment because the record demonstrated that the wife was not properly served by certified mail inasmuch as the envelopes and the return receipts that the husband mailed to her lacked the required "restricted delivery" designation, the mailing sent to the wife's residence was returned to the sender as "Unclaimed," the wife's sister was not authorized in writing to claim the second certified mail as her "agent," and the wife's alleged actual notice did not cure defective process. Pritchard v. Pritchard, 282 So. 3d 809, 2019 Miss. App. LEXIS 413 (Miss. Ct. App. 2019).

Limited liability company (LLC) was entitled to relief from a default judgment because the judgment was void as the party which sought to collect on a promissory note failed to properly serve the LLC, in that the party mailed copies of the summons and complaint to the appropriate agents of the LLC but only delivered copies, via process server, to the spouse of a member/manager of the LLC, and there was no effective waiver of service of process. Sun South LLC v. Bayou Vista LLC, 281 So. 3d 980, 2019 Miss. App. LEXIS 166 (Miss. Ct. App. 2019).

Method of service on the domestic insurance producer did not comply with Miss. R. Civ. P. 4 where the Mississippi Commissioner of Insurance's office had forwarded the complaint and summons to the producer via certified mail, and service of process could not be had by certified mail on an in-state defendant. Cent. Insurers of Gren., Inc. v. Greenwood, 268 So. 3d 493, 2018 Miss. LEXIS 237 (Miss. 2018).

Because the claimant in a personal injury suit produced no evidence that the summons and complaint were mailed and failed to address the issue of the mailing of the summons and complaint in the claimant's appellate brief, the claimant could not show that the trial court erred in finding that the service by mailing was ineffective. Thornton v. Freeman, 242 So. 3d 188, 2018 Miss. App. LEXIS 138 (Miss. Ct. App. 2018).

Tax sale was void because there was no evidence of (1) the chancery clerk's notice requirements or (2) attempts to personally serve the land's owner with process. Orcutt v. Chambliss, 243 So. 3d 757, 2018 Miss. App. LEXIS 23 (Miss. Ct. App. 2018).

Trial court properly denied a health care provider's motion to dismiss because a sister was the only party to the action, and thus, the order granting her motion for extension of time to serve process became effective once the order had been signed and had left the trial court's control; the sister timely obtained an extension to serve process and timely served process within that extension, and therefore, the statute of limitations remained tolled. Graceland Care Ctr. of New Albany, LLC v. Hamlet ex rel. Kinard, 236 So. 3d 1, 2017 Miss. LEXIS 430 (Miss. 2017).

Trial court did not rule on the issue of a sister's cause or good cause, and thus, there was no factual finding for the supreme court to review under an abuse-of-discretion standard; there is no requirement for "good cause shown" when the motion for extension is timely filed. Graceland Care Ctr. of New Albany, LLC v. Hamlet ex rel. Kinard, 236 So. 3d 1, 2017 Miss. LEXIS 430 (Miss. 2017).

Appellate court erred in affirming the trial court's granting of an out-of-state resident's motion to dismiss on the ground of insufficient service of process because both the proof of service and the return receipt were marked "restricted delivery," the out-of-state resident never argued or submitted an offer of proof that the person who signed the return receipt was not his authorized agent or that he did not receive process to rebut the presumption that the signed return receipt was valid when delivery was restricted. Long v. Vitkauskas, 228 So. 3d 302, 2017 Miss. LEXIS 408 (Miss. 2017).

Wife failed to properly serve notice to a daughter, who was the executor of the decedent's estate, of her contempt action because the wife's attorney mailed a copy of the contempt "motion" to the estate attorney, and the chancery court issued a summons to the daughgter in "care of" the estate attorney; those actions, failed to constitute proper service of process because the daughter, not the estate attorney, should have been served with the wife's contempt "motion" and the summons. Chester v. Labasse (In re Estate of Labasse), 242 So. 3d 167, 2017 Miss. App. LEXIS 540 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 70, 2018 Miss. LEXIS 192 (Miss. 2018).

Circuit court erred in denying a limited liability company's (LLC) motion to set aside a default judgment because service through the Secretary of State was not proper since the corporation did not exercised reasonable diligence in attempting to serve the LLC's members prior to attempting service through the Secretary of State; the LLC did not waive its objection to improper service by entering an appearance or by participating in the judgment debtor exam because it was not defending the case. S&M Trucking, LLC v. Rogers Oil Co. of Columbia, Inc., 195 So. 3d 217, 2016 Miss. App. LEXIS 368 (Miss. Ct. App. 2016).

In a medical malpractice case, although the plaintiff failed to obtain personal service on the doctor within the 120-day time limit of Miss. R. Civ. P. 4, her attorney showed good cause because his process server believed that he had served the doctor due to the misconduct of the doctor's father in misidentifying himself as defendant doctor. Alternatively, the plaintiff showed excusable neglect under Miss. R. Civ. P. 6. Collins v. Westbrook, 184 So. 3d 922, 2016 Miss. LEXIS 66 (Miss. 2016).

Circuit court properly denied the judgment debtors' motion to set aside a default judgment in favor of the judgment creditors because the circuit court weighed each statutory factor in making its ruling, the judgment creditors properly served the judgment debtors with process, the judgment debtors provided no good cause for failing to answer the complaint, and setting aside the default judgment would result in substantial prejudice to the creditors. Smith v. First Bank, 195 So. 3d 790, 2015 Miss. App. LEXIS 238 (Miss. Ct. App. 2015), cert. denied, 209 So. 3d 428, 2016 Miss. LEXIS 303 (Miss. 2016).

Because the owner was a corporation, it had to be served through an agent. Lewis Entm't, Inc. v. Brady, 142 So. 3d 396, 2014 Miss. LEXIS 322 (Miss. 2014).

Because a homeowner's rights regarding the motion for substitution were not affected by the failure to serve the decedent's successors, service was not mandatory, and the service executed upon the homeowner's attorney was sufficient to trigger the ninety-day time period; there existed no estate upon which or personal representative upon whom the suggestion of death could have been served. Clark v. Knesal, 113 So. 3d 531, 2013 Miss. LEXIS 291 (Miss. 2013).

Retroactive application of the decision in Bloodgood v. Leatherwood, 25 So. 3d 1047 (Miss. 2010) by a trial court that determined that service by mail in 2006 that was returned "unclaimed" was ineffective service was not unfair because appellate decisions were routinely applied retroactively and because the holding in Bloodgood was readily apparent from the language of Miss. R. Civ. P. 4(f) itself. Yarbrough v. Hiti Invs. LLC, 111 So. 3d 1270, 2013 Miss. App. LEXIS 183 (Miss. Ct. App. 2013).

Information in the record appeared to be insufficient to show process in a replevin action was properly made where there was not a complete, signed return showing proof of service as required by Miss. R. Civ. P. 4(f), and the return did not make clear who was served with process or whether the requirements of Rule 4(d) were met; regardless of these deficiencies, defendant appeared at the proper courthouse on the correct date. Magee v. Covington County Bank, 119 So. 3d 1053, 2012 Miss. App. LEXIS 591 (Miss. Ct. App. 2012), cert. denied, 119 So. 3d 328, 2013 Miss. LEXIS 408 (Miss. 2013).

When a lender failed to comply with Miss. R. Civ. P. 4(c)(4)(A) by attesting that it had performed a diligent inquiry before performing service by publication on a borrower, a default judgment entered against the borrower was void; thus, the chancery court erred in refusing to set the void judgment aside under Miss. R. Civ. P. 60(b)(4). Turner v. Deutsche Bank Nat'l Trust Co., 65 So. 3d 336, 2011 Miss. App. LEXIS 349 (Miss. Ct. App. 2011).

Nephew was properly noticed in the estate proceeding because the chancery court's docket showed that a summons was issued to both the nephew and his mother, giving them notice of the probate of a decedent's estate, and that the summonses were returned. Walton v. Walton, 52 So. 3d 468, 2011 Miss. App. LEXIS 32 (Miss. Ct. App. 2011).

Trial court erred by finding that defendant was properly served because the service of process upon defendant by certified mail, which was returned to sender marked "unclaimed/refused" failed to comply with Miss. R. Civ. P. 4(c)(5) since "unclaimed" and "refused" had two entirely different meanings, and there was no way to know which meaning applied in the case; a returned envelope marked "unclaimed" is insufficient to satisfy service requirements under Rule 4(c)(5) because the designation of "unclaimed/refused" renders impossible a determination whether the mailing was refused or unclaimed. Bloodgood v. Leatherwood, 25 So. 3d 1047, 2010 Miss. LEXIS 25 (Miss. 2010).

Chancellor lacked jurisdiction over the divorce action because the husband was improperly served with a Miss. R. Civ. P. 81 summons, rather than the required Miss. R. Civ. P. 4 summons. For that reason, the chancellor's judgment of divorce was void, as were all determinations therein, including the chancellor's awards of alimony, child custody, and child support; therefore, the chancellor erred in refusing to set aside the judgment pursuant to Miss. R. Civ. P. 60(b). Clark v. Clark, 43 So. 3d 496, 2010 Miss. App. LEXIS 28 (Miss. Ct. App.), cert. denied, 49 So. 3d 106, 2010 Miss. LEXIS 467 (Miss. 2010).

Under Miss. R. Civ. P. 4(c)(4), proper service upon a non-resident defendant requires that notice be published and, a copy of the summons and complaint mailed to the defendant's last known address; process is not complete until a copy has been mailed. Covington v. Griffin, 19 So. 3d 805, 2009 Miss. App. LEXIS 692 (Miss. Ct. App. 2009).

There was no error with the chancellor's ruling that appellee was not properly served with process when the complaint was not mailed to her last known addresses until after the chancery clerk entered a default; while the clerk eventually did mail a copy of the summons and complaint, the chancellor found they were not mailed until after the entry of default. It was not sufficient, as appellants argued, that appellee found out about the proceeding approximately two weeks before default judgment was entered against her; improper service of process, coupled with appellee's failure to appear rendered the default judgment against her void. Covington v. Griffin, 19 So. 3d 805, 2009 Miss. App. LEXIS 692 (Miss. Ct. App. 2009).

Applying Miss. R. Civ. P. 15(c), the patient's proposed amended complaint did arise out of the same transaction, but there was no evidence that the medical company received any notice of the institution of the present medical negligence action until after the time period for service of process had expired. Thus, the patient failed to meet the requirements of Rule 15(c) and seeing as the company was not a defendant in the case, it was not error for the circuit court to refuse to allow the patient to serve the company with process, and Miss. R. Civ. P. 4(h) was inapplicable. Johnson v. Lee, 17 So. 3d 1140, 2009 Miss. App. LEXIS 589 (Miss. Ct. App. 2009).

Chancery court was not required, under Miss. R. Civ. P. 40(b), to send a husband notice of a divorce hearing because the husband did not respond to the chancery court regarding the action, after he was personally served with process, under Miss. R. Civ. P. 4(h), within 120 days of the filing of the complaint by a wife. Carlisle v. Carlisle, 11 So. 3d 142, 2009 Miss. App. LEXIS 234 (Miss. Ct. App. 2009).

Buyer failed to effect proper service on a German seller because the buyer did not comply with the Hague Convention on the Service Abroad of Judicial and Extra judicial Documents in Civil and Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 362 T.I.A.S. No. 6638, with service by mail on the seller and the buyer failed to show that a sister corporation in the U.S. was an alter ego of the buyer to establish that it was a domestic agent for valid service of process under Fed. R. Civ. P. 4(e) and Miss. R. Civ. P. 4(d)(4). Delta Constructors, Inc. v. Roediger Vacuum, GmbH, 259 F.R.D. 245, 2009 U.S. Dist. LEXIS 68613 (S.D. Miss. 2009).

Trial court properly dismissed a patient's medical malpractice action against a nonresident physician because the patient failed to comply with the dictates of Miss. R. Civ. P. 4(c)(5) by failing to mark the mailed envelope containing the summons and complaint "restricted delivery." Worthy v. Trainor, 11 So. 3d 1267, 2009 Miss. App. LEXIS 350 (Miss. Ct. App. 2009).

Chancery court erred in entering a default judgment against a construction corporation in homeowners' action for slander of title because the homeowners mailed process to an attorney as the corporation's agent when, in fact, the corporation's owner was actually the corporation's registered agent for service of process under Miss. R. Civ. P. 4(d). Tucker v. Williams, 7 So. 3d 961, 2009 Miss. App. LEXIS 163 (Miss. Ct. App. 2009).

Where the process issued to defendants was deficient and not in substantial compliance with Miss. R. Civ. P. 4(b), a pro se response by one defendant might have constituted an appearance under Miss. R. Civ. P. 55, but was not a valid answer because it did not comport with the filing requirement of Miss. R. Civ. P. 5(d). Fletcher v. Limeco Corp., 996 So. 2d 773, 2008 Miss. LEXIS 598 (Miss. 2008).

In an action arising from alleged defects in plaintiff purchasers' manufactured home, the trial court lacked jurisdiction to issue a default judgment pursuant to Miss. R. Civ. P. 55(b) against defendant bank, a nonresident corporation, because defendant was never properly served with process under Miss. R. Civ. P. 4(c)(5) and (d)(4) where the uncontested evidence showed that the person who signed for the process was a mailroom clerk who was not defendant's agent for service of process. Flagstar Bank v. Danos, 46 So. 3d 348, 2008 Miss. App. LEXIS 717 (Miss. Ct. App. 2008), rev'd, 46 So. 3d 298, 2010 Miss. LEXIS 457 (Miss. 2010).

Service was effected under Miss. R. Civ. P. 4(d)(1)(A) when defendant California resident turned away, not accepting the summons and complaint, and the server then left the papers on the ground stating he had been served, thus, since service was 7 months before he removed the action filed by plaintiff Mississippi resident, remand was proper due to the untimely removal under 28 U.S.C.S. § 1446(b); just as under Fed. R. Civ. P. 4(e)(2), "in hand" delivery was not required. Slaieh v.

Zeineh, 539 F. Supp. 2d 864, 2008 U.S. Dist. LEXIS 14462 (S.D. Miss. 2008).

In a case in which a former employee served her amended complaint on an unnamed employee at her former employer's office on September 13, 2007, that service was not effective. The employer's notice of removal was timely because process was not effected until it was delivered to the employer's Board of Directors on October 5, 2007, and the removal was made on October 24, 2007. Benson v. Family Health Ctr., Inc., 2008 U.S. Dist. LEXIS 12025 (S.D. Miss. Jan. 30, 2008), aff'd, 339 Fed. Appx. 486, 2009 U.S. App. LEXIS 17458 (5th Cir. Miss. 2009); Humes-Pollett v. Family Health Ctr., Inc., 2008 U.S. Dist. LEXIS 12098 (S.D. Miss. Jan. 30, 2008), aff'd, 339 Fed. Appx. 490, 2009 U.S. App. LEXIS 17474 (5th Cir. Miss. 2009).

While plaintiffs erred in naming a sheriff's department as a defendant in a personal injury suit, the trial court erred in denying plaintiffs' motion for leave to amend the complaint pursuant to Miss. R. Civ. P. 15(c) to add a county as a defendant where, pursuant to Miss. R. Civ. P. 4(d)(6), plaintiffs' notice of claim letter put the proper county official on notice that, except for the mistake of naming the wrong party, the action would have been brought against the county. Mieger v. Pearl River County, 986 So. 2d 1025, 2008 Miss. App. LEXIS 21 (Miss. Ct. App.), cert. denied, 987 So. 2d 451, 2008 Miss. LEXIS 371 (Miss. 2008).

Circuit court did not err when it concluded that defendant doctor's office assistant did not have apparent authority to accept service of process on the doctor's behalf, where the process server did not identify himself as a process server and did not ask whether the office assistant could accept process for the doctor, and the office assistant did not realize that the process server attempted to serve the doctor through her until the doctor read the contents of the envelope. Spurgeon v. Egger, 989 So. 2d 901, 2007 Miss. App. LEXIS 828 (Miss. Ct. App. 2007), cert. denied, 993 So. 2d 832, 2008 Miss. LEXIS 388 (Miss. 2008).

Sheriff's service on physician's receptionist in medical malpractice suit was not sufficient to satisfy service of process requirements because the receptionist was not an authorized agent to accept service of process. Johnson v. Rao, 952 So. 2d 151, 2007 Miss. LEXIS 178 (Miss. 2007).

Trial court properly granted a university's motion to dismiss plaintiff's personal injury complaint where service of process was made on the president of the university, rather than on the Attorney General of the State of Mississippi, as required by Miss. R. Civ. P. 4(d)(5); plaintiff did not serve the Attorney General until after the expiration of the 120-day period mandated by Rule 4(h). Jones v. Miss. State Univ., 948 So. 2d 509, 2007 Miss. App. LEXIS 45 (Miss. Ct. App. 2007).

Miss. R. Civ. P. 4(d)(5) requires that service on a state institution be made by serving the Mississippi Attorney General. Jones v. Miss. State Univ., 948 So. 2d 509, 2007 Miss. App. LEXIS 45 (Miss. Ct. App. 2007).

There is no ambiguity in Miss. R. Civ. P. 4(d)(5). Jones v. Miss. State Univ., 948 So. 2d 509, 2007 Miss. App. LEXIS 45 (Miss. Ct. App. 2007).

Although a state hospital and a state mental health department were established and controlled by Miss. Code Ann. § 41-4-11(2) and Miss. Code Ann. § 41-4-5 and service of process was governed by Miss. R. Civ. P. 4(d)(5), requiring service upon the Attorney General, the entities waived the defenses of insufficient process and insufficient service of process because even though the defenses were properly and timely raised in their answer to a wrongful death action, their subsequent participation in litigation and their failure to pursue the defenses for two years waived the defenses. East Miss. State Hosp. v. Adams, 947 So. 2d 887, 2007 Miss. LEXIS 13 (Miss. 2007).

Where an estate mistakenly named a nursing home and personnel, and the estate failed to properly substitute any defendant for a fictitious party under Miss. R. Civ. P. 9(h), the amended complaint related back as to four of the defendants because they were the same owners and managers as the amended nursing home and had notice under Miss. R. Civ. P. 15(c), but the amended complaint did not relate back as to two defendants that did not have notice of the original complaint;

therefore, those two defendant's were not timely served under Miss. R. Civ. P. 4(h). Bedford Health Props., LLC v. Estate of Williams, 946 So. 2d 335, 2006 Miss. LEXIS 632 (Miss. 2006).

Worker's asbestos claim against a corporation for whom he had made products was dismissed for failure to timely serve the complaint within 120 days under Miss. R. Civ. P. 4(h), which in turn caused the statute of limitations in Miss. Code Ann. § 15-1-49(1), (2), to resume running and expire, barring his claims under Fed. R. Civ. P. 12(b)(6). Riley v. Ga. Pac. Corp., 2006 U.S. Dist. LEXIS 1623 (N.D. Miss. Jan. 5, 2006, dismissed, 2006 U.S. Dist. LEXIS 1625 (N.D. Miss. Jan. 5, 2006).

Trial court did not abuse its discretion in denying a motorist's motion to dismiss another driver's complaint in a personal injury matter arising out of a four-car accident because the other driver had made diligent attempts to complete service of process on the motorist; moreover, while the motorist was correct in his assertion that, for service by publication, Miss. R. Civ. P. 4 required that the proceeding must be in chancery court, or authorized by statute, his assertion that a defendant must be a nonresident of the state of Mississippi was incorrect. Bennett v. McCaffrey, 937 So. 2d 11, 2006 Miss. LEXIS 351 (Miss. 2006).

Tax sale of property was void because the three methods of service under Miss. Code Ann. § 27-43-3 were not satisfied; although two methods were completed, posting a notice of redemption on the owner's business was not one of the acceptable methods under Miss. R. Civ. P. 4. Viking Invs.,LLC v. Addison Body Shop, Inc., 931 So. 2d 679, 2006 Miss. App. LEXIS 459 (Miss. Ct. App. 2006).

Trial court properly granted an extension of time for the plaintiff to serve process because Miss. R. Civ. P. 4(h) clearly did not apply to a motion for additional time filed within the initial 120 days. There was no requirement that during the initial 120-day period, a plaintiff had to show good cause in order to obtain additional time in which to serve process. Cross Creek Prods. v. Scafidi, 911 So. 2d 958, 2005 Miss. LEXIS 834 (Miss. 2005).

Where executrix filed a complaint to admit the decedent's will to probate in solemn form, a Miss. R. Civ. P. 81 matter, but decedent's brother was served notice pursuant to Miss. R. Civ. P. 4, the trial court erred in admitting the will in solemn form, but had jurisdiction over the common form probate proceedings, and as decedent's brother did not contest the will within the two-year limitations period, the probate in common form was final and binding. In re Estate of Kelly v. Cuevas, 951 So. 2d 564, 2005 Miss. App. LEXIS 995 (Miss. Ct. App. 2005), aff'd in part and rev'd in part, 951 So. 2d 543, 2007 Miss. LEXIS 18 (Miss. 2007).

Denial of a motion to set aside a default judgment against an insurance company was reversed because the trial court lacked personal jurisdiction pursuant to Miss. R. Civ. P. 4 over the insurance company; because, in this default case, proper service of process was not shown in the record, the default judgment was void. Lexington Ins. Co. v. Buckley, 925 So. 2d 859, 2005 Miss. App. LEXIS 624 (Miss. Ct. App. 2005), cert. denied, 927 So. 2d 750, 2006 Miss. LEXIS 181 (Miss. 2006).

Court properly dismissed a wife's medical malpractice action against a medical center because service was not made on the medical center until three days after the 120-day deadline imposed by Miss. R. Civ. P. 4(h). Waiting until the last day to serve process on the medical center did not constitute good cause. Powe v. Byrd, 892 So. 2d 223, 2004 Miss. LEXIS 1376 (Miss. 2004).

Where one defendant manufacturer was served by mail under Miss. R. Civ. P. 4(c)(5), but the process served was not addressed to any particular person as required by Miss. R. Civ. P. 4(d)(4), and an employee who signed for the delivery was not authorized to receive process; and as to a second defendant manufacturer, the postal service erroneously allowed the properly addressed certified mail to be signed for by a mail clerk who was not authorized; and the third defendant manufacturer was timely and properly served, defendants moved for relief from entry of default and default judgment on the basis that they were not properly served with process. The court concluded that service of process was not effective as to either of the defendants; the entries of default and of the default judgment are void, having been entered without jurisdiction over those parties. Brown v. Bristol-Myers Squibb Co., 2002 U.S. Dist. LEXIS 27445 (S.D. Miss. Nov. 30, 2002).

Parties agreed that under the trial court's method of computation, service was complete on third party defendant one on day 130, and on third party defendant two on day 131. However, the appellate court found that although there was no good cause shown for the delay in service, the delay was relatively slight, and there was good cause for allowing the litigation to proceed; on the specific facts of the case, that was enough, and the trial court properly denied the third party defendants' motions to dismiss. Tunek v. Windham, 897 So. 2d 186, 2004 Miss. App. LEXIS 652 (Miss. Ct. App. 2004), cert. denied, 896 So. 2d 373, 2005 Miss. LEXIS 197 (Miss. 2005).

Court erred in denying a transport company and driver's motions to dismiss plaintiff's personal injury action because process was served on both defendants through certified mail, which constituted no service at all upon an in-state defendant pursuant to Miss. R. Civ. P. 4(c)(5). Triple "C" Transp., Inc. v. Dickens, 870 So. 2d 1195, 2004 Miss. LEXIS 414 (Miss. 2004).

Where defendant denied being served with process, there was no return of service in the record, and no entry in the docket book indicating that there ever was a return, a judgment finding him in contempt and ordering him to pay educational expenses was void. Morrison v. Miss. Dep't of Human Servs., 863 So. 2d 948, 2004 Miss. LEXIS 16 (Miss. 2004).

Pro se plaintiffs must strictly comply with Miss. R. Civ. P. 4(h). Perry v. Andy, 858 So. 2d 143, 2003 Miss. LEXIS 580 (Miss. 2003), aff'd, 2003 Miss. LEXIS 593 (Miss. Oct. 30, 2003).

Under Miss. R. Civ. P. 4(d)(4), an individual bringing a slip-and-fall action had not properly effected service on a motel management company by delivering a copy of the summons and complaint to a motel manager where the manager was not an employee or agent of the management company or of any other properly named defendant company. Lee v. Pineapple Mgmt. Servs., 241 F. Supp. 2d 690, 2002 U.S. Dist. LEXIS 25000 (S.D. Miss. 2002).

Miss. R. Civ. P. 4(h) does not require that a motion for additional time for service of process be filed within 120 days of the filing of the complaint. Webster v. Webster, 834 So. 2d 26, 2002 Miss. LEXIS 306 (Miss. 2002).

While an extension of time through the courts was not required under subsection (h), it was preferred; the 120-day rule had to be observed unless the party demonstrated that good cause existed to extend the time. Moore v. Boyd, 799 So. 2d 133, 2001 Miss. App. LEXIS 424 (Miss. Ct. App. 2001).

Where plaintiff made extensive efforts to locate and serve defendant who had moved from the area, he established good cause for his failure to complete service within 120 days of filing complaint. Fortenberry v. Memorial Hosp., 676 So. 2d 252, 1996 Miss. LEXIS 324 (Miss. 1996).

Parties who were not already subject to the court's jurisdiction were required to be served pursuant this rule. Leaf River Forest Prods. v. Deakle, 661 So. 2d 188, 1995 Miss. LEXIS 455 (Miss. 1995).

Since plaintiff had not properly served defendant with complaint, plaintiff's entry of default was premature. Bilbo v. Thigpen, 647 So. 2d 678, 1994 Miss. LEXIS 598 (Miss. 1994).

Deputy sheriff appeared to have properly served process on physician in medical practice action, where summons and complaint were left with physician's office manager, who, by custom and practice, was vested with apparent authority to accept service of process on behalf of physician and other doctors in his office. Williams v. Kilgore, 618 So. 2d 51, 1992 Miss. LEXIS 787 (Miss. 1992).

Valid service of process was not made on physician in medical practice action, where, even if service had been made upon his wife, there was no evidence that a copy of the summons and complaint had subsequently been mailed to him at his residence, in accordance with rule. Williams v. Kilgore, 618 So. 2d 51, 1992 Miss. LEXIS 787 (Miss. 1992).

Service of process on divorce defendant while he was in Mississippi and attending court in another matter was proper, where there was no question but that he was wholly amenable to his wife's divorce action in Mississippi and thus he was not required to waive any right that he otherwise would have enjoyed. Chenier v. Chenier, 573 So. 2d 699, 1990 Miss. LEXIS 840 (Miss. 1990).

**Statute of limitations.**

Trial court erred in denying an estate's motion to dismiss because a purchaser's suit was barred by the statute of limitations; the purchaser failed to perfect service before the expiration of the statute of limitations. Estate of Puckett v. Clement, 238 So. 3d 1139, 2018 Miss. LEXIS 124 (Miss. 2018).

Trial court erred in denying an estate's motion to dismiss because a customer's suit was barred by the statute of limitations; the customer failed to perfect service before the expiration of the statute of limitations. Estate of Puckett v. Clement, 2017 Miss. LEXIS 407 (Miss. Oct. 5, 2017).

Because the manufacturer stated that the three-year statute of limitations had run without service of process and it was never served with the first amended complaint, the first amended complaint was barred by Miss. R. Civ. P. 4(h) and the statute of limitations. Meeks v. Hologic, Inc., 179 So. 3d 1127, 2015 Miss. LEXIS 610 (Miss. 2015).

Circuit court properly granted the retailer's motion for summary judgment on the customers' personal injury action where the 120-day period within which to make service of process ended on November 24, 2009, proper service of process was not made until January 10, 2010, the statute of limitations had run four days after the 120-day period expired, but the action was not refiled until October 15, 2012, and as a result, the action was time-barred. Hudson v. Lowe's Home Ctrs., Inc., 170 So. 3d 602, 2014 Miss. App. LEXIS 731 (Miss. Ct. App. 2014), cert. denied, 168 So. 3d 962, 2015 Miss. LEXIS 384 (Miss. 2015).

Circuit court erred in dismissing a litigant's complaint for insufficient service of process because the 120-day time period for service had not expired by the time that the Board of Certified Court Reporters filed its motion to dismiss for insufficient service of process and there was no evidence that the litigant would not or could not properly serve the Attorney General before the time limit expired. Davis v. Miss. Bd. of Certified Court Reporters, 126 So. 3d 982, 2013 Miss. App. LEXIS 803 (Miss. Ct. App. 2013).

Circuit court did not err in granting an employer summary judgment in a passenger's action to recover for injuries she sustained when a vehicle driven by an employee collided with the vehicle in which she was riding because the employee was not timely served within 120 days under Miss. R. Civ. P. 4(h), and the statute of limitations as to him expired; since the claims against the employer were wholly derivative of the employee's actions, the claims against the employer were barred. Sykes v. Home Health Care Affiliates, Inc., 2012 Miss. App. LEXIS 602 (Miss. Ct. App. Oct. 2, 2012), op. withdrawn, sub. op., 125 So. 3d 107, 2013 Miss. App. LEXIS 665 (Miss. Ct. App. 2013).

Under Miss. R. Civ. P. 4(h), the trial court abused its discretion by denying school district's and bus driver's motion to set aside the order granting the extension of time because substantial evidence did not support a finding of good cause for the driver's failure to serve the school district and bus driver within the required 120-day period. Thus, the other driver was not entitled to an extension of time to effect service, the statute of limitations had expired, and the complaint was subject to dismissal with prejudice. Copiah County Sch. Dist. v. Buckner, 61 So. 3d 162, 2011 Miss. LEXIS 258 (Miss. 2011).

Although the filing of a personal injury lawsuit tolled the three-year statute of limitations under Miss. Code Ann. § 15-1-49 four days before its expiration, the limitations period resumed running at the end of the service of process period under Miss. R. Civ. P. 4(h) and, thus, dismissal with prejudice was proper where process was not served until six days after the expiration of the 120-day service period. Stutts v. Miller, 37 So. 3d 1, 2010 Miss. LEXIS 146 (Miss. 2010).

While the trial court erred by finding that defendant was served properly, dismissal was not warranted because plaintiff had to be afforded the opportunity to apply for additional time to serve process and to demonstrate whether the circumstances constituted good cause under Miss. R. Civ. P. 4(h) for failing to serve defendant. Bloodgood v. Leatherwood, 25 So. 3d 1047, 2010 Miss. LEXIS 25 (Miss. 2010).

Trial court properly granted a hospital's motion to dismiss a medical malpractice suit, finding no good cause for the failure of a patient's family to serve a summons upon the hospital during the 120-day time period, under Miss. R. Civ. P. 4(h), and finding that the two-year statute of limitations, under Miss. Code Ann. § 15-1-36(2), had expired. Lucas v. Baptist Mem. Hosp. - N. Miss., Inc., 997 So. 2d 226, 2008 Miss. App. LEXIS 720 (Miss. Ct. App. 2008).

Although the statute of limitations was three years for a legal malpractice action, a client's first complaint tolled the statute of limitations even though that complaint was not properly served, and a second complaint was subsequently filed. Parmley v. Pringle, 976 So. 2d 422, 2007 Miss. App. LEXIS 488 (Miss. Ct. App. 2008).

In a personal injury case removed from state court, a company's motion to dismiss was granted because the company was not served within the 120-day period provided for by Miss. R. Civ. P. 4(h), and the worker failed to re-file his complaint within the three-year period provided for in Miss. Code. Ann. § 15-1-49(1). Riley v. Ga. Pac. Corp., 2006 U.S. Dist. LEXIS 1626 (N.D. Miss. Jan. 5, 2006).

When a passenger brought a suit against a driver in a matter arising out of a collision, but failed to serve the driver within the 120-day period, as required, the matter was properly dismissed with prejudice because the driver did not waive his defenses of insufficiency of process and insufficiency of service of process, and when the passenger failed to show good cause for not completing service within 120 days, the statute of limitations expired. Heard v. Remy, 937 So. 2d 939, 2006 Miss. LEXIS 367 (Miss. 2006).

Where: (1) an individual filed his personal injury complaint against a car maker with two days remaining in the limitations period, (2) the limitations period was tolled during the 120 days provided for by Miss. R. Civ. P. 4(h) for service, (3) service was not made on the car maker until 123 days had passed, and (4) the statute of limitations period for filing suit resumed after the 120 days had ended, the individual's personal injury claims against the car maker were dismissed with prejudice because they were time-barred. Riley v. Ga. Pac. Corp., 2006 U.S. Dist. LEXIS 1625 (N.D. Miss. Jan. 5, 2006, dismissed, 2006 U.S. Dist. LEXIS 1626 (N.D. Miss. Jan. 5, 2006).

Plaintiff's failure to effect timely service upon two manufacturers in his personal injury suit caused the applicable three-year statute of limitations to begin running after the 120-day period in Miss. R. Civ. P. 4(h) for effecting service elapsed; because the three-year statute of limitations expired a few days after the 120-day time frame for effecting service expired and plaintiff did not refile his complaint prior to the expiration of the statute of limitations, plaintiff's claims were time-barred. Riley v. Ga. Pac. Corp., 2006 U.S. Dist. LEXIS 1440 (N.D. Miss. Jan. 5, 2006, dismissed, 2006 U.S. Dist. LEXIS 1623 (N.D. Miss. Jan. 5, 2006).

In November 1997, plaintiff brought suit for wrongful death, but the record reflected that she failed to properly serve process upon defendant within 120 days. Because process was not served within the 120-day period as provided by Miss. R. Civ. P. 4(h), the running of the statute of limitations resumed; further, the statute of limitations ran in March, 2000, some 14 months prior to defendant's motion to dismiss and some 19 months prior to plaintiff's filing of a second identical wrongful death action, and therefore, when plaintiff filed her second action, the three year statute of limitation set forth in Miss. Code Ann. § 15-1-49 had run. Owens v. Mai, 891 So. 2d 220, 2005 Miss. LEXIS 18 (Miss. 2005).

Filing the complaint suspends the running of the statute of limitations regardless of whether service is made within the 120-day period set forth in Rule 4(h). Ball v. Wal-Mart Stores, Inc., 34 F. Supp. 2d 424, 1998 U.S. Dist. LEXIS 21156 (S.D. Miss. 1998).

Filing of complaint for medical malpractice, even without service of process, tolls statute of limitations governing medical malpractice actions for the 120 day period allowed in subdivision (h) of this rule. Fortenberry v. Memorial Hosp., 676 So. 2d 252, 1996 Miss. LEXIS 324 (Miss. 1996).

Filing of medical malpractice complaint without process being issued tolled applicable statute of limitations, where service of process was made within 120 days after filing of complaint. Erby v. Cox, 654 So. 2d 503, 1995 Miss. LEXIS 236 (Miss. 1995).

**Timeliness.**

Circuit court did not err in dismissing plaintiff's complaint for failure to make timely service of process. Plaintiff did not make any attempt to re-serve defendant within the remaining eighty days of the 120-day period, nor did plaintiff file a motion for an extension of time to serve defendant. Priede v. Jones, 282 So. 3d 1266, 2019 Miss. App. LEXIS 502 (Miss. Ct. App. 2019).

When an accident victim filed suit a day before statute of limitations expired, the limitations period was only tolled for 120 days unless an extension was granted. However, dismissal was appropriate because the claims were not effectively served with process before the statute of limitations expired as the victim failed to obtain a ruling on a motion for extension and failed to demonstrate good cause for extension on a later untimely motion despite good-faith negotiations coupled with counsel's belief that service of process was not an issue. Hadley v. FedEx Ground Package Sys., Inc., — So. 3d —, 2019 Miss. App. LEXIS 453 (Miss. Ct. App. Sept. 17, 2019).

Parent's notice of appeal was considered timely and the appellate court had jurisdiction to decide the appeal because the chancellor denied the parent's motion to alter or amend the judgment, the thirtieth day thereafter was a Sunday, and the parent filed the notice of appeal on the following Monday. Barbaro v. Smith, 282 So. 3d 578, 2019 Miss. App. LEXIS 322 (Miss. Ct. App. 2019).

Motion filed by a county board of supervisors to dismiss a property owner's appeal was denied because the appeal was not untimely filed under Miss. R. App. P. 4 since the owner timely filed his Miss. R. Civ. P. 52 and 59 motions; although the owner had previously filed his notice of appeal,the premature filing did not nullify his appeal. Wirtz v. Adams Cty. Bd. of Supervisors, 278 So. 3d 1170, 2019 Miss. App. LEXIS 156 (Miss. Ct. App. 2019).

By not effectuating service within 120 days, an employee failed to follow the rules, and she could have used legitimate means to preserve her claim but instead chose to file a duplicative claim. Triplett v. Southern Hens, Inc., 238 So. 3d 1128, 2018 Miss. LEXIS 130 (Miss. 2018).

Trial court's order dismissing a case was premature to the extent it was based on insufficient service of process because, although the complainant initially served the city attorney's wife and later served the city attorney, the complainant subsequently served both the mayor and the acting city clerk, after the circuit court's order dismissing the case. The complainant's motion for reconsideration was pending, and the complainant was still well within the 120-day period allowed when the mayor and the acting city clerk were served. O'Hara v. City of Hattiesburg, 222 So. 3d 314, 2017 Miss. App. LEXIS 165 (Miss. Ct. App. 2017).

**Waiver.**

Limited liability company (LLC) was entitled to relief from a default judgment because the judgment was void as the party which sought to collect on a promissory note failed to properly serve the LLC and there was no effective waiver of service of process in that the LLC did not file an answer or participate in the litigation and an affidavit by a member/manager of the LLC which was submitted by the party did not constitute an entry of appearance on behalf of the LLC. Sun South Llc v. Bayou Vista Llc, 281 So. 3d 980, 2019 Miss. App. LEXIS 166 (Miss. Ct. App. Apr. 23, 2019).

Plaintiffs in a personal injury action were required to serve a minor defendant with process because he was clearly over the age of twelve, and defendants did not waiver their right to pursue their affirmative defenses of insufficiency of process and insufficiency of service of process because filing the answer that contained the affirmative defenses and responding to requests for admissions constituted only minimal participation in the litigation. Standifer v. Boren, 111 So. 3d 1267, 2013 Miss. App. LEXIS 163 (Miss. Ct. App. 2013).

In a case arising from an automobile accident in which a trial court granted defendant's motion to dismiss or, in the alternative, for summary judgment because plaintiff had failed to properly serve her, plaintiff unsuccessfully argued that defendant waived her affirmative defense of insufficiency of process by actively participating in the litigation. During the course of the litigation: (1) defendant filed a motion to dismiss or, in the alternative, a motion for summary judgment; (2) she filed an answer to the complaint; and (3) she responded to plaintiff's request for production of documents; defendant's participation in litigation was minimal, and she had not waived her affirmative defense of insufficiency of process based on her minimal participation in litigation. Shaver v. Blackwell, 43 So. 3d 1155, 2010 Miss. App. LEXIS 103 (Miss. Ct. App.), cert. denied, 49 So. 3d 106, 2010 Miss. LEXIS 481 (Miss. 2010).

Contractors waived the issue of insufficiency of service of process because they did not contest the sufficiency of service of process; the contractors did not claim that service was improper in their motion to set aside the default judgment that was entered against them, and they expressly admitted that they were served either under the Mississippi Long-Arm Statute or personally by certified mail. Woodkrest Custom Homes Inc. v. Cooper, 24 So. 3d 340, 2009 Miss. App. LEXIS 843 (Miss. Ct. App. 2009).

In a medical malpractice suit, a hospital did not waive its affirmative defense of insufficient service of process by the failure of the hospital to include the affirmative defense in a subsequent motion for a change or venue or by its active participation in the litigation. Lucas v. Baptist Mem. Hosp. - N. Miss., Inc., 997 So. 2d 226, 2008 Miss. App. LEXIS 720 (Miss. Ct. App. 2008).

In a negligence case, the defense of lack of personal jurisdiction was waived under Miss. R. Civ. P. 12(h)(1) because an out-of-state resident made a general appearance when he sought relief from a default judgment without raising that objection; therefore, the case was improperly dismissed for a failure timely serve process. Courtney v. McCluggage, 991 So. 2d 642, 2008 Miss. App. LEXIS 571 (Miss. Ct. App. 2008).

Custody award of the mother's and father's child to the father was appropriate, in part because the mother waived her jurisdictional arguments when she failed to timely seek resolution of the issue and when she participated in the hearing without first seeking an adjudication of her jurisdictional issue. Price v. McBeath, 989 So. 2d 444, 2008 Miss. App. LEXIS 497 (Miss. Ct. App. 2008).

In a son's negligence action against his father, the father was deemed to have waived his right to assert insufficiency of process due to the son's failure to serve process on the father until nine months after the expiration of the 120-day period in Miss. R. Civ. P. 4(h) where the father assertedin sufficient service as a defense in his answer but then proceeded to participate in discovery, engage in settlement talks, and notice the son's deposition over the next two years and did not raise the service of process issue again until the statute of limitations on the son's claim expired. Whitten v. Whitten, 956 So. 2d 1093, 2007 Miss. App. LEXIS 356 (Miss. Ct. App. 2007).

Eight-month period of inactivity, with regard to a defendant's assertion that he was not served within the 120-day period allowed under Miss. R. Civ. P. 4(h), presumptively constitutes a waiver of that defense when coupled with the defendant's participation in the litigation. Whitten v. Whitten, 956 So. 2d 1093, 2007 Miss. App. LEXIS 356 (Miss. Ct. App. 2007).

While an original motel owner was not properly served under Miss. R. Civ. P. 4(h), because it waited more than 12 months after an appearance was entered on its behalf to challenge service of process, the matter was waived and the owner's dismissal from the action was improper. Schustz v. Buccaneer, Inc., 850 So. 2d 209, 2003 Miss. App. LEXIS 637 (Miss. Ct. App. 2003).

Where waiver of process and entry of appearance form were signed on same day divorce was filed, but dated the following day, and where there were other irregularities, the case was reversed and remanded for further proceedings. Peterson v. Peterson, 648 So. 2d 54, 1994 Miss. LEXIS 549 (Miss. 1994), modified, 1995 Miss. LEXIS 46 (Miss. Jan. 19, 1995).

## Rule 5. Service and filing of pleadings and other papers.

(a) *Service: When Required.* — Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided in Rule 4 for service of summons. In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b)(1) *Service: How Made.* — Whenever under these rules service is required or permitted to be made upon a party who is represented by an attorney of record in the proceedings, the service shall be made upon such attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him; or by transmitting it to him by electronic means; or by mailing it to him at his last known address, or if no address is known, by leaving it with the clerk of the court, or by transmitting it to the clerk by electronic means. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no on one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by electronic means is complete when the electronic equipment being used by the attorney or party being served acknowledges receipt of the material. If the equipment used by the attorney or party being served does not automatically acknowledge the transmission, service is not complete until the sending party obtains an acknowledgment from the recipient. Service by mail is complete upon mailing.

(2) *Electronic Court System Service: How Made.* — Where a court has, by local rule, adopted the Mississippi Electronic Court System, service which is required or permitted under these rules shall be made in conformity with the Mississippi Electronic Court System procedures.

(c) *Service: Numerous Defendants.* — In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants, and that any cross-claim, counter-claim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) *Filing.* — All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter but, unless ordered by the court, discovery papers need not be filed until used with respect to any proceeding. Proof of service of any paper shall be upon certificate of the person executing same.

(e)(1) *Filing with the Court Defined.* — The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

(2) *Electronic Filing with Court Defined.* — A court may, by local rule, allow pleadings and other papers to be filed, signed, or verified by electronic means in conformity with the Mississippi Electronic Court System procedures. Pleadings and other papers filed electronically in compliance with the procedures are written papers for purposes of these rules.

**HISTORY: Amended effective March 1, 1989; Amended effective January 8, 2009, for the purpose of establishing a pilot program for Mississippi Electronic Court System; Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective March 1, 1989, Rule 5(b) and Rule 5(e) were amended by authorizing the service and filing of pleadings and documents by electronic means. 536-538 So. 2d XXI (West Miss. Cas. 1989).

## ADVISORY COMMITTEE NOTE

Rule 5 provides an expedient method of exchanging written and electronic communications between parties and an efficient system of filing papers with the clerk. This rule presupposes that the court has already gained jurisdiction over the parties. A "pleading subsequent to the original complaint," which asserts a claim for relief against a person over whom the court has not at the time acquired jurisdiction, must be served upon such person along with a copy of a summons in the same manner as the copy of the summons and complaint is required to be served upon the original defendants.

A motion which may be heard ex parte is not required to be served, but should be filed; see also Rule 81(b). The enumeration of papers in Rule 5(a) which are required to be served is not exhaustive; also included are affidavits in support of or in opposition to a motion, Rule 6(d), and a motion for substitution of parties, Rule 25.

An electronic case management system and electronic filing system, known as the Mississippi Electronic Court System (MEC) is optional for the chancery, circuit and county courts; however, the procedures of the MEC must be followed where a court has adopted and implemented the MEC by local rule. Therefore, to the extent the MEC procedures address service and filing of pleadings and other papers, the procedures should be followed to satisfy Rule 5(e) and Rule 5(b). For purposes of Rule 5(e), the MEC procedures provide reasonable exceptions to the requirement of electronic filing. See, Mississippi Supreme Court Website.

Although service must be made within the times prescribed, filing is permitted to be made within a reasonable time thereafter. Instances requiring the pleading to be filed before it is served include Rule 3 (complaint) and any other pleading stating a claim for relief which is necessary to serve with a summons. Pursuant to Rule 5(c) (numerous defendants) the filing of a pleading, coupled with service on the plaintiff, is notice to the parties. Rule 65(b) requires temporary restraining orders to be filed forthwith in the clerk's office.

To obtain immediate court action under Rule 5(e), a party may file papers with the judge, if the latter permits, and obtain such order as the judge deems proper. Rule 5(e) should be read in conjunction with Rules 77(a) (courts always open), 77(b) (trials and hearings; orders in chambers), and 77(c) (clerk's office and orders by clerk).

Rule 5(b) has no application to service of summons; that subject is completely covered by Rule 4 and Rule 81(d).

## JUDICIAL DECISIONS

### ANALYSIS

Construction.
Applicability.
Filing with court.
Jurisdiction and venue.
Proof of Mailing.
Service upon attorney.
Service upon party.

**Construction.**

Bill of peace was a pleading subsequent to initial complaint because it was derived from and part of original litigation; service on each individual plaintiff (defendants in the bill of peace) as in an independent, unrelated action was therefore not necessary, and service on plaintiffs' attorneys of record was sufficient. Leaf River Forest Prods. v. Deakle, 661 So. 2d 188, 1995 Miss. LEXIS 455 (Miss. 1995).

**Applicability.**

Trial court erred in denying a motion filed by an insured and its insurer (jointly, the insured) for relief from judgment because, while the parents added new claims to their products liability and personal injury lawsuit, the insured was not yet in default, the parents properly complied with the filing rules, and the insured did not had good cause for failing to answer the complaint, the insured had colorable defenses to the claims against them and the parents would not suffer prejudice. BB Buggies, Inc. v. Leon, 2014 Miss. LEXIS 372 (Miss. July 31, 2014), op. withdrawn, 2014 Miss. LEXIS 540 (Miss. Oct. 30, 2014), sub. op., 150 So. 3d 90, 2014 Miss. LEXIS 543 (Miss. 2014).

Notice of the transfer of structured settlement payment rights required under Miss. Code Ann. § 11-5-11(2) requires a return for a date certain similar to the procedure authorized in Miss. R. Civ. P. 81(d)(5); once the original notice is provided to an interested party, notice of subsequent proceedings must comply with Miss. R. Civ. P. 5. RSL Funding, LLC v. Saucier (In re Saucier), 130 So. 3d 1108, 2013 Miss. App. LEXIS 133 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 71 (Miss. 2014), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 74 (Miss. 2014).

Although this rule is generally utilized after suit has been filed, mechanics of this rule could properly be used where notice was required by statute as a preliminary step to filing a lawsuit. Brocato v. Mississippi Publishers Corp., 503 So. 2d 241, 1987 Miss. LEXIS 2358 (Miss. 1987).

Party who is granted permission to intervene pursuant to M.R.C.P. Rule 24(b)(2) is not required to issue a summons and complaint pursuant to Rule 4; rather, service pursuant to Rule 5, of motion to intervene accompanied by complaint, is sufficient service. Breland v. Smith-Johnson, Inc., 501 So. 2d 389, 1987 Miss. LEXIS 2278 (Miss. 1987).

**Filing with court.**

Where the process issued to defendants was deficient and not in substantial compliance with Miss. R. Civ. P. 4(b), a pro se response by one defendant might have constituted an appearance under Miss. R. Civ. P. 55, but was not a valid answer because it did not comport with the filing requirement of Miss. R. Civ. P. 5(d). Fletcher v. Limeco Corp., 996 So. 2d 773, 2008 Miss. LEXIS 598 (Miss. 2008).

Where an attorney appealed the denial of unemployment benefits, it was error to find that the attorney's appeal was untimely based on the failure to include a civil cover sheet, because the attorney demonstrated good cause for an extension of the filing deadline since the cover sheet requirement did not bar the otherwise timely notice of appeal. Cummings v. Miss. Dep't of Empl. Sec., 980 So. 2d 340, 2008 Miss. App. LEXIS 251 (Miss. Ct. App. 2008).

Under Miss. R. Civ. P. 5(d), only proof of service of discovery responses, and not the responses themselves, need be filed with the court, and a plaintiff's motion for judgment based on the defendant's failure to file discovery responses with the court was thus clearly frivolous and justified sanctions under Miss. R. Civ. P. 11(b). McIntosh v. Victoria Corp., 877 So. 2d 519, 2004 Miss. App. LEXIS 21 (Miss. Ct. App.), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 860 (Miss. 2004).

A pro se prisoner's motion for post-conviction relief is delivered for filing under the Uniform Post-Conviction Collateral Relief Act and the Mississippi Rules of Civil Procedure when the prisoner delivers the papers to prison authorities for mailing; further, prison authorities may initiate such procedures as are necessary to document reliably the date of such delivery, by means of a prison mail log of legal mail or other expeditious means, and henceforth, an inmate's certificate of service will not suffice as proof. Sykes v. State, 757 So. 2d 997, 2000 Miss. LEXIS 75 (Miss. 2000).

Petition was deemed "filed" when delivered to clerk of youth court, as there was no conflict between subdivision (e) of this rule and any provision of the Youth Court Act. Cortesi v. Washington County Dep't of Human Servs., 566 So. 2d 691 (Miss. 1990).

**Jurisdiction and venue.**

Absent proper jurisdiction, the supreme court could not address the denial of summary judgment regarding the claims remaining because it lacked jurisdiction over those claims pending in the trial court. Jourdan River Estates, LLC v. Favre, 278 So. 3d 1135, 2019 Miss. LEXIS 345 (Miss. 2019).

**Proof of Mailing.**

Plaintiff's testimony regarding his usual practice and procedure for mailing letters was insufficient to establish that notice was served in compliance with Miss. Code Ann. § 15-1-36(15) and Miss. R. Civ. P. 5, in the absence of evidence showing that the required notice letter had actually been stamped and placed in the mail. Brewer v. Wiltcher, 22 So. 3d 1188, 2009 Miss. LEXIS 582 (Miss. 2009).

**Service upon attorney.**

Correspondence between employer's counsel and claimant's treating physician was not an impermissible non-consensual ex parte communication because the claimant's counsel was copied on the correspondence requesting clarification of the physician's opinions, but made no objection to the communication or the physician's response in a letter report. Therefore, the administrative judge and the Mississippi Workers' Compensation Commission did not err in considering the physician's letter report. Jones v. Univ. of Miss. Med. Ctr., 309 So. 3d 1135, 2021 Miss. App. LEXIS 7 (Miss. Ct. App. 2021).

Correspondence between employer's counsel and claimant's treating physician was not an impermissible non-consensual ex parte communication because the claimant's counsel was copied on the correspondence requesting clarification of the physician's opinions, but made no objection to the communication or the physician's response in a letter report. Therefore, the administrative judge and the Mississippi Workers' Compensation Commission did not err in considering the physician's letter report.

Because a homeowner's rights regarding the motion for substitution were not affected by the failure to serve the decedent's successors, service was not mandatory, and the service executed upon the homeowner's attorney was sufficient to trigger the ninety-day time period; there existed no estate upon which or personal representative upon whom the suggestion of death could have been served. Clark v. Knesal, 113 So. 3d 531, 2013 Miss. LEXIS 291 (Miss. 2013).

In a partition action, appellant had notice of a public sale of the property because service of a copy of the order on appellant's attorney regarding the public sale of the property was sufficient for actual notice to appellant under Miss. R. Civ. P. 5(b)(1); the attorney was obligated to act in the capacity of counsel for appellant until allowed to withdraw by the chancellor. Polk v. Jones, 20 So. 3d 710, 2009 Miss. App. LEXIS 191 (Miss. Ct. App. 2009).

Plaintiff's failure to serve defendant's attorney with a copy of a motion to extend the time to serve process under Miss. R. Civ. P. 6(b)(1) was not a dereliction sufficient to justify setting aside the extension because such a motion could be heard ex parte under Miss. R. Civ. P. 5(a). Johnson v. Thomas, 982 So. 2d 423, 2007 Miss. App. LEXIS 546 (Miss. Ct. App. 2007), rev'd, 982 So. 2d 405, 2008 Miss. LEXIS 257 (Miss. 2008).

Letters did show that the father's attorney failed to serve notice of the subpoena immediately under Miss. R. Civ. P. 45, but the father's attorney's failure to follow correct procedure did not rise to the level of abuse of process. The trial court properly granted summary judgment in favor of the father and his attorney as to the abuse of process claim; moreover, the mother's argument that the father was required to hand deliver the notice to her attorney under Miss. R. Civ. P. 5(b) was without merit, as service was allowed by mail under the plain language of Miss. R. Civ. P. 5(b). Ayles v. Allen, 907 So. 2d 300, 2005 Miss. LEXIS 361 (Miss. 2005).

Where neither a motion requesting his formal withdrawal as counsel nor a court order permitting withdrawal were present in the record, the circuit court and opposing counsel were obligated to serve all motions and notices upon the plaintiff's attorney of record, and having failed to so do, a default judgment entered against the plaintiff was void. McClain v. White, 738 So. 2d 306, 1999 Miss. App. LEXIS 162 (Miss. Ct. App. 1999).

Notice of filing of statement of evidence was not properly served on wife in divorce proceeding, where attorney on whom it was served had represented wife in Louisiana, but not Mississippi, and attorney had never appeared as an attorney of record for wife in either appellate court or the court below. Barber v. Barber, 608 So. 2d 1338, 1992 Miss. LEXIS 577 (Miss. 1992).

Court had continuing jurisdiction over parties to divorce, and therefore husband's subsequent complaint regarding wife's failure to provide child visitation only required giving of notice rather than actual service of process, and mailing of complaint to wife's attorney of record was sufficient under this rule. Cooley v. Cooley, 574 So. 2d 694, 1991 Miss. LEXIS 15 (Miss. 1991), overruled, Powell v. Powell, 644 So. 2d 269, 1994 Miss. LEXIS 627 (Miss. 1994).

**Service upon party.**

Wife failed to properly serve notice to a daughter, who was the executor of the decedent's estate, of her contempt action because the wife's attorney mailed a copy of the contempt "motion" to the estate attorney, and the chancery court issued a summons to the daughghter in "care of" the estate attorney; those actions, failed to constitute proper service of process because the daughter, not the estate attorney, should have been served with the wife's contempt "motion" and the summons. Chester v. Labasse (In re Estate of Labasse), 242 So. 3d 167, 2017 Miss. App. LEXIS 540 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 70, 2018 Miss. LEXIS 192 (Miss. 2018).

Trial court erred in denying a motion to set aside a default judgment filed by the owners of an off-road vehicle because, while they were not entitled to notice where they had not appeared, were served with an amended complaint while they still had time to respond to the original complaint, and the parents of a child injured while driving the vehicle complied with the civil procedure rules, the owners had colorable defenses to the claims against them and the parents would not suffer prejudice. BB Buggies, Inc. v. Leon, 150 So. 3d 90, 2014 Miss. LEXIS 543 (Miss. 2014).

Summary judgment was appropriate because the record revealed no evidence of prejudice, or even a claim of prejudice, suffered by the owners of a condominium unit from the alleged lack of proper electronic notice of the summary judgment hearing. Furthermore, the trial court's order stated that the condominium association's motion for summary judgment on the owner's claims was properly noticed for hearing. Robohm v. Wheeler Roofing, Inc., 135 So. 3d 172, 2013 Miss. App. LEXIS 595 (Miss. Ct. App. 2013).

Widow's seven-year delay in taking any action in her suit against her deceased husband's employer other than letters to the clerk that were not served on the employer as required by Miss. R. Civ. P. 5, and an absence of good cause shown for the delay, required dismissal of her action pursuant to Miss. R. Civ. P. 41(d). Ill. Cent. R.R. Co. v. Moore, 994 So. 2d 723, 2008 Miss. LEXIS 422 (Miss. 2008).

Trial court did not err in refusing to grant a default judgment based on defendant's alleged failure to answer the complaint within 30 days; defendant had placed the answer in the mail in a timely fashion and plaintiff could not refuse to accept it and then claim defendant had not answered. Slaydon v. Hansford, 830 So. 2d 686, 2002 Miss. App. LEXIS 477 (Miss. Ct. App. 2002), overruled, Blake v. Estate of Clein, 37 So. 3d 622, 2010 Miss. LEXIS 322 (Miss. 2010).

The plaintiff complied with the notice requirements of subsection (b) when it mailed a notice of hearing upon its motion for default judgment to the defendant, rather than his attorney, where it knew that the defendant's first counsel of record had withdrawn but could not have known that the defendant had retained another attorney to represent him until after it had mailed the notice of the hearing directly to the defendant. Duckworth v. Strite, 748 So. 2d 794, 1999 Miss. App. LEXIS 186 (Miss. Ct. App. 1999).

## RESEARCH REFERENCES

**ALR.**

Service of Process Via Computer or Fax. 30 A.L.R.6th 413.

## Rule 5.1. Privacy protection for filings made with the court.

Beginning July 1, 2016, all courts and offices of a circuit or chancery clerk that maintain electronic storage or electronic filing of documents, as defined under Section 9-1-51 of the Mississippi Code, and make those documents accessible online must conform with the privacy provisions of the Administrative Procedures for Mississippi Electronic Courts – specifically, Sections 5 and 9 therein.

**HISTORY: Added April 28, 2015; suspended June 4, 2015; amended effective July 1, 2016.**

## Rule 6. Time.

(a) *Computation.* — In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, as defined by statute, or any other day when the courthouse or the clerk's office is in fact closed, whether with or without legal authority, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, a legal holiday, or any other day when the courthouse or the clerk's office is closed. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. In the event any legal holiday falls on a Sunday, the next following day shall be a legal holiday.

(b) *Enlargement.* — When by these rules or by notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), 59(d), 59(e), 60(b), and 60(c) except to the extent and under the conditions therein stated.

(c) *Unaffected by expiration of term.* — The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in a civil action consistent with these rules.

(d) *Motions.* — A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five days before the time fixed for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be served at some other time.

(e) *Additional time after service by mail.* — Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period. This subdivision does not apply to responses to service of summons under Rule 4.

**HISTORY: Amended effective March 1, 1989; amended effective June 24, 1992; amended effective July 1, 2008; Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective June 24, 1992, Rule 6(a) was amended to provide that the legal holidays which cause a period of time to be enlarged are those defined by statute. 598-602 So. 2d XXII-XXIII (West Miss. Cas. 1992).

Effective March 1, 1989, Rule 6(a) was amended to abrogate the inclusion of time periods established by local court rules. 536-538 So. 2d XXI (West Miss. Cas. 1989).

## ADVISORY COMMITTEE NOTE

It is not uncommon for clerks' offices and courthouses to be closed occasionally during what are normal working periods, whether by local custom or for a special purpose, such as attendance at a funeral. Rule 6(a) was drafted to obviate any harsh result that may otherwise ensue when an attorney, faced with an important filing deadline, discovers that the courthouse or the clerk's office is unexpectedly closed.

Rule 6(b) gives the court wide discretion to enlarge the various time periods both before and after the actual termination of the allotted time, certain enumerated cases being excepted. A court cannot extend the time: (1) for filing of a motion for judgment notwithstanding the verdict pursuant to Rule 50(b); (ii) for filing a motion to amend the court's findings pursuant to Rule 52(b); (iii) for filing a motion for new trial pursuant to Rule 59(b); (iv) for filing a motion to alter or amend the judgment pursuant to Rule 60(b); (vi) for filing a motion to reconsider a court order transferring a case to another court pursuant to Rule 60(c); or (vii) for entering a *sua sponte* order requiring a new trial pursuant to Rule 59(d).

Importantly, such enlargement is to be made only for cause shown. If the application for additional time is made before the period expires, the request may be made ex parte; if it is made after the expiration of the period, notice of the motion must be given to other parties and the only cause for which extra time can be allowed is "excusable neglect."

Rule 6(c) does not abolish court terms; it merely provides greater flexibility to the courts in attending the myriad functions they must perform, many of which were heretofore possible only during term time. The rule is also consistent with the provisions elsewhere herein that prescribe a specific number of days for taking certain actions rather than linking time expirations to the opening day, or final day, or any other day of a term of court; e.g., Rule 6(d) (motions and notices of hearings thereon to be served not less than five days before time fixed for hearing), and Rule 12(a) (defendant to answer within thirty days after service of summons and complaint).

**Cross References** — Computation and enlargement of time in criminal proceedings, see MRCrP 1.3.

Computation and enlargement of time in criminal proceedings, see MRCrP 1.3.

## JUDICIAL DECISIONS

### ANALYSIS

Construction.
Affidavits.
Computations.
Enlargement of time.
Excusable neglect.
Good cause.
Motions.
Order, when effective.
Notice.
Service by mail.

**Construction.**

Miss. R. Civ. P. 4(h) is not a specific rule governing a general rule because Rule 4(h) and Miss. R. Civ. P. 6(b) are in no way contradictory; if Rule 6(b) is meant to be read in conjunction with Rule 4(h), then a trial judge has discretion to grant a second (or third, fourth, fifth, etc.) enlargement of time to serve process "for cause shown" so long as the motion is made before the expiration of the period as extended by a previous order. Fulgham v. Jackson, 234 So. 3d 279, 2017 Miss. LEXIS 257 (Miss. 2017).

Miss. R. Civ. P. 6(e) was not applicable to calculate the sixty-day appeal period for taxpayers' appeal of a ruling by the Mississippi Board of Tax Appeals. Pursuant to Miss. Code Ann. § 1-3-67, the sixty-day period began on the date the Board issued its ruling and had expired. Southside, Inc. v. Miss. Dep't of Revenue, 158 So. 3d 277, 2014 Miss. LEXIS 570 (Miss. 2014).

Because the Mississippi Employment Security Commission (MESC) was not a circuit, chancery or county court, the Mississippi Rules of Civil Procedure, particularly Miss. R. Civ. P. 6(e), were not applicable to its administrative hearings or appeals. Miss. Empl. Sec. Comm'n v. Parker, 903 So. 2d 42, 2005 Miss. LEXIS 58 (Miss. 2005).

M.R.C.P. 6(b) is a general rule and is

therefore subject to specific provisions of M.R.C.P. 56(b), and therefore trial judge correctly granted defendant leave to file dispositive motion because, under M.R.C.P. 56(b), a motion for summary judgment is proper at any time. Diogenes Editions v. State by & Through Board of Trustees of Insts. of Higher Learning, 700 So. 2d 316, 1997 Miss. LEXIS 447 (Miss. 1997).

Ten day time limit set forth in M.R.C.P. Rule 59(b) is jurisdictional and mandatory, and Rule 6(b) gives trial judge no discretion to enlarge this time period. Telford v. Aloway, 530 So. 2d 179, 1988 Miss. LEXIS 413 (Miss. 1988).

**Affidavits.**

Trial court acted within its discretion in electing not to consider the unsworn report of an expert witness and the expert's affidavit when they were not filed by the claimant until the day of the hearing on the premises owner's motion for summary judgment. Chandler v. Mary Mahoney's, Inc., 126 So. 3d 972, 2013 Miss. App. LEXIS 794 (Miss. Ct. App. 2013).

In a brother's coverage dispute with a sister's insurer regarding uninsured motor benefits under the sister's policy, counter-affidavits submitted by the brother, attesting to the sister's residence, were not considered by a circuit court, pursuant to Miss. R. Civ. P. 6(b), because the affidavits were not timely filed and the brother did not file a motion showing excusable neglect. Robinson v. State Farm Mut. Auto. Ins. Co., 52 So. 3d 416, 2010 Miss. App. LEXIS 560 (Miss. Ct. App. 2010), cert. dismissed, 56 So. 3d 574, 2011 Miss. LEXIS 159 (Miss. 2011).

Affidavit submitted more than two months after summary judgment hearing was late and was not allowed under either M.R.C.P. Rule 6(d) or Rule 56(c); moreover, Rule 56(e) did not allow a supplemental affidavit to be submitted after time set out in Rule 56(c) or Rule 6(d). Jones v. James Reeves Contrs., 701 So. 2d 774, 1997 Miss. LEXIS 98 (Miss. 1997).

**Computations.**

Former husband was not untimely added as a permissible party because although the husband filed a motion to amend the judgment eleven days after the former wife obtained a settlement order, the final day in the applicable period fell on a Sunday. Cooper v. Estate of Gatwood, 119 So. 3d 1031, 2013 Miss. LEXIS 412 (Miss. 2013).

Under Miss. R. Civ. P. 4(h), the trial court abused its discretion by denying school district's and bus driver's motion to set aside the order granting the extension of time because substantial evidence did not support a finding of good cause for the driver's failure to serve the school district and bus driver within the required 120-day period. Applying the rules for computation of time under Miss. R. Civ. P. 6(a), the limitations period expired on November 10, 2008. Copiah County Sch. Dist. v. Buckner, 61 So. 3d 162, 2011 Miss. LEXIS 258 (Miss. 2011).

Architect sought to appeal a decision from the Mississippi State Board of Architecture that found that the architect had unlawfully engaged in the practice of architecture in Mississippi; the chancery court improperly dismissed the appeal because the time for appeal expired on a Saturday, and therefore when the notice and bond were filed the following Monday, the appeal was timely. Broady v. Miss. State Bd. of Architecture, 936 So. 2d 441, 2006 Miss. App. LEXIS 593 (Miss. Ct. App. 2006).

Where the statute of limitations applicable to plaintiff's personal injury claims would have expired on a Sunday, pursuant to Miss. R. Civ. P. 6(a), the limitations period expired the following Monday. Riley v. Ga. Pac. Corp., 2006 U.S. Dist. LEXIS 1440 (N.D. Miss. Jan. 5, 2006, dismissed, 2006 U.S. Dist. LEXIS 1623 (N.D. Miss. Jan. 5, 2006).

Pursuant to Miss. R. Civ. P. 6(a) and 6(e), the claimant's time to appeal her case to the Mississippi Employment Security Commission Board of Review began on July 2, 2002, the day after the appeals referee mailed her decision to the claimant, and ended July 19, 2002, which reflected the addition of an additional three days for the claimant to respond, as required by Rule 6(e); therefore, the claimant's appeal was filed timely with the Board of Review. Miss. Empl. Sec. Comm'n v. Parker, 905 So. 2d 613, 2004

Miss. App. LEXIS 303 (Miss. Ct. App. 2004).

Hearing on defendant's motion to compel discovery was not properly noticed, due to improper computation of time under this rule. Cunningham v. Mitchell, 549 So. 2d 955, 1989 Miss. LEXIS 442 (Miss. 1989).

**Enlargement of time.**

Circuit court did not err in finding no excusable neglect for plaintiff's failure to serve process timely. Thus, the appellate court upheld the circuit court's denial of plaintiff's motion for additional time to serve defendant. Priede v. Jones, 282 So. 3d 1266, 2019 Miss. App. LEXIS 502 (Miss. Ct. App. 2019).

There was no abuse of discretion in allowing substitution of a neighbor's estate as a party because the neighbor's son, who had been appointed as executor of the estate, timely petitioned for an extension to file a substitution of parties. Sullivan v. Estate of Maddox, 283 So. 3d 222, 2019 Miss. App. LEXIS 364 (Miss. Ct. App. 2019).

Trial court properly denied a health care provider's motion to dismiss because a sister was the only party to the action, and thus, the order granting her motion for extension of time to serve process became effective once the order had been signed and had left the trial court's control; the sister timely obtained an extension to serve process and timely served process within that extension, and therefore, the statute of limitations remained tolled. Graceland Care Ctr. of New Albany, LLC v. Hamlet ex rel. Kinard, 236 So. 3d 1, 2017 Miss. LEXIS 430 (Miss. 2017).

Trial court did not rule on the issue of a sister's cause or good cause, and thus, there was no factual finding for the supreme court to review under an abuse-of-discretion standard; there is no requirement for "good cause shown" when the motion for extension is timely filed. Graceland Care Ctr. of New Albany, LLC v. Hamlet ex rel. Kinard, 236 So. 3d 1, 2017 Miss. LEXIS 430 (Miss. 2017).

Court, in its discretion, for cause shown, may enlarge the time period for service of process prior to the expiration of the initial 120-day period; there is no requirement for good cause shown when the motion for extension is timely filed. Graceland Care Ctr. of New Albany, LLC v. Hamlet, 2017 Miss. LEXIS 327 (Miss. Aug. 17, 2017), op. withdrawn, sub. op., 236 So. 3d 1, 2017 Miss. LEXIS 430 (Miss. 2017).

Johnson v. Thomas ex rel Polatsidis, 982 So. 2d 405 (Miss. 2008), is overruled to the extent that it requires a party to show good cause instead of "for cause shown" when a second motion for enlargement of time is filed before the expiration of the time provided under the prior enlargement. Fulgham v. Jackson, 234 So. 3d 279, 2017 Miss. LEXIS 257 (Miss. 2017).

Miss. R. Civ. P. 6(b) provides that a trial judge may grant an enlargement of time, not establish a separate period of time; thus, Miss. R. Civ. P. 4(h) actually requires a good-cause showing after the expiration of the 120-day period as enlarged by any court order pursuant to Rule 6(b), not just after the expiration of 120 days. Fulgham v. Jackson, 234 So. 3d 279, 2017 Miss. LEXIS 257 (Miss. 2017).

Trial court did not abuse its discretion by finding good cause justifying a second enlargement of time because plaintiff timely sought enlargements of time to serve process and provided specific details concerning her attempts to locate defendant; plaintiff diligently inquired into defendant's whereabouts, and defendant's incarceration and movement through the prison system, coupled with the statements from the prison official upon which plaintiff relied, misdirected her ability to serve him. Fulgham v. Jackson, 234 So. 3d 279, 2017 Miss. LEXIS 257 (Miss. 2017).

Plaintiffs will be held to the "for cause shown" standard to obtain any enlargement of time, including the initial enlargement; likewise, defendants still can challenge whether "cause" was shown, and also, a trial court's determination of cause will be reviewed under an abuse-of-discretion standard as with any other fact-based finding. Fulgham v. Jackson, 234 So. 3d 279, 2017 Miss. LEXIS 257 (Miss. 2017).

To demonstrate "for cause shown" or "cause" to obtain an enlargement of time, a party must articulate a legitimate reason, made in good faith, as to why the enlargement of time should be granted; while this may not rise to the level of the "good cause" standard, it requires something constituting diligence or a legitimate reason excusing same, and each case should be left to the discretion of the trial court to look to the totality of the circumstances to determine if "cause" is being shown. Fulgham v. Jackson, 234 So. 3d 279, 2017 Miss. LEXIS 257 (Miss. 2017).

In a case where service of process on a receptionist was found to be improper, an extension of time was not granted for service because good cause was not shown; misleading information was not relied upon about the proper agent for service, and inquiries should have been made about possible defects in the service. Anderson v. Pascagoula Sch. Dist., 218 So. 3d 296, 2017 Miss. App. LEXIS 123 (Miss. Ct. App. 2017).

Circuit court properly dismissed an executrix's wrongful-death lawsuit as untimely because, while the court erred in setting aside its order granting the initial extension to effect service of process – the executrix only needed to show cause when service was effected within the initial 120 days – the executrix failed to show good cause for her second extension where she and her local counsel (the only counsel of record) attempted to shift blame to her out-of-state counsel for local counsel's failure to timely effect service of process and local counsel failed to inform the circuit court of all the material facts related to the alleged conflict with the executrix's out-of-state counsel and local counsel's intent to withdraw from the case. Booth v. Williams, 200 So. 3d 1053, 2016 Miss. App. LEXIS 525 (Miss. Ct. App. 2016).

Trial court properly determined that failure to identify the successors or representatives of a decedent's estate did not toll the ninety-day time period for substitution because no identification of the successors or representatives was required. Clark v. Knesal, 113 So. 3d 531, 2013 Miss. LEXIS 291 (Miss. 2013).

Insured's claims against her insurer for uninsured motorist benefits was properly dismissed because she failed to serve the insurer within the 120-day time limit of Miss. R. Civ. P. 4(h); although she filed a motion for enlargement of time, she never obtained a ruling on that motion, and she failed to show good cause for the delay. Edwards v. State Farm Mut. Ins. Co., 117 So. 3d 639, 2013 Miss. App. LEXIS 389 (Miss. Ct. App. 2013).

Responses to requests for admissions were filed by the proper deadline because the requests were served by mail and, pursuant to Miss. R. Civ. P. 6(e), the end of the thirty-day period to respond fell on a Sunday, which, pursuant to Miss. R. Civ. P. 6(a), extended the period to respond to the following day, Monday. Bell v. Miss. Dep't of Human Servs., 126 So. 3d 999, 2013 Miss. App. LEXIS 826 (Miss. Ct. App. 2013).

In a divorce case, a former husband's appeal was time-barred because it was not perfected within 10 days of a final judgment entered in January 2007; the husband's post-trial motions were untimely under Miss. R. Civ. P. 52 and Miss. R. Civ. P. 59, and a chancellor did not have the authority to extend the time for such. The January 2007 judgment was final because it attended to all of the issues before the chancellor, including the support of two minor children, the equitable distribution of marital assets and liabilities, whether to award a former wife alimony, and whether to award the former wife attorney's fees. Anderson v. Anderson, 8 So. 3d 264, 2009 Miss. App. LEXIS 195 (Miss. Ct. App. 2009).

In a divorce case, a former husband's request for findings of fact was time-barred because it was filed more than 10 days after entry of a final judgment, pursuant to Miss. R. Civ. P. 52(b); the fact that a chancellor granted the request did not make the motion timely since the chancellor lacked authority to extend the time limitation. The chancellor's decision to grant the request and make additional findings was only harmless error. Anderson v. Anderson, 8 So. 3d 264, 2009 Miss. App. LEXIS 195 (Miss. Ct. App. 2009).

Once a party has received a first extension of time under Miss. R. Civ. P. 4(h) in which to serve process, a second or subsequent extension of time to effectuate service of process may be granted by a trial court only upon a showing of good cause; in other words, once the initial 120-day period after filing the complaint has elapsed, good cause is required to avoid dismissal. While Miss. R. Civ. P. 6(b)(1) provides for an enlargement of time for cause shown, when reading the two Rules together, it is apparent that Miss. R. Civ. P. 4(h) requires good cause after the expiration of 120 days. Johnson v. Thomas, 982 So. 2d 405, 2008 Miss. LEXIS 257 (Miss. 2008), overruled in part, Fulgham v. Jackson, 234 So. 3d 279, 2017 Miss. LEXIS 257 (Miss. 2017).

It was arbitrary and capricious for a trial court to void an order granting plaintiff's motion under Miss. R. Civ. P. 6(b)(1) to extend the time to serve process after the court learned of defendant's previous motion to dismiss where the court said that the motion to extend had been granted without having "all the information" before the court, but there was nothing in the motion to dismiss that would have provided the court with any additional information, other than the fact that the motion existed. Johnson v. Thomas, 982 So. 2d 423, 2007 Miss. App. LEXIS 546 (Miss. Ct. App. 2007), rev'd, 982 So. 2d 405, 2008 Miss. LEXIS 257 (Miss. 2008).

In a son's negligence action against his father, the son failed to show good cause for why process was not served on the father until nine months after the expiration of the 120-day period in Miss. R. Civ. P. 4(h) where: (1) the events pertaining to the father's attempts to evade service of process arose after the 120-day period for serving process; (2) the son only attempted to serve process one time during the 120-day period; and (3) the son failed to show that he exercised due diligence by moving for additional time to effect service prior to the expiration of the 120-day period. Whitten v. Whitten, 956 So. 2d 1093, 2007 Miss. App. LEXIS 356 (Miss. Ct. App. 2007).

Motion for extension of time filed after expiration of initial time under Miss. R. Civ. P. 6(b)(2) was properly denied, even though the trial court did not at first address good cause, as required by Miss. R. Civ. P. 4(h); the trial court cured its own error by finding good cause had not been shown and the statute of limitations had expired. Heard v. Remy, 937 So. 2d 939, 2006 Miss. LEXIS 367 (Miss. 2006).

Trial court did not abuse its discretion in denying a motorist's motion to dismiss another driver's complaint in a personal injury matter arising out of a four-car accident, because the other driver had made diligent attempts to complete service of process on the motorist, and she demonstrated good cause why extensions of time to complete service should be granted. Bennett v. McCaffrey, 937 So. 2d 11, 2006 Miss. LEXIS 351 (Miss. 2006).

Application under Miss. R. Civ. P. 6(b)(1) to enlarge the time for service of process was granted in the absence of bad faith or prejudice to the adverse party. The plaintiff did not act in bad faith in failing to issue and serve summons; her excuse was that she was proceeding pro se. Ignorance of the court rules did not constitute bad faith and the defendant had shown absolutely no prejudice as a result of the delay. Cross Creek Prods. v. Scafidi, 911 So. 2d 958, 2005 Miss. LEXIS 834 (Miss. 2005).

Plaintiff's filing of complaint by mail did not extend by three days the statute of limitations on actions for assault and battery and intentional infliction of emotional distress; dismissal of action on grounds of limitation was not error when the complaint was not received by the trial court clerk until after the statute of limitations had run. Slaydon v. Hansford, 830 So. 2d 686, 2002 Miss. App. LEXIS 477 (Miss. Ct. App. 2002), overruled, Blake v. Estate of Clein, 37 So. 3d 622, 2010 Miss. LEXIS 322 (Miss. 2010).

Subsection (b) of this rule does not authorize a trial court to enlarge the 30-day period provided by § 41-29-176 for the filing of a petition to contest the forfeiture of property. Craigo v. North Miss. Narcotics Unit, 762 So. 2d 349, 2000 Miss. App. LEXIS 283 (Miss. Ct. App. 2000).

Time limit for serving a M.R.C.P. Rule 59 motion for reconsideration is 10 days after judgment, and that period may not be enlarged except by request made within time period provided and such request being granted by the court. Wright v. White, 693 So. 2d 898, 1997 Miss. LEXIS 160 (Miss. 1997), overruled in part, E. Miss. State Hosp. v. Callens, 892 So. 2d 800, 2004 Miss. LEXIS 361 (Miss. 2004).

**Excusable neglect.**

In a medical malpractice case, although

the plaintiff failed to obtain personal service on the doctor within the 120-day time limit of Miss. R. Civ. P. 4, her attorney showed good cause because his process server believed that he had served the doctor due to the misconduct of the doctor's father in misidentifying himself as defendant doctor. Alternatively, the plaintiff showed excusable neglect under Miss. R. Civ. P. 6. Collins v. Westbrook, 184 So. 3d 922, 2016 Miss. LEXIS 66 (Miss. 2016).

Trial court properly entered a judgment of dismissal in favor of a doctor in the plaintiffs' medical malpractice action because they did not show good cause or excusable neglect where the doctor stated that he had never been served with process, the doctor's father (who was a dentist) stated that he was served with process, the plaintiffs did not seek an extension of time, and the process server should have been alerted to the possibility he was communicating with a different "doctor." Collins v. Westbrook, 188 So. 3d 1206, 2014 Miss. App. LEXIS 693 (Miss. Ct. App. 2014), rev'd, 184 So. 3d 922, 2016 Miss. LEXIS 66 (Miss. 2016).

Trial court did not abuse its discretion in filing to find a homeowner's delay in responding to a suggestion of death resulted from excusable neglect because the homeonwer was able to plead his case for excusable neglect fully at the hearing on the motion for substitution and dismissal; a motion for substitution may be granted after the ninety-day period only upon a showing of excusable neglect. Clark v. Knesal, 113 So. 3d 531, 2013 Miss. LEXIS 291 (Miss. 2013).

Where affidavits opposing a summary judgment motion were untimely, a trial court did not abuse its discretion by failing to grant a continuance because the proponents had almost two years after their complaint was filed to obtain expert testimony, and their failure to do so was inexcusable neglect. Maxwell v. Baptist Mem. Hospital-Desoto, Inc., 15 So. 3d 427, 2008 Miss. App. LEXIS 331 (Miss. Ct. App. 2008).

Trial court did not abuse its discretion in denying a written motion for continuance of a hearing on a wife's petition to increase alimony and a proceeding to hear the petition on the wife's evidence alone where the husband's attorney had not filed the motion until three days before the trial date even though the attorney had been aware of a schedule conflict for two months, neither the attorney nor the husband appeared in the trial court on the date of the hearing, the conflicting trial had been continued by opposing counsel and the husband's attorney merely returned to his office without contacting the trial court. Profilet v. Profilet (In re Profilet), 826 So. 2d 91, 2002 Miss. LEXIS 281 (Miss. 2002).

Attorney's failure to monitor the status of the claimant's personal injury lawsuit against a casino was not good cause for the attorney's failure to effect service within 120 days; dismissal with prejudice was appropriate because the statute of limitations had run. In re Holtzman, 823 So. 2d 1180, 2002 Miss. LEXIS 253 (Miss. 2002).

Chancery court did not err in failing to grant a continuance requested by a former husband of a hearing on the former wife's petition to increase alimony; the motion for a continuance was filed three working days prior to the hearing date, and the husband failed to show excusable neglect. In re Profilet, 2001 Miss. App. LEXIS 270 (Miss. Ct. App. July 17, 2001), aff'd in part, vacated, 826 So. 2d 91, 2002 Miss. LEXIS 281 (Miss. 2002).

A motion for additional time to serve the defendant which cited "inadvertence and excusable neglect" as the basis for the failure to timely serve the defendant was sufficient to cover good cause under the notice pleading standard. Crumpton v. Hegwood, 740 So. 2d 292, 1999 Miss. LEXIS 251 (Miss. 1999).

**Good cause.**

Rules of civil procedure, including the rule about good cause, seek to ensure timely and diligent litigation, both before and after service of process, and we should not punish litigants who take steps to do just that. Holland v. Miss. Dep't of Rehab. Servs., 287 So. 3d 289, 2019 Miss. App. LEXIS 340 (Miss. Ct. App. 2019).

Circuit court abused its discretion by failing to allow a driver an extension of time for service of process and erred by dismissing her claims because she demonstrated a sufficient showing of good cause for her failure to serve Mississippi Department of Rehabilitation Services (MDRS); when the driver served MDRS through the Attorney General's Office and filed her motion for extension she did so months before her statute of limitations under the Mississippi Tort Claims Act expired. Holland v. Miss. Dep't of Rehab. Servs., 287 So. 3d 289, 2019 Miss. App. LEXIS 340 (Miss. Ct. App. 2019).

Appellee was not required to show good cause once she had failed to obtain an order within the original 120-day period. Graceland Care Ctr. of New Albany, LLC v. Hamlet, 2017 Miss. LEXIS 327 (Miss. Aug. 17, 2017), op. withdrawn, sub. op., 236 So. 3d 1, 2017 Miss. LEXIS 430 (Miss. 2017).

**Motions.**

Orders are effective upon filing, and such a rule will secure the just, speedy, and inexpensive determination of every action; a party should be responsible for timely filing a motion, ensuring that the judge rules on the motion, and making certain that the resulting order is timely filed with the clerk. Graceland Care Ctr. of New Albany, LLC v. Hamlet ex rel. Kinard, 236 So. 3d 1, 2017 Miss. LEXIS 430 (Miss. 2017).

Trial court erred in sua sponte entering a default judgment against a city under Miss. R. Civ. P. 55 in a suit brought under the Mississippi Tort Claims Act, specifically Miss. Code Ann. § 11-46-9(1)(c); although the city did not timely answer plaintiff's amended complaint pursuant to Miss. R. Civ. P. 15(a), the parties continued to engage in discovery for over four years and plaintiff had no intention of seeking of a default judgment. City of Jackson v. Presley, 942 So. 2d 777, 2006 Miss. LEXIS 649 (Miss. 2006).

The trial court committed no error in denying a motion for a continuance where the motion was not made until only three working days prior to trial, the movant showed no execusable neglect, and he had almost two months notice of the trial setting. Profilet v. Profilet (In re Marriage of Profilet), 2001 Miss. App. LEXIS 48 (Miss. Ct. App. Feb. 6, 2001).

The movant failed to comply with the notice provisions as supplied by subsection (d) of this rule where the notice of motion and the motion to dismiss were served by mail on August 15, filed August 17, and delivered unannounced to the opposing party's attorney's office at 5:00 p.m. on August 17, when the hearing was scheduled for 9:00 a.m. on August 19. L.W. v. C.W.B., 762 So. 2d 323, 2000 Miss. LEXIS 168 (Miss. 2000).

Trial court erred in granting plaintiff's motion for voluntary dismissal, and dismissing her complaint without prejudice, without giving defendant reasonable advance notice and an opportunity to be heard on the motion. Bolls v. Harris, 528 So. 2d 1128, 1988 Miss. LEXIS 342 (Miss. 1988).

**Order, when effective.**

In considering when an order becomes effective and grants the enlargement of time, in cases involving ex parte motions, the order becomes effective upon leaving the judge's control, but in cases where more than one party is involved and notice becomes essential, an order becomes effective once it is officially entered into the record by the court clerk; temporary restraining orders and other emergency orders are effective before filing with a clerk, and certain rulings requiring immediate action, such as those under a judge's contempt powers, would not be subject to the general rule. Graceland Care Ctr. of New Albany, LLC v. Hamlet, 2017 Miss. LEXIS 327 (Miss. Aug. 17, 2017), op. withdrawn, sub. op., 236 So. 3d 1, 2017 Miss. LEXIS 430 (Miss. 2017).

**Notice.**

Appellee timely obtained an extension to serve process and timely served process within that extension, such that the statute of limitations remained tolled; because appellee was the only party to the action at that time, the trial judge's order granting her motion for extension of time to serve process became effective once the order had been signed and had left the trial judge's control. Graceland Care Ctr. of New Albany, LLC v. Hamlet, 2017 Miss. LEXIS 327 (Miss. Aug. 17, 2017), op. withdrawn, sub. op., 236 So. 3d 1, 2017 Miss. LEXIS 430 (Miss. 2017).

Plaintiff's failure to serve defendant's attorney with a copy of a motion to extend the time to serve process under Miss. R. Civ. P. 6(b)(1) was not a dereliction sufficient to justify setting aside the extension because such a motion could be heard ex parte under Miss. R. Civ. P. 5(a). Johnson v. Thomas, 982 So. 2d 423, 2007 Miss. App. LEXIS 546 (Miss. Ct. App. 2007), rev'd, 982 So. 2d 405, 2008 Miss. LEXIS 257 (Miss. 2008).

Siblings did not submit their objections to the special commissioners' report in the form of a motion and did not notice a hearing, they simply objected to the special commissioners' recommendations and suggested alternative partition methods commensurate with their position; their document failed to include a written notice of a hearing and did not even include are quest for hearing; nothing in their document placed the chancellor on notice that the siblings desired a hearing on their objections. Miles v. Miles, 949 So. 2d 774, 2006 Miss. App. LEXIS 507 (Miss. Ct. App. 2006), cert. denied, 949 So. 2d 37, 2007 Miss. LEXIS 155 (Miss. 2007).

Failure of plaintiff to serve motorist did not constitute receipt by the insurance company of "other paper" and did not trigger the 30-day removal period, but service of discovery requests was "other paper" from which the insurance company first learned that the case was removable; therefore, the insurance company timely filed the Notice of Removal, since it was within 30 days from when they could first ascertain the case was removable, and it was within one year from the filing of the complaint. Jones v. Hartford Fire Ins. Co., 347 F. Supp. 2d 328, 2004 U.S. Dist. LEXIS 24627 (S.D. Miss. 2004).

Plaintiff waived any objection he might have had to not being given timely notice of the hearing when he did not raise any objections during the proceedings or request a continuance when the chancellor announced that he would consider the motion for contempt and rule upon it. Yancey v. Yancey, 752 So. 2d 1006, 1999 Miss. LEXIS 388 (Miss. 1999).

**Service by mail.**

Respondent attorney's motion for additional time to plead, filed twenty-three days after formal disciplinary complaint was filed and mailed to her, was filed on the last day permitted. Terrell v. The Mississippi Bar, 635 So. 2d 1377, 1994 Miss. LEXIS 203 (Miss. 1994).

## CHAPTER III. PLEADINGS AND MOTIONS

### Rule 7. Pleadings allowed; form of motions.

(a) *Pleadings.* — There shall be a complaint and an answer; a reply to a counter-claim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who is not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

(b) *Motions and other papers.* —

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing, or other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(c) *Size of paper.* — All pleadings, motions and other papers, including depositions, shall be made on 8 ½″ by 11″ paper. The format for all depositions shall comply with the Guidelines for Court Reporters as provided in Mississippi Supreme Court Rule 11.

(d) *Demurrers, pleas, etc., abolished.* — Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

**HISTORY: Comments repealed effective July 1, 2014.**

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective November 19, 1992, Rule 7(c) was redesignated Rule 7(d), and a new Rule 7(c), requiring letter size paper for all pleadings, motions and other papers was adopted. 606-607 So. 2d XIX-XX (West Miss. Cas. 1993).

## JUDICIAL DECISIONS

### ANALYSIS

Construction.
Construction with other rules.
Document not pleading or motion.
Failure to plead.

**Construction.**

When a husband filed his counterclaim 36 days after the final judgment in his divorce was entered, without a motion asking the court to allow him to amend the pleadings or to allow the untimely counterclaim, the counterclaim was not properly before the court under Miss. R. Civ. P. 7(b)(1) and Miss. R. Civ. P. 13(e) and (f). McNeese v. McNeese, 119 So. 3d 264, 2013 Miss. LEXIS 172 (Miss. 2013).

As a mother's notices of hearing indicated that she sought a determination of child support arrears owed by the father, they specifically advised him of the relief sought and thus were sufficient under Miss. R. Civ. P. 7(b)(1). Reasor v. Jordan, 110 So. 3d 307, 2013 Miss. LEXIS 144 (Miss. 2013).

Where defendant in an automobile negligence case failed to file an answer to plaintiff's complaint but filed a counterclaim, the trial court did not err in granting plaintiff's motion to dismiss because the submission of a counterclaim without filing a responsive pleading was procedurally improper. A counterclaim was a claim asserted against a party in a responsive pleading pursuant to Miss. R. Civ. P. 7(a); because defendant failed to file an answer to plaintiff's complaint, his counterclaim was not properly before the trial court. Keyes v. Berry, 995 So. 2d 861, 2008 Miss. App. LEXIS 699 (Miss. Ct. App. 2008).

Siblings did not submit their objections to the special commissioners' report in the form of a motion and did not notice a hearing, they simply objected to the special commissioners' recommendations and suggested alternative partition methods commensurate with their position; their document failed to include a written notice of a hearing and did not even include are quest for hearing; nothing in their document placed the chancellor on notice that the siblings desired a hearing on their objections. Miles v. Miles, 949 So. 2d 774, 2006 Miss. App. LEXIS 507 (Miss. Ct. App. 2006), cert. denied, 949 So. 2d 37, 2007 Miss. LEXIS 155 (Miss. 2007).

Trial court correctly granted a convenience store's motion to reconsider the dismissal of an amended wrongful death action against the store because the motion to reconsider was an application to the court for an order pursuant to Miss. R. Civ. P. 7(b)(1). Anderson v. R & D Foods, Inc., 913 So. 2d 394, 2005 Miss. App. LEXIS 294 (Miss. Ct. App. 2005).

The rule does not provide for a responsive pleading after the assertion of an affirmative defense. Smith v. Franklin Custodian Funds, Inc., 726 So. 2d 144, 1998 Miss. LEXIS 526 (Miss. 1998).

Defendants' timely filed motion to stay the requirement that they respond to plaintiffs' request for admissions was equivalent to a motion for an extension of time within which to respond, and the motion operated to prevent matters set forth in request from being deemed admitted. Schmidt v. City of Jackson, 494 So. 2d 348 (Miss. 1986).

Counter-claim denominated a "cross-petition" was sufficiently denominated a counter-claim that a reply was required under this rule. Shannon v. Henson, 499 So. 2d 758, 1986 Miss. LEXIS 2883 (Miss. 1986).

**Construction with other rules.**

"Application in writing" for purposes of avoiding dismissal under Miss. R. Civ. P. 41(d) was required to be in the form of a motion to the court under Miss. R. Civ. P. 7. Ill. Cent. R.R. Co. v. Moore, 994 So. 2d 723, 2008 Miss. LEXIS 422 (Miss. 2008).

**Document not pleading or motion.**

Fee bill was clearly not a pleading or motion because it was essentially an exhibit in support of the motion for contempt and sanctions. Smith v. Hickman, Goza & Spragins, PLLC, 265 So. 3d 139, 2019 Miss. LEXIS 22 (Miss. 2019).

**Failure to plead.**

Chancery court did not manifestly err in findings that its court administrator had not authorized a continuance of the motion hearing and trial and that the parties' agreed order setting a trial date had the effect of lifting the stay because a taxpayer should have filed formal motions requesting continuances rather than simply relying on oral representations of court staff. SW 98/99, LLC v. Pike Cty., 242 So. 3d 847, 2018 Miss. LEXIS 218 (Miss. 2018).

Chancery court properly entered final judgment in favor of appellee because appellant never pleaded a claim for damages; appellant's motion to reconsider was not sufficient as a pleading since it did not assert a demand for judgment, and at the time of filling, appellant did not intend for its motion to reconsider to be treated as a pleading for damages. RSL Funding, LLC v. Saucier (In re Transfer of Structured Settlement Payment Rights by Benny Ray Saucier), 207 So. 3d 689, 2016 Miss. App. LEXIS 801 (Miss. Ct. App. 2016).

## Rule 8. General rules of pleading.

(a) *Claims for relief.* — A pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim, shall contain

(1) a short and plain statement of the claim showing that the pleader is entitled to relief, and,

(2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) *Defenses: form of denials.* — A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials or designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all of its averments, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) *Affirmative defenses.* — In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counter-claim or a counter-claim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been proper designation.

(d) *Effect of failure to deny.* — Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) *Pleading to be concise and direct: consistency.* —

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has, regardless of consistency. All statements shall be made subject to the obligations set forth in Rule 11.

(f) *Construction of pleadings.* — All pleadings shall be so construed as to do substantial justice.

(g) *Pleadings shall not be read or submitted.* — Pleadings shall not be carried by the jury into the jury room when they retire to consider their verdict, except insofar as a pleading or portion thereof has been admitted in evidence.

(h) *Disclosure of minority or legal disability.* — Every pleading or motion made by or on behalf of a person under legal disability shall set forth such fact unless the fact of legal disability has been disclosed in a prior pleading or motion in the same action or proceeding.

**HISTORY: Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

## ADVISORY COMMITTEE NOTE

Rule 8 allows claims and defenses to be stated in general terms so that the rights of the client are not lost by poor drafting skills of counsel. Under Rule 8(a), "it is only necessary that the pleadings provide sufficient notice to the defendant of the claims and grounds upon which relief is sought." See *DynaSteel Corp. v. Aztec Industries, Inc.*, 611 So. 2d 977 (Miss. 1992). A plaintiff must set forth direct or inferential fact allegations concerning all elements of a claim. See *Penn. Nat'l Gaming, Inc. v. Ratliff,* 954 So. 2d 427, 432 (Miss. 2005). Motions or pleadings seeking modification of child custody must include an allegation that a material change has occurred which adversely affects the child or children. It is not sufficient to allege that an adverse change will occur if the modification is not granted. See, e.g., *McMurry v. Sadler,* 846 So. 2d. 240, 244 (Miss. Ct. App. 2002). In cases involving the joinder of multiple plaintiffs, the complaint must contain the allegations identifying by name the defendant or defendants against whom each plaintiff asserts a claim, the alleged harm caused by specific defendants as to each plaintiff, and the location at which and time period during which the harm was caused. See *3M Co. v. Glass,* 917 So. 2d 90, 92 (Miss. 2005); Harold's Auto Parts, Inc. v. Mangialardi, 889 So. 2d

493, 495 (Miss. 2004). Failure to provide this "core information" is a violation of Rules 8 and 11. Plaintiffs in such cases must also plead sufficient facts to support joinder. Glass, 917 So. 2d at 93; Mangialardi, 889 So. 2d at 495.

Rule 8(c)'s requirement that defendants plead affirmative defenses when answering is intended to give fair notice of such defenses to plaintiffs so that they may respond to such defenses. Just as Rule 8(a) requires only that the plaintiff give the defendant notice of the claims, Rule 8(c) requires only that the defendant give the plaintiff notice of the defense. "A defendant's failure to timely and reasonably raise and pursue the enforcement of any affirmative defense or other affirmative matter or right which would serve to terminate or stay the litigation, coupled with active participation in the litigation process, will ordinarily serve as a waiver." *Kimball Glassco Residential Ctr., Inc. v. Shanks,* 64 So. 3d 941, 945 (Miss. 2011) (citing *MS Credit Ctr., Inc. v. Horton,* 926 So. 2d 167, 180 (Miss. 2006)).

The list of affirmative defenses in Rule 8(c) is not intended to be exhaustive. A defense is an affirmative defense if the defendant bears the burden of proof. See *Natchez Elec. & Supply Co., Inc. v. Johnson,* 968 So. 2d 358, 361 (Miss. 2007). "A matter is an 'avoidance or affirmative defense' only if it assumes the plaintiff proves everything he alleges and asserts, even so, the defendant wins. Conversely, if, in order to succeed in the litigation, the defendant depends upon the plaintiff failing to prove all or part of his claim, the matter is not an avoidance or an affirmative defense. A defendant does not plead affirmatively when he merely denies what the plaintiff has alleged." *Hertz Commercial Leasing Div. v. Morrison,* 567 So. 2d 832, 835 (Miss. 1990).

Examples of some affirmative defenses or matters of avoidance that are not enumerated in Rule 8(c) but which have been recognized by the Supreme Court include: the failure of a foreign limited liability corporation transacting business in the state to register to do business as a prerequisite to maintaining an action in state court as required by Mississippi Code Annotated section 79-29-1007(1) (Supp. 2011) (*see Loggers, L.L.C. v. 1 Up Technologies, L.L.C.,* 50 So. 3d 992, 993 (Miss. 2011)); immunity under the Mississippi State Tort Claims Act (*see Price v. Clark,* 21 So. 3d 509, 524 (Miss. 2009)); failure to comply with the requirement of a certificate of expert consultation in medical malpractice cases as required by Mississippi Code Annotated section 11-1-58 (Supp. 2011) (*see Meadows v. Blake,* 36 So. 3d 1225, 1232-33 (Miss. 2010)); plaintiff's non-compliance with the 90-day notice requirement contained in Mississippi Code Annotated section 11-46-11(1) (Supp. 2011) (*see Stuart v. University of Miss. Med. Ctr.,* 21 So. 3d 544, 549-50 (Miss. 2009)); the assertion of the right to arbitrate (*see Ms. Credit Ctr., Inc. v Horton,* 926 So. 2d 167, 179 (Miss. 2006)); apportionment of fault pursuant to Mississippi Code Annotated section 85-5-7 (Supp. 2011) (*see Eckmann v. Moore,* 876 So. 2d 975, 989 (Miss. 2004)); argument that a contractual acceleration clause is an unenforceable penalty (*see Hertz Comm'l Leasing Div. v. Morrison,* 567 So. 2d 832, 834 (Miss. 1990)); the failure of a foreign corporation transacting business in this state to obtain a certificate of authority as prerequisite to maintaining an action in this state as required by Mississippi Code Annotated section 79-4-15.02 (Supp. 2011) (see *Bailey v. Georgia Cotton Goods Co.,* 543 So. 2d 180, 182-83 (Miss. 1989)); election of remedies (*see O'Briant v. Hull,* 208 So. 2d 784, 785 (Miss. 1968)); adverse possession as a defense to neighboring landowner's actions (*see Charlot v. Henry,* 45 So. 3d 1237, 1243-44 (Miss. Ct. App. 2010)); the defense of condonation in a divorce case (*see Ashburn v. Ashburn,* 970 So. 2d 204, 212-13 (Miss. Ct. App. 2007)).

A party may be denied leave to amend its answer to include an affirmative defense if that affirmative defense has been waived. *See Hutzel v. City of Jackson,* 33 So. 3d 1116, 1122 (Miss. 2010).

## JUDICIAL DECISIONS

### ANALYSIS

In general.
Construction.
Applicability.
Affirmative defenses.
Alternative pleadings.
Claims for relief.
Notice pleading.
Sufficiency of pleadings.

**In general.**

When a circuit court accepted a judgment debtor's letter of credit in lieu of a supersedeas bond, the circuit court retained jurisdiction to do so; however, the circuit court correctly determined that it lacked jurisdiction to cancel the judgment and to remove the judgment from the county's rolls. Fitch v. Valentine, 946 So. 2d 780, 2007 Miss. LEXIS 10 (Miss. 2007).

In her negligence action against a homeowner, decided in the homeowner's favor on summary judgment, on appeal, the worker asserted that Miss. R. Civ. P. 8(c) clearly set forth that the defense of statute of limitations was an affirmative defense which had to be set forth in responsive pleadings and that Miss. R. Civ. P. 12(b) required every defense to be asserted in responsive pleadings, except the seven which could be made by motion, and that the statute of limitations defense was not included therein; however, the defense of statute of limitations was proper for summary judgment where there existed no genuine issues of material fact on the issue. Robertson v. Moody, 918 So. 2d 787, 2005 Miss. App. LEXIS 327 (Miss. Ct. App. 2005).

In a suit to confirm title to real property, the plaintiff was required to state with reasonable certainty the nature of a named defendant's claim to the property, and the trial court's entry of judgment on the pleadings, given a lack of such statement, was plain error. Derby v. 20/20 Invs., L.L.C., 807 So. 2d 500, 2002 Miss. App. LEXIS 81 (Miss. Ct. App. 2002).

While this rule abolishes many technical requirements of pleadings, it does not eliminate necessity of stating circumstances, occurrences, and events which support the proffered claim. PACCAR Financial Corp. v. Howard, 615 So. 2d 583, 1993 Miss. LEXIS 85 (Miss. 1993).

While it is unnecessary for a party to state facts in detail, it is necessary to state at least enough facts to put the opposing side on fair notice of the basis of one's claim. Hester v. Bandy, 627 So. 2d 833, 1993 Miss. LEXIS 534 (Miss. 1993).

**Construction.**

Miss. R. Civ. P. 8 does require that a party assert a demand for prejudgment interest in the appropriate pleading; on the other hand, Rule 8 does not require that a party seeking prejudgment interest must plead the specific date on which the prejudgment interest allegedly is due. Upchurch Plumbing, Inc. v. Greenwood Utils. Comm'n, 964 So. 2d 1100, 2007 Miss. LEXIS 495 (Miss. 2007).

Neither attorney's letter to member of bar complaint tribunal nor her discovery requests constituted an "answer" or a sufficiently responsive pleading to a disciplinary complaint of the Mississippi Bar, and therefore tribunal did not err in entering default against attorney. Harrison v. The Mississippi Bar, 637 So. 2d 204, 1994 Miss. LEXIS 266 (Miss. 1994).

When a complaint is tested via motion under M.R.C.P. Rule 12(b)(6) for failure to state a claim upon which relief may be granted, sufficiency of complaint is in substantial part determined by reference to subdivisions (a) and (e) of Rule 8. Luckett v. Mississippi Wood, Inc., 481 So. 2d 288, 1985 Miss. LEXIS 2425 (Miss. 1985).

**Applicability.**

Complaint, otherwise properly filed, may not be dismissed, and need not be amended, simply because the plaintiff failed to attach a certificate or waiver; the certificate did not indicate whether the daughter's attorney consulted with the expert prior to, or after, filing the complaint; if the former, then the daughter was in compliance with the enforceable portion of § 11-1-58, and if the latter, then the pretrial statutory requirement was not met, and the trial court had to dismiss the complaint with prejudice. Wimley v.

Reid, 991 So. 2d 135, 2008 Miss. LEXIS 456 (Miss. 2008).

Mississippi Rules of Civil Procedure are only applicable in divorce actions when governing statute is silent; however, where issue is sufficiency of pleadings to support a specific award, general rules of pleading govern, as there is no inconsistent statutory provision. Crowe v. Crowe, 641 So. 2d 1100, 1994 Miss. LEXIS 378 (Miss. 1994).

**Affirmative defenses.**

Because appellant failed to assert an affirmative defense of in pari delicto in the appellant's answer and actively participated in litigation without asserting the defense within a reasonable time, the defense was waived. Latham v. Johnson, 262 So. 3d 569, 2018 Miss. App. LEXIS 314 (Miss. Ct. App. 2018), cert. denied, 260 So. 3d 798, 2019 Miss. LEXIS 48 (Miss. 2019).

In a case alleging a breach of employment contract, it was in the interest of judicial economy and bringing finality to a lengthy dispute to find that a circuit court properly relied on the affirmative defense of impossibility, even though an employee failed to raise it as an affirmative defense. Baptist Mem. Hosp.-N. Miss., Inc. v. Lambert, 157 So. 3d 109, 2015 Miss. App. LEXIS 32 (Miss. Ct. App. 2015).

Mortgagors' affirmative defense of election of remedies was waived under Miss. R. Civ. P. 8(c) because the first reference to the doctrine of election of remedies was within a supplemental memorandum in support of the mortgagors' motion for reconsideration and to vacate a judgment in favor of the mortgagee. Knight Props. v. State Bank & Trust Co., 77 So. 3d 491, 2011 Miss. App. LEXIS 98 (Miss. Ct. App. 2011).

In a breach of contract action brought by the employee, the employer did not assert any affirmative defenses in his answer to the employee's complaint, Miss. R. Civ. P. 8(c); rather, the employer waited and asserted them in his motion for summary judgment, which was over four years later. When a responsive pleading was required, all affirmative defenses must be raised in that pleading; therefore, the chancellor erred in relying on those affirmative defenses in reaching his judgment. Harris v. Tom Griffith Water Well & Conductor Serv., 26 So. 3d 352, 2009 Miss. App. LEXIS 39 (Miss. Ct. App. 2009), rev'd, 26 So. 3d 338, 2010 Miss. LEXIS 46 (Miss. 2010).

Despite the fact that a county failed to set forth the affirmative defense of contributory negligence in the pleadings as required under Miss. R. Civ. P. 8(c), neither a car driver nor a passenger mother voiced an objection at either request by the county to apply comparative negligence during the trial and thus, the defense could be treated as if it had been raised in the pleadings under Miss. R. Civ. P. 15(b). Callahan v. Ledbetter, 992 So. 2d 1220, 2008 Miss. App. LEXIS 547 (Miss. Ct. App. 2008).

College did not waive its right to arbitrate students' causes of action centered around the prospect of "educational malpractice" because, while it was true that the college took part in the pretrial litigation process, it consistently advanced its arbitration rights. In its answer, the college asserted arbitration as an affirmative defense, and the college filed its motion to compel arbitration at the same time it filed its answer. Va. College, LLC v. Moore, 974 So. 2d 269, 2008 Miss. App. LEXIS 88 (Miss. Ct. App. 2008).

By including the motion to compel arbitration in its answer, a termite compnay complied with Miss. R. Civ. P. 8(c) and sufficiently preserved for appeal the issue of whether the matter between the compnay and clients should be arbitrated. Terminix Int'l, Inc., Ltd. P'ship v. Rice, 904 So. 2d 1051, 2004 Miss. LEXIS 1459 (Miss. 2004).

Where a termite inspector did not file a motion to compel arbitration until seven months after answering the complaint, and did not raise it as a defense in its answer, the appellate court held that the inspector had waived its right to demand arbitration. Pass Termite & Pest Control, Inc. v. Walker, 904 So. 2d 1030, 2004 Miss. LEXIS 1453 (Miss. 2004).

In the mother's child custody modification action, while personal jurisdiction was an affirmative defense, which was waived if not affirmatively pled, the Uniform Child Custody Jurisdiction Act (UCCJA), specifically Miss. Code Ann.

§ 93-23-5(1), required personal jurisdiction of the minor child and the contestant. The father, who had custody and resided with the child in California, properly raised the issue of lack of jurisdiction over the child in his amended complaint, and the chancellor's finding that she lacked jurisdiction over the child rendered the issue of jurisdiction over the father moot. Scaife v. Scaife, 880 So. 2d 1089, 2004 Miss. App. LEXIS 851 (Miss. Ct. App. 2004).

Court did not err in dismissing an employee's action against an employer for wrongful termination because the employee had agreed to release the employer from all civil liability; it did not matter that the affirmative defense of release was not raised in the employer's answer. Miss. R. Civ. P. 8(c) was not a bar to the trial judge's consideration of the release. Rankin v. Clements Cadillac, Inc., 905 So. 2d 710, 2004 Miss. App. LEXIS 771 (Miss. Ct. App. 2004), rev'd, 903 So. 2d 749, 2005 Miss. LEXIS 317 (Miss. 2005).

Appellant tax sale purchaser raised the statute of limitations in his appeal of the lower court's decision that the tax sale of the landowners' property was void due to the lack of notice provided; however, this issue was not raised as an affirmative defense, and was not properly before the appellate court. Alexander v. Womack, 857 So. 2d 59, 2003 Miss. LEXIS 528 (Miss. 2003).

Laches was in the nature of an affirmative defense that had to be affirmatively pled under the provisions of Miss. R. Civ. P. 8(c), and the appellate court declined to address the issue when it was raised for the first time on appeal. Aron v. Reid, 850 So. 2d 108, 2002 Miss. App. LEXIS 268 (Miss. Ct. App. 2002).

The alleged voidness of a judgment is an avoidance or affirmative defense which must be pled under subsection (c) or it is waived. Bank of Mississippi v. Knight (In re Knight), 208 F.3d 514, 2000 U.S. App. LEXIS 6724 (5th Cir. Miss. 2000).

Appellants failed to affirmatively plead defense of laches and also failed to raise the defense at any time during hearings, and therefore they were procedurally barred from raising defense of laches for the first time on appeal. Goode v. Village of Woodgreen Homeowners Ass'n, 662 So. 2d 1064, 1995 Miss. LEXIS 533 (Miss. 1995).

If a party fails to raise the Statute of Frauds as a defense in his answer to a complaint, he will be deemed to have waived the defense. Canizaro v. Mobile Communications Corp. of Am., 655 So. 2d 25, 1995 Miss. LEXIS 138 (Miss. 1995).

Defendant's answer to complaint was sufficient, as defendant was not required to plead timeliness of plaintiff's demand under recourse agreement as an affirmative defense, and therefore timeliness issue was not waived. Associates Commercial Corp. v. Parker Used Trucks, Inc., 601 So. 2d 398, 1992 Miss. LEXIS 314 (Miss. 1992).

The maker of a note who claims it is unenforceable as against public policy must say so affirmatively by way of defense. Martin v. Estate of Martin, 599 So. 2d 966, 1992 Miss. LEXIS 191 (Miss. 1992).

Lessee was required to affirmatively plead that acceleration clause in lease was a penalty, and thus substantially unenforceable, in order to employ that theory and avoid obligations otherwise provided under literal language of lease. Hertz Commercial Leasing Div. v. Morrison, 567 So. 2d 832, 1990 Miss. LEXIS 453 (Miss. 1990).

Allegation that corporate plaintiff had not qualified to do business in Mississippi and thus had no right to sue in Mississippi was an affirmative defense; trial court's default judgment, and its denial of defendant's motion to vacate, stood as a final judgment that defendant's affirmative defense was not timely pleaded. Bailey v. Georgia Cotton Goods Co., 543 So. 2d 180, 1989 Miss. LEXIS 244 (Miss. 1989).

Defendants' plea under exclusive remedy provision of workers' compensation act was an affirmative defense and, as such, defendants bore the burden of production and the risk of non-persuasion on that issue. McDaniel v. Ritter, 556 So. 2d 303, 1989 Miss. LEXIS 501 (Miss. 1989).

**Alternative pleadings.**

Trial judge properly concluded that the homeowners were prohibited from arguing that propane gas caused the explosion in their home based on judicial admission where they had consistently argued that natural gas caused the explosion and consistently represented that the propane gas dealers were not the target of their lawsuit. Elliott v. AmeriGas Propane, L.P., 249 So. 3d 389, 2018 Miss. LEXIS 325 (Miss. 2018).

Trial court did not err in precluding evidence that accident victim had sued and then settled with his father's liability insurer before trial, since victim was simply alleging and supporting alternative theories of recovery, as allowed by this rule. Sperry-New Holland, Div. of Sperry Corp. v. Prestage, 617 So. 2d 248, 1993 Miss. LEXIS 124 (Miss. 1993).

Although plaintiffs failed to particularly describe any easement in their pleadings, this failure was not fatal under modern rules of pleading, since plaintiffs clearly prayed alternatively for an easement by necessity. Broadhead v. Terpening, 611 So. 2d 949, 1992 Miss. LEXIS 824 (Miss. 1992).

Party may combine a suit to determine heirship with a suit to contest a will, and will contestant's allegation that she was decedent's sole heir at law was sufficient as a request for determination of heirship. Dees v. Estate of Moore, 562 So. 2d 109, 1990 Miss. LEXIS 257 (Miss. 1990).

**Claims for relief.**

Trial court erred by awarding a purchaser prejudgment interest because the purchaser failed to make a demand for prejudgment interest, and no record evidence existed to show that a seller was on notice of a claim for prejudgment interest; the purchaser did not specifically demand prejudgment interest in either his original or amended complaint, but he merely made a request for general relief. Swartzfager v. Saul, 213 So. 3d 55, 2017 Miss. LEXIS 67 (Miss. 2017).

Chancery court properly entered final judgment in favor of appellee because appellant never pleaded a claim for damages; appellant's motion to reconsider was not sufficient as a pleading since it did not assert a demand for judgment, and at the time of filling, appellant did not intend for its motion to reconsider to be treated as a pleading for damages. RSL Funding, LLC v. Saucier (In re Transfer of Structured Settlement Payment Rights by Benny Ray Saucier), 207 So. 3d 689, 2016 Miss. App. LEXIS 801 (Miss. Ct. App. 2016).

Where the allegations by a farm against the Mississippi Transportation Commission for flooding of the farm's property had sounded in negligence, the farm could not assert Miss. Const. art. 3, § 17 for the first time in its response to the Commission's summary judgment motion as a defense, because the MTC did not have sufficient notice of the taking claim for the farm's response to the summary judgment motion. B & W Farms v. Miss. Transp.Comm'n, 922 So. 2d 857, 2006 Miss. App. LEXIS 149 (Miss. Ct. App. 2006).

The chancellor did err in basing a finding of contempt in part on the defendant husband's failure to pay April, 1998 alimony and child support and in including the amount past due in the judgment against him, notwithstanding the contention that the wife did not specifically seek that relief in her amended counter-motion for contempt, which was filed on April 6, 1998, since she was not required to speculate as to the dollar amount of unpaid obligations that might accrue between the time her pleading was filed and a hearing held on the matter. Watkins v. Watkins, 748 So. 2d 808, 1999 Miss. App. LEXIS 326 (Miss. Ct. App. 1999).

Chancellor's award of lump sum alimony was not beyond scope of the pleadings, where complaint asked for permanent support and maintenance and other general relief, and husband could not reasonably have been surprised by chancellor's award of alimony in a divorce action. Crowe v. Crowe, 641 So. 2d 1100, 1994 Miss. LEXIS 378 (Miss. 1994).

In view of notice pleading requirements of M.R.C.P. Rule 8, client's complaint against his former attorney stated at least one actionable cause upon which relief could be granted, and therefore summary judgment in favor of attorney was reversed. Owen v. Pringle, 621 So. 2d 668, 1993 Miss. LEXIS 291 (Miss. 1993).

Chancellor did not err in imposing lien in wife's favor to secure lump sum alimony payment, despite absence in wife's pleadings of any request for lien. Smith v. Smith, 607 So. 2d 122, 1992 Miss. LEXIS 664 (Miss. 1992).

Circuit court had no authority to dismiss inmate's pro se complaint unless it could fairly and objectively be said that he could prove no set of facts in support of his claim which would entitle him to relief. Singleton v. Stegall, 580 So. 2d 1242, 1991 Miss. LEXIS 310 (Miss. 1991).

**Notice pleading.**

Trial court erred in dismissing a breach of contract claim in an original complaint against the prior owner of a building due to the untimely service of the current owner under Miss. R. Civ. P. 4(h) of an amended complaint as the prior owner was the real party in interest under Miss. R. Civ. P. 17(a), and the prior owner was timely served; the original complaint gave the prior owner sufficient notice of the claims and grounds upon which relief which was sought under the liberal notice pleading requirements of Miss. R. Civ. P. 8(a). Welch Roofing & Constr., Inc. v. Farina, 99 So. 3d 274, 2012 Miss. App. LEXIS 639 (Miss. Ct. App. 2012).

**Sufficiency of pleadings.**

Mother's petition to hold a father in contempt for not paying child support was sufficient because (1) the father waived a claim that the petition had to cite every instance of contempt by not raising the claim in the trial court, (2) the father did not show the trial court committed plain error by deviating from a legal rule, (3) the father had sufficient notice of the issues, with specific dates and amounts, and (4) the mother did not have to amend the petition after the petition was filed when dates and amounts changed. Herrin v. Perkins, 282 So. 3d 727, 2019 Miss. App. LEXIS 382 (Miss. Ct. App. 2019).

Trial court erred in denying an estate's motion to dismiss because a customer's suit was barred by the statute of limitations; the customer failed to perfect service before the expiration of the statute of limitations. Estate of Puckett v. Clement, 2017 Miss. LEXIS 407 (Miss. Oct. 5, 2017).

It was error to grant a driver's motion to dismiss for failure to state a claim because the city's forfeiture petition satisfied the notice pleading requirements; the petition for forfeiture put the driver on reasonable notice of the city's claims, and it sufficiently demonstrated that a recognized cause of action existed upon which the city could prevail under some set of facts. City of Meridian v. $104,960.00 United States Currency, 231 So. 3d 972, 2017 Miss. LEXIS 404 (Miss. 2017).

Equitable lien on a husband's law practice to secure the payment of future alimony did not err, despite a wife's failure to specifically seek such relief, because the wife's prayer for general relief gave the husband sufficient notice a chancellor could impose any relief the proof entitled the wife to within the court's jurisdiction. Shumake v. Shumake, 233 So. 3d 234, 2017 Miss. LEXIS 204 (Miss. 2017).

Chancery court properly dismissed, for lack of jurisdiction, an injured customer's bill of discovery regarding her personal injury and premises liability claims against a grocery store because she had an adequate opportunity for discovery in circuit court where the discovery she desired was only incidental to an action at law for which a justiciable claim already has been articulated in her complaint, avoidance of sanctions for a frivolous suit did not provide support for her bill of discovery, and she failed to make a showing that the information sought could not be obtained by other methods. Kuljis v. Winn-Dixie Montgomery, LLC, 214 So. 3d 283, 2017 Miss. LEXIS 120 (Miss. 2017).

As both discovery and accounting remained independent causes of action under Mississippi law, and because an attorney never argued the insufficiency of the former clients' allegations seeking only discovery or an accounting on any specific element of either, the trial court erred in granting the attorney's motion to dismiss the clients' complaint for failure to state a claim upon which relief could be granted. Graham v. Franks, 220 So. 3d 992, 2017 Miss. App. LEXIS 17 (Miss. Ct. App. 2017).

Dismissal of a former municipal judge's complaint was appropriate because the complaint failed to meet the pleading requirements as the did not plead with any particularity the claims which the judge asserted in that the judge never stated the specific person or persons who purportedly defamed, slandered, or intentionally inflicted emotional distress upon the judge, nor did the judge state with any specificity when, where, or how the act took place. Jones v. City of Hattiesburg, 228 So. 3d 816, 2017 Miss. App. LEXIS 14 (Miss. Ct. App.), cert. denied, 229 So. 3d 118, 2017 Miss. LEXIS 372 (Miss. 2017).

Chancellor's corporate dissolution order did not exceed the pleadings because (1) such a claim was adequately pled, (2) the chancellor did not have to grant an election to purchase shares before exercising broad equity powers under Miss. Code Ann. § 79-4-14.34(i), (3) the chancellor could grant alternate remedies, since dissolution was not ordered, and (4) fiduciary breach was adequately claimed. Scafidi v. Hille, 180 So. 3d 634, 2015 Miss. LEXIS 603 (Miss. 2015).

Trial court erred in denying a motion to set aside a default judgment filed by the owners of an off-road vehicle because, while they were not entitled to notice where they had not appeared, were served with an amended complaint while they still had time to respond to the original complaint, and the parents of a child injured while driving the vehicle complied with the civil procedure rules, the owners had colorable defenses to the claims against them and the parents would not suffer prejudice. BB Buggies, Inc. v. Leon, 150 So. 3d 90, 2014 Miss. LEXIS 543 (Miss. 2014).

Trial court erred in denying a motion filed by an insured and its insurer (jointly, the insured) for relief from judgment because, while the parents added new claims to their products liability and personal injury lawsuit, the insured was not yet in default, the parents properly complied with the filing rules, and the insured did not had good cause for failing to answer the complaint, the insured had colorable defenses to the claims against them and the parents would not suffer prejudice. BB Buggies, Inc. v. Leon, 2014 Miss. LEXIS 372 (Miss. July 31, 2014), op. withdrawn, 2014 Miss. LEXIS 540 (Miss. Oct. 30, 2014), sub. op., 150 So. 3d 90, 2014 Miss. LEXIS 543 (Miss. 2014).

Veteran's claim of civil conspiracy was properly dismissed under Miss. R. Civ. P. 12(b)(6), as despite the notice pleading of Miss. R. Civ. P. 8, the veteran's complaint did not state that an agreement, unlawful or otherwise, was made by defendants, such that a claim was not properly stated; conclusory allegations or legal conclusions did not suffice to defeat the dismissal motion. Cook v. Wallot, 172 So. 3d 788, 2013 Miss. App. LEXIS 245 (Miss. Ct. App. 2013).

While a husband's claim for alienation of affection met the liberal notice-pleading requirements of Miss. R. Civ. P. 8(a), in that he set forth factual allegations respecting each material element of the claim, the claim was time-barred as it was not filed within the three-year period in Miss. Code Ann. § 15-1-49 (Rev. 2003). Almost six years had passed between the date alleged in the complaint and the date that the husband filed his complaint. Carter v. Reddix, 115 So. 3d 851, 2012 Miss. App. LEXIS 813 (Miss. Ct. App. 2012).

Although the resident's complaint did not specifically track the language of the statute, it was not fatal to the issue of whether the police officer and the city were liable under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-9(1)(c); Rule 8 did not have a magic words requirement. Scott v. City of Goodman, 997 So. 2d 270, 2008 Miss. App. LEXIS 783 (Miss. Ct. App. 2008).

Trial court erred in dismissing plaintiff's action against defendant under Miss. R. Civ. P. 12(b)(6) and/or (c) because, as permitted by Miss. R. Civ. P. 8(a)(2) and (e)(2), plaintiff permissibly pleaded a claim of both negligence and assault, notwithstanding that the claims were inconsistent. Jordan v. Wilson, 5 So. 3d 442, 2008 Miss. App. LEXIS 461 (Miss. Ct. App. 2008), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 130 (Miss. 2009).

Trial court erred in granting a law firm's motion for summary judgment in a legal malpractice suit because whether an insurance company adequately alleged in its amended complaint that it was the assignee of the insurance company's third party administrator's claims against the firm, and thus the real party in interest, was a genuine issue. MS Comp Choice, SIF v. Clark, Scott & Streetman, 981 So. 2d 955, 2008 Miss. LEXIS 220 (Miss. 2008).

In a dispute involving a promissory note, an issue of which statute of limitations applied was not decided because the creditor never filed suit to foreclose on the note, and he never filed collection on the note; further, the creditor's non-existent pleadings did not satisfy the pleading requirement of Miss. R. Civ. P. 8 and the debtor had no preceding pleadings to which to respond and allege affirmative defenses. Chimento v. Fuller, 965 So. 2d 668, 2007 Miss. LEXIS 543 (Miss. 2007).

Complaint alleging slander failed to comply with relaxed, notice-pleading requirements of Miss. R. Civ. P. 8 because it did not specify which plaintiff was slandered by which defendant and it did not set forth statements, paraphrased or verbatim, that constituted slander; without setting forth any information in the complaint regarding the statements, to whom the statements were directed, by whom the statements were made, and how the statements were slanderous, the allegation that appellees made "slanderous statements" constituted a bare legal conclusion with no support in the complaint. Chalk v. Bertholf, 980 So. 2d 290, 2007 Miss. App. LEXIS 468 (Miss. Ct. App. 2007).

Parent company of an alcohol permit holder should have been dismissed from a personal injury case because it was not liable under Miss. Code Ann. § 67-1-83 since it was not a permit holder itself or an employee of such; moreover, the pleadings did not adequately state a claim showing that the corporate veil should have been pierced. Penn Nat'l Gaming, Inc. v. Ratliff, 954 So. 2d 427, 2007 Miss. LEXIS 229 (Miss. 2007).

Judgment was properly awarded to plaintiffs in their suit against defendants for encroachment on their property where plaintiffs' pleadings met the requirements of notice pleading, as required by Miss. R. Civ. P. 8(a); the complaint informed defendants that the suit involved the placement of a boundary line, as the complaint alleged that a fence was on land that belonged to plaintiffs. Crosswhite v. Golmon, 939 So. 2d 831, 2006 Miss. App. LEXIS 738 (Miss. Ct. App. 2006).

In a forfeiture proceeding, the State's complaint with regards to defendant's real property did not meet the requirements of Miss. R. Civ. P. 8(a), but defendant and his mother did not seek a prior ruling on the matter, and proceeded to trial; at the conclusion of its case-in-chief, the State made an oral motion to conform the pleadings to the proof, which included the description of the real property on which forfeiture was sought, and the reasons for the same. When the trial court inquired whether defendant and his mother objected to the motion to amend, their attorney stated that they had no objection, and the trial court approved the amendment; that amendment allowed the State's complaint to meet the threshold pleading requirements of Rule 8(a). Cannon v. State, 918 So. 2d 734, 2005 Miss. App. LEXIS 166 (Miss. Ct. App. 2005), cert. denied, 2005 Miss. LEXIS 537 (Miss. Aug. 25, 2005), aff'd in part and rev'd in part, 919 So. 2d 913, 2005 Miss. LEXIS 764 (Miss. 2005).

In a suit for alleged asbestos-related injuries, the trial court's order granting plaintiffs' proposed case management order was reversed, where plaintiffs submitted pleadings which did not, at the very least, include the name or names of the defendants against whom each plaintiff alleged a claim, the time and location of exposure, and the medical condition caused by such exposure; this was a clear failure to comply with Miss. R. Civ. P. 8, 9, 10, and 11. 3M Co. v. Hinton, 910 So. 2d 526, 2005 Miss. LEXIS 111 (Miss. 2005).

In a mass-joined asbestos action brought by plaintiff consumers against defendants, manufacturers and retailers, seeking recovery for injuries resulting from exposure to asbestos-containing products, the consumers were entitled to have the action remanded to state court because defendants failed to show that certain local retailers were fraudulently joined for the purpose of defeating removal jurisdiction. Defendants' suggestion that the consumers were required to set forth detailed allegations against the local retailers lacked merit under Miss. R. Civ. P. 8(a)(2) and Fed. R. Civ. P. 8(a)(2), and, under liberal notice pleading rules, the complaint was not defective because it clearly indicated that the consumers were proceeding against the local retailers under a standard theory of strict products liability. Duffin v. Honeywell Int'l, Inc., 312 F. Supp. 2d 869, 2004 U.S. Dist. LEXIS 12857 (N.D. Miss. 2004).

Where a widow filed an action against a city, its police chief, and two police officers, arising from the shooting death of her husband in his home, the trial court erred in dismissing her amended complaint under the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq., as she had properly specified and separated the negligence-and-tort-based state law claims from the constitutional tort claims under 42 U.S.C.S. § 1983 in that amended complaint; the MTCA operated as the exclusive remedy for the state law civil claims against the city, the chief, and the officers, and Miss. R. Civ. P. 8(a) required no more than that notice of a claim be given. Elkins v. McKenzie, 865 So. 2d 1065, 2003 Miss. LEXIS 582 (Miss. 2003).

In an action by an attorney to recover a fee based on quantum meruit after he was discharged by his client, the complaint was insufficient to support a claim for conversion by the former client's subsequently hired attorney where the sole basis advanced in the complaint against the subsequently hired attorney was for breach of an alleged ethical duty. Estate of Stevens v. Wetzel, 762 So. 2d 293, 2000 Miss. LEXIS 46 (Miss. 2000).

Plaintiff sufficiently asserted theory of equitable estoppel in its pleadings, where complaint clearly put defendant on notice that plaintiff changed its position, detrimentally, in reliance on defendant's assurance that funds for completion of construction project were in hand. Christian Methodist Episcopal Church v. S & S Constr. Co., 615 So. 2d 568, 1993 Miss. LEXIS 45 (Miss. 1993).

Pleadings were sufficient to support trial court's award of punitive damages against defendant, where complaint provided sufficient notice to defendant that plaintiff sought to recover punitive damages for defendant's bad faith refusal to pay. Dynasteel Corp. v. Aztec Industries, Inc., 611 So. 2d 977, 1992 Miss. LEXIS 828 (Miss. 1992).

Wife's pleadings in divorce action were sufficient to give chancery court authority to order partition of marital home; although pleadings did not contain the word "partition", they plainly advised husband that she was looking to the marital residence as a source of a monetary award. Johnson v. Johnson, 550 So. 2d 416, 1989 Miss. LEXIS 454 (Miss. 1989).

## RESEARCH REFERENCES

**Law Reviews.**

Taming an Elephant: A Closer Look at Mass Tort Screening and the Impact of Mississippi Tort Reforms, 26 Miss. C. L. Rev. 253, 2006/2007.

## Rule 9. Pleading special matters.

(a) *Capacity.* — The capacity in which one sues or is sued must be stated in one's initial pleading.

(b) *Fraud, mistake, condition of the mind.* — In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally.

(c) *Conditions precedent.* — In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) *Official document or act: ordinance or special statute.* — In pleading an official document or official act it is sufficient to aver that the document was issued or the act was done in compliance with the law. In pleading an ordinance of a municipality or a county, or a special, local, or private statute or any right derived therefrom, it is sufficient to identify specifically the ordinance or statute by its title or by the date of its approval, or otherwise.

(e) *Judgment.* — In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) *Time and place.* — For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) *Special damage.* — When items of special damage are claimed, they shall be specifically stated.

(h) *Fictitious parties.* — When a party is ignorant of the name of an opposing party and so alleges in his pleading, the opposing party may be designated by any name, and when his true name is discovered the process and all pleadings and proceedings in the action may be amended by substituting the true name and giving proper notice to the opposing party.

(i) *Unknown parties in interest.* — In an action where unknown proper parties are interested in the subject matter of the action, they may be designated as unknown parties in interest.

**HISTORY: Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

## ADVISORY COMMITTEE NOTE

A party desiring to raise an issue as to the legal existence, capacity, or authority of a party must assert such in the answer. If lack of capacity appears affirmatively on the face of the complaint, the defense may be raised by a motion pursuant to Rule 12(b)(6) or Rule 12(c).

"Circumstances" in Rule 9(b) refers to matters such as the time, place and contents of the false representations, in addition to the identity of the person who made them and what the person obtained as a result.

Rule 9(g) requires a detailed pleading of special damages and only a general pleading of general damages. General damages are damages that are typically caused by, and flow naturally from, the injuries alleged. Special damages are damages that are unusual or atypical for the type of claim asserted. Special damages are required to be pled with specificity so as to give the defendant notice of the nature of the alleged damages. Special damages include, but are not limited to, consequential damages, damages for lost business profit, and punitive damages. *See Puckett Machinery Co. v. Edwards,* 641 So. 2d 29, 37-38 (Miss. 1994) (consequential damages must be plead with specificity); *Lynn v. Soterra, Inc.,* 802 So. 2d 162, 169 (Miss. Ct. App. 2001) (damages for lost business profit caused by defendant's blocking of a road are likely special damages). If claimant fails to plead special damages with specificity, an award for such damages may be reversed. The requirement that special damages must be stated with specificity will be waived if special damages are tried by the express or implied consent of the parties pursuant to Rule 15(b).

## JUDICIAL DECISIONS

### ANALYSIS

Capacity of state officials.
Challenging subject matter jurisdiction.
Fictitious parties.
Fraud.
Malice.
Mistake.

Names of defendants.
Special damages.

**Capacity of state officials.**

In a state employee's suit alleging that he was terminated in retaliation for exercising freedom of speech, the complaint sufficiently identified, as required by Miss. R. Civ. P. 9(a), the individual state officials against whom relief was sought and the fact that these officials were being sued in their personal or individual capacity. E. Miss. State Hosp. v. Callens, 892 So. 2d 800, 2004 Miss. LEXIS 361 (Miss. 2004).

**Challenging subject matter jurisdiction.**

In an interlocutory appeal from orders of the Tallahatchie County Chancery Court and the Leflore County Circuit Court regarding the transfer of plaintiff estate from Tallahatchie to Leflore county, denial of defendants' motion to void the appointment and denial of defendants' motion for summary judgment, defendants had standing before both courts because they challenged the Tallahatchie court's subject matter jurisdiction to open the estate; under Miss. R. Civ. P. 9(a), defendants had standing to challenge the estate as a party plaintiff in the Leflore court tort action against defendants. Nat'l Heritage Realty, Inc. v. Estate of Boles, 947 So. 2d 238, 2006 Miss. LEXIS 473 (Miss. 2006), overruled in part, Lewis v. Pagel, 233 So. 3d 740, 2017 Miss. LEXIS 221 (Miss. 2017).

**Fictitious parties.**

Plaintiff's claims were time-barred where his original complaint did not identify a cause of action against a fictitious party, the amended allegations were the first against the fictitious parties and directly contradicted the case's original theory, and thus, the amended complaint did not relate back under Miss. R. Civ. P. 9(h) and 15(c)(2). Hammons v. Navarre, 252 So. 3d 9, 2018 Miss. LEXIS 252 (Miss. 2018).

Plaintiff's original complaint did not identify a cause of action against a fictitious party where its sole contention was that a named party supplied defective fuel to the airplane that crashed and caused his injuries, and the allegations in the amended complaint were the first allegations against the fictitious parties and directly contradicted the case's original theory. Hammons v. Navarre, 252 So. 3d 9, 2018 Miss. LEXIS 252 (Miss. 2018).

Case law holding that parties added in an amended complaint were new parties not substitutions under Miss. R. Civ. P. 9(h) was consistent with precedent as it correctly applied the plain and ordinary meaning of Rule 9(h), and it was possible for a plaintiff to actually know the true name of an entity and still be ignorant of the entity's name under the fictitious-party rule. Hammons v. Navarre, 252 So. 3d 9, 2018 Miss. LEXIS 252 (Miss. 2018).

Wrongful-death beneficiary's suit against a nursing home was time-barred because (1) the relation-back privilege for a Miss. R. Civ. P. 9(h) amendment did not apply as the nursing home was known to the beneficiary when filing the original complaint naming a fictitious defendant, and, (2) if the nursing home were unknown to the beneficiary when filing the original complaint or before the statute of limitations ran, it was not timely named due to the beneficiary's failure to exercise due diligence to attempt to learn the proper party, as the beneficiary knew the nursing home existed, and medical records available at the start of the case showed the nursing home's potential liability. Hopkins v. CLC of Biloxi, LLC, 229 So. 3d 742, 2017 Miss. App. LEXIS 620 (Miss. Ct. App. 2017).

Circuit court did not err in granting manufacturers summary judgment because it properly applied clear and controlling Mississippi Supreme Court precedent in determining that a pilot's attempted substitution of fictitious parties failed to comply with the rule; because the manufacturers were not properly added, the claims against them did not relate back to the original complaint and were barred by the statute of limitations. Hammons v. Navarre, 2017 Miss. App. LEXIS 215 (Miss. Ct. App. Apr. 18, 2017), aff'd, 252 So. 3d 9, 2018 Miss. LEXIS 252 (Miss. 2018).

Summary judgment was properly granted to the owner of man buggy that was involved in an accident, because the applicable statute of limitations had run, and the owner was not properly substituted for a fictitious party into the accident victim's complaint, as the victim possessed enough information to determine the legal entity that owned the buggy, given that the owner's label was on the buggy. The amendment by the victim to add the owner as a party did not relate back to the filing of the complaint because the victim failed to establish that the victim utilized reasonable diligence to timely identify the owner as a fictitious party. Davenport v. Hertz Equip. Rental Corp., 187 So. 3d 194, 2016 Miss. App. LEXIS 112 (Miss. Ct. App. 2016).

To invoke the relation-back principle of Miss. R. Civ. P. 9(h) and 15(c)(2), a plaintiff, after filing suit, must proceed in a reasonably diligent manner to determine the true identity of a fictitiously named defendant and to amend the plaintiff's complaint accordingly. Anderson v. ALPS Auto., Inc., 51 So. 3d 929, 2010 Miss. LEXIS 603 (Miss. 2010).

Wife's delay in seeking leave under Miss. R. Civ. P. 9(h) and 15(c)(2) to substitute a manufacturer for a fictitious defendant in a wrongful death suit of more than nine months after discovering the true identity of the fictitious defendant was unreasonable as Rule 9(h) contemplated a plaintiff amending the plaintiff's complaint in a reasonably diligent manner once the plaintiff learned the true identity of a fictitious party. Anderson v. ALPS Auto., Inc., 51 So. 3d 929, 2010 Miss. LEXIS 603 (Miss. 2010).

Circuit court did not err in granting summary judgment in favor of the manufacturers because they were not properly substituted pursuant to Miss. R. Civ. P. 9(h) and Miss. R. Civ. P. 15(c)'s relation-back provision did not apply, which meant that a wife's wrongful death claims against the manufacturers were untimely. Miller v. Engelhard Corp., 95 So. 3d 740, 2012 Miss. App. LEXIS 492 (Miss. Ct. App. 2012).

In a products liability suit, pursuant to Miss. R. Civ. P. 9(h) and 15(c)(2), a patient's second amended complaint, which substituted a medical device manufacturer for an unknown defendant, related back to the date of the original complaint naming a fictitious defendant because the patient made a reasonably diligent inquiry into the identity of the manufacturer where the suit was filed one day before the three-year limitations period in Miss. Code Ann. § 15-1-49 expired; less than three months elapsed between when the hospital that used the device on the patient supplied an erroneous manufacturer's name and when the patient sought to substitute that manufacturer's name for the fictitious party designation; and the patient sought to substitute the correct manufacturer for the first manufacturer within three weeks after learning that the manufacturer had actually made the device. Scoggins v. Boston Sci. Corp., 2008 U.S. Dist. LEXIS 35507 (N.D. Miss. Apr. 22, 2008).

Circuit court erred in dismissing the entire action when dismissing the hospital in the beneficiaries' wrongful death action where, to dismiss the entire action, only when the identified parties were dismissed and the complaint articulated claims against fictitious parties whose identity could be discovered, was to deprive a plaintiff of this benefit. Long v. Mem'l Hosp. at Gulfport, 969 So. 2d 35, 2007 Miss. LEXIS 570 (Miss. 2007).

Where an estate mistakenly named a nursing home and personnel, and the estate failed to properly substitute any defendant for a fictitious party under Miss. R. Civ. P. 9(h), the amended complaint related back as to four of the defendants because they were the same owners and managers as the amended nursing home and had notice under Miss. R. Civ. P. 15(c), but the amended complaint did not relate back as to two defendants that did not have notice of the original complaint; therefore, those two defendant's were not timely served under Miss. R. Civ. P. 4(h). Bedford Health Props., LLC v. Estate of Williams, 946 So. 2d 335, 2006 Miss. LEXIS 632 (Miss. 2006).

Patient's amended complaint did not relate back to the original complaint as the patient was not diligent by waiting almost two years after filing the original complaint to identify a clinic and a doctor who had been named as fictitious parties. Joiner v. Phillips, 953 So. 2d 1123, 2006

Miss. App. LEXIS 649 (Miss. Ct. App. 2006).

Summary judgment was properly awarded to a doctor in a patient's medical malpractice action where the patient's amended complaint, in which she added the doctor as a defendant, was not a proper Miss. R. Civ. P. 9(h) substitution because the amended complaint had not replaced a John Doe defendant with the doctor, and the amendment was made after the expiration of the statute of limitations. Santangelo v. Green, 920 So. 2d 521, 2006 Miss. App. LEXIS 75 (Miss. Ct. App. 2006).

Plaintiff is required to make a "reasonably diligent inquiry" into the identity of an unknown defendant within the limitations period in order to substitute the defendant for a fictitious party under Miss. R. Civ. P. 9(h) and Miss. R. Civ. P.15(c)(2). Santangelo v. Green, 920 So. 2d 521, 2006 Miss. App. LEXIS 75 (Miss. Ct. App. 2006).

Amendment that changes the parties against whom the claim is asserted will relate back if within the statute of limitations period and the additional 120 days for service of process, the new party receives such notice of the action as will prevent prejudice, and the new party knows or should have known that but for a mistake concerning the identity of the proper party, the action would be brought against the party. If the complaint uses fictitious names because the plaintiff is ignorant of the name of an opposing party and so alleges in his pleading, then an amendment to add the newly discovered actual party relates back to the date of the original pleading pursuant to Miss. R. Civ. P. 9(h) and Miss. R. Civ. P. 15(c)(2). Wilner v. White, 929 So. 2d 343, 2005 Miss. App. LEXIS 1033 (Miss. Ct. App. 2005), rev'd, 929 So. 2d 315, 2006 Miss. LEXIS 267 (Miss. 2006).

The purpose of Miss. R. Civ. P. 9(h) specifically, is to toll the statute of limitations when, in good faith, the plaintiff is unable to identify unknown defendants; this shield protects defendants and may be waived only by them. Rawson v. Jones, 816 So. 2d 367, 2001 Miss. LEXIS 169 (Miss. 2001).

Medical malpractice defendants were not Miss. R. Civ. P. 9(h) fictitious parties where plaintiff had known doctor was her child's only treating physician as early as the day of the child's death, she hired a lawyer within a week of the death for purposes of the lawsuit, she and her lawyer attended a death conference where the doctor was present, her deposition showed she discussed suing the doctor many times, her initial and amended complaints did not name him, she made only minor changes to her complaint after consulting an expert, and defendants were added after the statute of limitation had run. Rawson v. Jones, 816 So. 2d 367, 2001 Miss. LEXIS 169 (Miss. 2001).

Plaintiff's attempt to join new party after running of statute of limitations was denied; plaintiff improperly substituted one party for another, not for a fictitiously named defendant, and therefore could not avail herself of relation back provisions of rules. Doe v. Mississippi Blood Servs., 704 So. 2d 1016, 1997 Miss. LEXIS 460 (Miss. 1997), cert. denied, 523 U.S. 1078, 118 S. Ct. 1525, 140 L. Ed. 2d 676, 1998 U.S. LEXIS 2613 (U.S. 1998).

**Fraud.**

Employees' claim of fraudulent concealment did not toll the one-year statute of limitations because the employees did not show they were unaware that they had not been paid, and they did not plead fraudulent concealment with specificity and particularity. Culpepper Enters. v. Parker, 270 So. 3d 116, 2018 Miss. App. LEXIS 365 (Miss. Ct. App. 2018).

Chancellor did not abuse its discretion by denying a motion for leave to amend a complaint because the movant failed to inform the chancellor of what facts or acts constituted alleged fraud or negligence per se by the attorneys who represented the interests of the decedent's estate, a testamentary trust, and a guardianship as the motion to amend contained only bare allegations and no facts from which to determine the existence of a cause of action. Flowers v. Estate of Flowers (In re Estate of Flowers), 269 So. 3d 198, 2018 Miss. App. LEXIS 56 (Miss. Ct. App. 2018), aff'd in part and rev'd in part, 264 So. 3d 775, 2019 Miss. LEXIS 95 (Miss. 2019).

Plaintiff's allegations of fraud failed to state a claim against defendant, as none of the facts alleged rose to the level of fraud; defendant's statements, taken as true, did not meet the requirements of pleading a claim of fraud, as defendant was introducing plaintiff and another person for the first time, and the statements represented defendant's opinion of the other person and his business. Soni v. Dhaliwal, 203 So. 3d 628, 2016 Miss. App. LEXIS 673 (Miss. Ct. App. 2016).

A claimant's failure to plead fraud with the required specificity resulted in the claimant's failure to show a genuine dispute of material fact as to fraud. Dorman v. Power, 203 So. 3d 33, 2016 Miss. App. LEXIS 662 (Miss. Ct. App. 2016).

In a case alleging that there was a fraudulent transfer, a judgment creditor did not plead the action with sufficient particularity because no specific information was provided; the creditor admitted that it did not know what was transferred, when it was transferred or how it was transferred, only that something might have been transferred. EDW Invs., LLC v. Barnett, 149 So. 3d 489, 2014 Miss. LEXIS 533 (Miss. 2014).

Chancellor did not err in dismissing a nephew's lawsuit against his uncles for failure to state a claim upon which relief can be granted under Miss. R. Civ. P. 12(b)(6) because the nephew failed to plead his claim of fraudulent conveyance with particularity; the nephew pleaded a fraudulent conveyance in general terms but failed to state with particularity what made the conveyance fraudulent. Walton v. Walton, 52 So. 3d 468, 2011 Miss. App. LEXIS 32 (Miss. Ct. App. 2011).

In a fraud action, the State met the specificity requirement of Miss. R. Civ. P. 9(b) when it alleged a knowing, material, and false representation by pharmaceutical manufacturers with the purpose of deceiving the State, and that the State's reliance on the representation proximately caused the State's injury. State v. Bayer Corp., 32 So. 3d 496, 2010 Miss. LEXIS 201 (Miss. 2010).

Decedent's grandson, who was not an heir at law, failed to set out in his complaint basic available information, such as the time of the alleged fraud on the part of the decedent's administrator; the allegation of fraud was not stated with the required particularity to overcome the two-year statute of limitations. McClendon v. Hudson (In re Estate of Hudson), 962 So. 2d 90, 2007 Miss. App. LEXIS 489 (Miss. Ct. App. 2007).

Estate representatives' fraud claims brought against the administrator and the licensee of a nursing home were dismissed because the representatives simply alleged the collective defendants (not each defendant specifically) misrepresented the qualitative and quantitative care and supervision they would receive, and made those misrepresentations to the representatives and their families; the complaint did not specify the date or locations the allegedly fraudulent statements were made. Howard v. Estate of Harper, 947 So. 2d 854, 2006 Miss. LEXIS 626 (Miss. 2006).

When fraudulent concealment or other fraud-based allegations are asserted in a complaint, they are required to be pleaded with specificity and particularity under Miss. R. Civ. P. 9(b). State Indus. v. Hodges, 919 So. 2d 943, 2006 Miss. LEXIS 17 (Miss. 2006).

Child was killed by a water heater's explosion; while minimal, the mother's and sister's pleadings in a wrongful death action were factually particular enough to allege fraudulent concealment and to satisfy Miss. R. Civ. P. 9(b), and the circuit court's decision to deny a motion to dismiss was not an abuse of discretion. State Indus. v. Hodges, 919 So. 2d 943, 2006 Miss. LEXIS 17 (Miss. 2006).

Pursuant to Miss. R. Civ. P. 9(b), fraud must be pled with particularity. Hence, a court did not err in dismissing an insured's action against an insurer for fraud because there were no facts alleged by the insured to support a claim of fraud against the insurer. Ngo v. Centennial Ins. Co., 893 So. 2d 1076, 2005 Miss. App. LEXIS 1 (Miss. Ct. App. 2005).

Where an insured alleged that three insurance agents misrepresented the extent of coverage under two insurance policies and the effect of such policies on Medicaid and Medicare, the insured failed to satisfy the specificity requirements of Fed. R. Civ. P. 9(b) and Miss. R. Civ. P. 9(b) because the insured's complaint alleged fraud claims only in broad, conclusory

language. Williams v. Union Nat'l Life Ins. Co., 2003 U.S. Dist. LEXIS 26332 (S.D. Miss. Sept. 25, 2003), vacated, 2004 U.S. Dist. LEXIS 27494 (S.D. Miss. Sept. 17, 2004).

Two corporate defendants and seven individual defendants were parties to the suit and the subject complaint failed to specify which of the seven individual defendants made the allegedly fraudulent statements. Under the pleading standards of Miss. R. Civ. P. 9(b) and Fed. R. Civ. P. 9(b) the court could not assume that each of the individual defendants made all of the allegedly fraudulent statements to the nursing home resident; and further, the complaint failed to allege the date on which, and location at which the allegedly fraudulent statements were made, thus the claim failed to meet the required pleading standards. Gray v. Beverly Enterprises-Mississippi, 261 F. Supp. 2d 652, 2003 U.S. Dist. LEXIS 8160 (S.D. Miss. 2003), rev'd, 390 F.3d 400, 2004 U.S. App. LEXIS 23459 (5th Cir. Miss. 2004).

Depositor's claim and reliance on a bank's fiduciary duty was unfounded in facts or law; there was no evidence that the bank perpetrated a fraud or intentionally deceived the depositor regarding the contract for the certificates of deposit or the provision therein regarding setoff to satisfy a debt of a joint tenant on the certificates of deposit. Union Planters Nat'l Bank, N.A. v. Jetton, 856 So. 2d 674, 2003 Miss. App. LEXIS 639 (Miss. Ct. App. 2003), cert. denied, 866 So. 2d 473, 2004 Miss. LEXIS 193 (Miss. 2004).

Purchasers' complaint covered all the elements of fraud and satisfied the pleading requirements of Miss. R. Civ. P. 9(b) where the complaint alleged that the insurance agents each made a representation about the nature of the policies in question that was not true, induced each purchaser to buy a policy that was deliberately presented to each purchaser by each agent in full knowledge of its falsity, with the intent that the purchaser should buy a policy based on the false representation; moreover, the complaint alleged that the purchasers did not know that the representation was false, and relied on presentations that were prepared by the insurance company and delivered by the agents, having the right to rely on the representations by the agents with apparent authority, and suffered financial injury as a direct result. Anderson v. Equitable Life Assur. Soc'y of the United States, 248 F. Supp. 2d 584, 2003 U.S. Dist. LEXIS 3135 (S.D. Miss. 2003).

Home buyers' fraud claims failed where they did not plead the claims with particularity, because the only evidence of fraud that they set forth was a copy of the sales contract which they claimed had no repair disclosures, but the sales contract identified several areas that had to be repaired as a condition of the sale, and there was no evidence in the record of "willful or intentional" misconduct by the sellers. Mitchell v. Nelson, 830 So. 2d 635, 2002 Miss. LEXIS 332 (Miss. 2002).

Deciding feature was that the mother and daughter who defaulted on a bank note and security agreement failed to plead fraud with the requisite specificity, and any allegations of fraud were unsupported by the evidence; no agreements, other than a reaffirmation agreement filed in bankruptcy, were executed, and the evidence did not support the claim that the mother and daughter were fraudulently induced into reaffirming the debt to the bank. Burgess v. BankPlus, 830 So. 2d 1223, 2002 Miss. LEXIS 353 (Miss. 2002).

In an action arising from a residential real property transaction, the plaintiff buyer's complaint was insufficient to state a cause of action for fraudulent misrepresentation by the sellers' agent where the complaint merely alleged that the agent made misrepresentations to her. Powell v. Cohen Realty, Inc., 803 So. 2d 1186, 1999 Miss. App. LEXIS 665 (Miss. Ct. App. 1999).

Complaint alleging fraudulent inducement to enter into and continue distributorship, while not artfully pled, alleged fraud sufficiently to meet standards predicated under subdivision (b) of this rule. Allen v. Mac Tools, Inc., 671 So. 2d 636, 1996 Miss. LEXIS 14 (Miss. 1996).

Plaintiff's averments of fraud were more than a mere summary recitation of elements, and were asserted with sufficient particularity to satisfy subdivision (b) of this rule. Nichols v. Tri-State Brick & Tile Co., 608 So. 2d 324, 1992 Miss. LEXIS 675 (Miss. 1992).

Petitioner's motion for leave to amend should have been allowed, where motion alleged fraud perpetrated upon court by administratrix of estate; if an allegation of fraud is sufficiently pled it should be heard, and thirty days leave to amend is to be granted when court sustains a motion to dismiss. Smith v. Estate of King, 501 So. 2d 1120, 1987 Miss. LEXIS 2287 (Miss. 1987).

**Malice.**

Summary judgment was granted to a creditor in an action under the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., because a claim of harassment by two debtors was preempted under 15 U.S.C. § 1681h(e); an exception to this did not apply since the pleadings did not contain an allegation of malice. Harmon v. Regions Bank, 961 So. 2d 693, 2007 Miss. LEXIS 326 (Miss. 2007).

**Mistake.**

Finding in favor of one brother and his wife in a boundary dispute action was proper, where nothing in any of the pleadings was stated generally, much less with particularity, concerning mistake or the circumstances of such a mistake, that would support reformation, Miss. R. Civ. P. 9(b). Estate of DeLoach v. DeLoach, 873 So. 2d 146, 2004 Miss. App. LEXIS 438 (Miss. Ct. App. 2004).

**Names of defendants.**

In a medical malpractice/wrongful death claim in which plaintiff's first two complaints asserted claims against John Does 1-5, the third complaint, which substituted the names of actual physicians for the John Does, did not relate back to the original complaint because plaintiff failed to exercise due diligence to discover the identities of the John Doe physicians where she received records pertaining to the patient's treatment prior to filing suit. Price v. Clark, 21 So. 3d 509, 2009 Miss. LEXIS 365 (Miss. 2009).

Addition of defendants' names in plaintiff's amended complaint pursuant to Miss. R. Civ. P. 9(h) without the court's leave was improper because the new names were not substituted for fictitious parties, but rather were those of new defendants whose addition required court approval under Miss. R. Civ. P. 21. Veal v. J. P. Morgan Trust Co., N.A., 955 So. 2d 843, 2007 Miss. LEXIS 368 (Miss. 2007).

Although Miss. R. Civ. P. 9(h) pleadings are not considered amendments changing a party against whom a claim was asserted and are allowed under Miss. R. Civ. P. 15(c) to relate back to the date of the original pleading, the rule did not apply to a patient's malpractice case because, in order for Rule 9(h)to apply, there had to be a substitution of a true party name for a fictitious one; the patient did not substitute the doctor's name for a "John Doe," but simply added his name. Wilner v. White, 929 So. 2d 315, 2006 Miss. LEXIS 267 (Miss. 2006).

In a suit for alleged asbestos-related injuries, the trial court's order granting plaintiffs' proposed case management order was reversed, where plaintiffs submitted pleadings which did not, at the very least, include the name or names of the defendants against whom each plaintiff alleged a claim, the time and location of exposure, and the medical condition caused by such exposure; this was a clear failure to comply with Miss. R. Civ. P. 8, 9, 10, and 11. 3M Co. v. Hinton, 910 So. 2d 526, 2005 Miss. LEXIS 111 (Miss. 2005).

**Special damages.**

Homeowners' claim for damages for mental anguish or emotional distress were special damages, which had to be pleaded, but they were not; however, because a builder did not raise the matter before the circuit court or on appeal, the court of appeals would not grant relief on grounds not presented to the circuit court, and such objection was waived. Woodkrest Custom Homes Inc. v. Cooper, 108 So. 3d 460, 2013 Miss. App. LEXIS 24 (Miss. Ct. App. 2013).

Trial court in replevin action erred in submitting issue of defendant's consequential damages to jury, where defendant failed to sufficiently prove his consequential damages, and failed to comply with subdivision (g) of this rule by not sufficiently pleading his consequential damages. Puckett Mach. Co. v. Edwards, 641 So. 2d 29, 1994 Miss. LEXIS 364 (Miss. 1994).

## RESEARCH REFERENCES

**Law Reviews.**

Taming an Elephant: A Closer Look at Mass Tort Screening and the Impact of Mississippi Tort Reforms, 26 Miss. C. L. Rev. 253, 2006/2007.

## Rule 10. Form of pleadings.

(a) *Caption; names of parties.* — Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

(b) *Paragraphs; separate statement.* — The first paragraph of a claim for relief shall contain the names and, if known, the addresses of all the parties. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and the paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) *Adoption by reference; exhibits.* — Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

(d) *Copy must be attached.* — When any claim or defense is founded on an account or other written instrument, a copy thereof should be attached to or filed with the pleading unless sufficient justification for its omission is stated in the pleading.

**HISTORY: Amended effective April 13, 2000; Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective April 13, 2000, Rule 10(d) was amended to suggest, rather than require that documents on which a claim or defense is based be attached to a pleading. So. 2d (West Miss. Cas. 2000).

## ADVISORY COMMITTEE NOTE

Failure to comply with the requirements of Rule 10(b) is not ground for dismissal of the complaint or striking the answer. Instead, the court, upon a motion or on its own, may order a party to amend the pleading so as to comply with the provisions of Rule 10(b). *See, e.g., 3M Co. v. Glass,* 917 So. 2d 90, 92-94 (Miss. 2005); *Harold's Auto Parts, Inc. v. Mangialardi,* 889 So. 2d 493, 494-95 (Miss. 2004).

## JUDICIAL DECISIONS

### ANALYSIS

Attachments.
Parties to be listed.
Separate counts.

**Attachments.**

A condemnor was not required to attach to its petition a corporate resolution authorizing a taking, and the failure to do so did not merit dismissal of the case. Ford v. Destin Pipeline Co., 809 So. 2d 573, 2000 Miss. LEXIS 118 (Miss. 2000).

The court reversed the judgment of dismissal of the plaintiff's claim for breach of contract to allow him the opportunity to discover if any contracts did in fact exist, and if so, whether such contracts established him as an intended third-party beneficiary. The plaintiff was not required to attach a copy of the contract to the pleadings. Donald v. AMOCO Prod. Co., 735 So. 2d 161, 1999 Miss. LEXIS 125 (Miss. 1999).

Defendant in partnership dispute should have been allowed to amend his pleadings to attach copies of pertinent agreements to his answer and counterclaim, where plaintiff signed, was a party to, and was familiar with terms of the agreements, and his argument that defendant was trying to ambush him was without merit. Edwards v. Beasley, 577 So. 2d 384, 1991 Miss. LEXIS 114 (Miss. 1991).

Since defendant registered no objection to complaint prior to hearing on summary judgment motion, it waived any advantage it might gain from plaintiff's failure to provide affidavit attesting to accuracy of documents attached to complaint. Key Constructors, Inc. v. H & M Gas Co., 537 So. 2d 1318, 1989 Miss. LEXIS 8 (Miss. 1989).

Although complaint failed to comply with this rule since invoices were not attached, defendant's failure to assert violation by proper motion or otherwise, reasonably in advance of trial, operated as a waiver of its rights under this rule. Gilchrist Machinery Co. v. Ross, 493 So. 2d 1288, 1986 Miss. LEXIS 2619 (Miss. 1986).

**Parties to be listed.**

In a suit for alleged asbestos-related injuries, the trial court's order granting plaintiffs' proposed case management order was reversed, where plaintiffs submitted pleadings which did not, at the very least, include the name or names of the defendants against whom each plaintiff alleged a claim, the time and location of exposure, and the medical condition caused by such exposure; this was a clear failure to comply with Miss. R. Civ. P. 8, 9, 10, and 11. 3M Co. v. Hinton, 910 So. 2d 526, 2005 Miss. LEXIS 111 (Miss. 2005).

Trial court did not err in excluding from the courtroom certain witnesses after the sequestration rule, Miss. R. Evid. 615, was invoked because the 500 names of the other witnesses were not originally listed as parties on the original complaint pursuant to Miss. R. Civ. P. 10(a), and thus they were not considered parties. Prestridge v. City of Petal, 841 So. 2d 1048, 2003 Miss. LEXIS 53 (Miss. 2003).

**Separate counts.**

In an action arising from a motor vehicle accident, the defendant was not entitled to the exclusion of evidence based on the plaintiffs' allegation that the defendant exited his vehicle after the collision and pointed a gun at the plaintiffs in a dangerous and threatening manner since the gun-brandishing incident was a part of the totality of circumstances surrounding the collision, rather than a separate occurrence. Sims v. Collins, 762 So. 2d 785, 2000 Miss. App. LEXIS 307 (Miss. Ct. App. 2000).

## RESEARCH REFERENCES

**Law Reviews.**

Taming an Elephant: A Closer Look at Mass Tort Screening and the Impact of Mississippi Tort Reforms, 26 Miss. C. L. Rev. 253, 2006/2007.

## Rule 11. Signing of pleadings and motions.

(a) *Signature required.* — Every pleading or motion of a party represented by an attorney shall be signed by at least one attorney of record in that attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign that party's pleading or motion and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate that the attorney has read the pleading or motion; that to the best of the attorney's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. The signature of an attorney who is not regularly admitted to practice in Mississippi, except on a verified application for admission pro hac vice, shall further constitute a certificate by the attorney that the foreign attorney has been admitted in the case in accordance with the requirements and limitations of Rule 46(b) of the Mississippi Rules of Appellate Procedure.

(b) *Sanctions.* — If a pleading or motion is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false, and the action may proceed as though the pleading or motion had not been served. For wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted. If any party files a motion or pleading which, in the opinion of the court, is frivolous or is filed for the purpose of harassment or delay, the court may order such a party, or his attorney, or both, to pay to the opposing party or parties the reasonable expenses incurred by such other parties and by their attorneys, including reasonable attorneys' fees.

**HISTORY: Amended effective March 13, 1991; amended effective January 16, 2003; Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

### ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 16, 2003, Rule 11(a) was amended to provide that the signature of a foreign attorney certifies compliance with MRAP 46(b) and to make other editorial changes. ____ So. 2d ____ (West Miss. Cases 2003).

Effective March 13, 1991, Rule 11(b) was amended to provide for sanctions against a party, his attorney or both. 574-576 So. 2d XXI (West Miss. Cas. 1991).

### ADVISORY COMMITTEE NOTE

Good faith and professional responsibility are the bases of Rule 11. Rule 8(b), for instance, authorizes the use of a general denial "subject to the obligations set forth in Rule 11," meaning only when counsel can in good faith fairly deny all the averments in the adverse pleading should he do so.

Verification will be the exception and not the rule to pleading in Mississippi. No pleading or petition need be verified or accompanied by affidavit unless there is a specific provision to that effect in a rule or statute. *See, e.g.,* M.R.C.P. 27(a) and 65.

The final sentence of Rule 11(b) is intended to ensure that the trial court has sufficient power to deal forcefully and effectively with parties or attorneys who may misuse the liberal, notice pleadings system effectuated by these rules. The Rule authorizes a court to award a party reasonable attorneys' fees and expenses when an adverse party "files a motion or pleading which, in the opinion of the court, is frivolous or is filed for the purpose of harassment or delay." Thus, Rule 11 provides two alternative grounds for the imposition of sanctions-the filing of a frivolous motion or pleading, and the filing of a motion or pleading for the purpose of harassment or delay. *See Nationwide Mut. Ins. Co. v. Evans,* 553 So. 2d 1117, 1120 (Miss. 1989). Although a finding of bad faith is necessary to sustain the imposition of sanctions based on purposeful harassment or delay, a finding of bad faith is not necessary to sustain the imposition of sanctions based upon frivolous pleadings or motions. A pleading or motion is frivolous "only when, objectively speaking, the pleader or movant has no hope of success." *See In re Spencer,* 985 So. 2d 330, 339 (Miss. 2008). A pleading is "frivolous" if its "insufficiency…is so manifest upon a bare inspection of the pleadings, that the court or judge is able to determine its character without argument or research." *In re Estate of Smith,* 69 So. 3d 1, 6 (Miss. 2011). A defensive pleading is not frivolous unless "conceding it to be true does not, taken as a whole, contain any defense to any part of complainant's cause of action and its insufficiency as a defense is so glaring that the Court can determine it upon a bare inspection without argument." *In re Estate of Smith,* 69 So. 3d at 6.

Sanctions against a party are improper in cases where the party relied strictly on advice of counsel and could not be expected to know whether the complaint was supported by law, where the party relied on advice of counsel in filing the pleading and played no significant role in prosecution of the action; or where the party was unaware and lacked responsibility for any bad faith harassment or delay. *See Stevens v. Lake,* 615 So. 2d 1177, 1184 (Miss. 1993).

The Litigation Accountability Act also authorizes a court to impose sanctions upon attorneys and/or parties who assert "any claim or defense that is without substantial justification, or …was interposed for delay or harassment." Miss. Code Ann. §11-55-5 (Supp. 2011). "Without substantial justification" is defined as any claim that is "frivolous, groundless in fact or in law, or vexatious, as determined by the court." Miss. Code Ann. §11-55-3(a) (Supp. 2011). "Frivolous" as used in the Act means the same thing as "frivolous" as used in Rule 11: a claim or defense made "without hope of success."' *See In re Spencer,* 985 So. 2d 330, 338 (Miss. 2008).

## JUDICIAL DECISIONS

### ANALYSIS

In general.
Construction.
Frivolousness.
Particular cases.
Review.
Sanctions.

**In general.**

Where plaintiff's counsel commenced a personal injury suit against defendant railroad company one year and eight months after plaintiff's demise, the lawsuit amounted to a nullity; because the railroad company had a complete defense based upon the death of plaintiff some 20 months earlier, the lawsuit was frivolous, and an award of attorney fees was proper under Miss. R. Civ. P. 11 and Miss. Code Ann. § 11-55-5. Ill. Cent. R.R. Co. v. Broussard, 2008 Miss. App. LEXIS 589 (Miss. Ct. App. Sept. 30, 2008), op. withdrawn, sub. op., 19 So. 3d 821, 2009 Miss. App. LEXIS 745 (Miss. Ct. App. 2009).

Complaints should not be filed in matters where plaintiffs intend to find out in discovery whether or not, and against whom, they have a cause of action, and absent exigent circumstances, plaintiffs' counsel should not file a complaint until sufficient information is obtained, and plaintiffs' counsel believes in good faith that each plaintiff has an appropriate cause of action to assert against a defendant in the jurisdiction where the complaint is to be filed; to do otherwise is an abuse of the system, and is sanctionable under Miss. R. Civ. P. 11. Harold's Auto Parts, Inc. v. Mangialardi, 889 So. 2d 493, 2004 Miss. LEXIS 1501 (Miss. 2004).

Rule did not apply to a petition to return forfeited property and did not give an attorney the power to substitute his signature for that of his client. Shannon v. N. Miss. Narcotics Unit, 815 So. 2d 1255, 2002 Miss. App. LEXIS 240 (Miss. Ct. App. 2002).

Pursuant to its inherent authority, circuit court had power to impose monetary sanctions against attorney as well as his clients. Bean v. Broussard, 587 So. 2d 908, 1991 Miss. LEXIS 707 (Miss. 1991).

**Construction.**

For purposes of this rule, a claim is frivolous only when, objectively speaking, the pleader or movant has no hope of success. Scruggs v. Saterfiel, 693 So. 2d 924, 1997 Miss. LEXIS 166 (Miss. 1997).

This rule must be read and interpreted in light of purpose implicit in it: one of general deterrence of frivolous filings. Tricon Metals & Services, Inc. v. Topp, 537 So. 2d 1331, 1989 Miss. LEXIS 3 (Miss. 1989).

Trial court has authority to act sua sponte under this rule, and ought to exercise that authority against backdrop of its inherent authority to impose sanctions upon those who abuse the judicial process. Tricon Metals & Services, Inc. v. Topp, 537 So. 2d 1331, 1989 Miss. LEXIS 3 (Miss. 1989).

**Frivolousness.**

Trial court did not abuse its discretion by awarding a movant attorney's fees and costs because the court granted summary judgment to the movant when the movant's former spouse petitioned for injunctive relief and the spouse failed to investigate the validity of claims, all facts were readily available to the spouse, the spouse prosecuted the actions for an improper purpose, there were no issues of fact reasonably in conflict, and the spouse did not prevail on any claim and was not granted any relief or offered any settlement. Wilson v. Wilson, 283 So. 3d 195, 2019 Miss. App. LEXIS 93 (Miss. Ct. App.), cert. denied, — So. 3d —, 2019 Miss. LEXIS 314 (Miss. 2019).

Mortgage company owed appellee association dues, and appellant owed the company rent, and he agreed to pay the dues in lieu of some of his rent; appellant lived in the condominium and enjoyed the services provided by appellee, but neither appellant nor the mortgage company paid the association dues, and appellee's claim to be a third-party beneficiary was hardly frivolous for sanction purposes. Russell v. Beachwalk Condominums Ass'n, 193 So. 3d 657, 2016 Miss. App. LEXIS 311 (Miss. Ct. App. 2016).

Vendor and a former employee of a company in the pipeline services business were entitled to an award of attorneys' fees and expenses because the company filed its application for a preliminary injunction against them frivolously and in bad faith, regardless of the amount of the injunction bond posted by the company. Expro Ams., LLC v. Walters, 179 So. 3d 1010, 2015 Miss. LEXIS 574 (Miss. 2015).

Chancellor abused her discretion in failing to award sanctions because a stepson withheld the existence of a handwritten document stating, among other things, the testator's intention to revoke all prior wills, the stepson had no hope of rebutting the presumption that the will had been lost and not destroyed, the nondisclosure made his petition to probate a will frivolous, and the son incurred unnecessary expense in contesting the probate of the will. Pannagl v. Lambert (In re Estate of Pannagl), 166 So. 3d 39, 2014 Miss. App. LEXIS 627 (Miss. Ct. App. 2014), cert. denied, 166 So. 3d 38, 2015 Miss. LEXIS 336 (Miss. 2015).

Sanctions were inappropriate because a husband's pleading was not frivolous; it was possible that the husband's petition could have been granted, and his intentions in filing the pleading were irrelevant because the pleading itself was capable of succeeding. Huseth v. Huseth, 135 So. 3d 846, 2014 Miss. LEXIS 196 (Miss. 2014).

Chancellor in a modification of child custody matter did not commit an abuse of discretion by imposing sanctions against a parent for filing a frivolous report with the Mississippi Department of Human Services, alleging that the other parent had abused the parties' child. Martin v. Stevenson, 139 So. 3d 740, 2014 Miss. App. LEXIS 62 (Miss. Ct. App. 2014).

Circuit court did not err in finding that sanctions and attorneys' fees were proper because it found that a former wife's attorney intentionally had misrepresented the terms of an order to obtain a writ of garnishment, and the attorney had been sanctioned under similar circumstances; the attorney could not, in good faith, have believed that the wife's suggestion for writ of garnishment would succeed. Cooper v. Estate of Gatwood, 119 So. 3d 1031, 2013 Miss. LEXIS 412 (Miss. 2013).

Record contained sufficient evidence to support the chancellor's award of attorney's fees in the amount of $ 800 in favor of a brother because the chancellor set forth his calculations regarding attorney's fees, reviewed the time sheets the brother's attorney submitted, and evaluated the length of the attorney's practice, as well as his skill and expertise, in determining an hourly rate; the chancellor did not abuse his discretion in finding Miss. R. Civ. P. 11 sanctions appropriate based upon his finding that a sister filed a frivolous counterclaim against the brother. Buckalew v. Buccluch (In re Buckalew), 62 So. 3d 460, 2011 Miss. App. LEXIS 95 (Miss. Ct. App. 2011).

Chancery court did not abuse its discretion in imposing sanctions against a nephew on the ground that he instituted a second frivolous lawsuit against his uncles because in the first lawsuit that was dismissed for failure to state a claim, the nephew sued the uncles and requested the chancellor to set aside a deed that conveyed an interest in one tract of land to one of the uncles, and that tract of land was also one of the six tracts of land that was conveyed to the uncles in another deed; the nephew failed to plead his claim of fraudulent conveyance with particularity, and thus, there was no way that he could prove the claim, making the claim frivolous. Walton v. Walton, 52 So. 3d 468, 2011 Miss. App. LEXIS 32 (Miss. Ct. App. 2011).

Trial court did not err in ordering sanctions in a citizen's action against a city, a municipal court, and a municipal court judge pursuant to the Mississippi Litigation Accountability Act and Miss. R. Civ. P. 11(b) because the record clearly supported a finding that the citizen pursued a frivolous collateral action in trial court and that the sanctions were appropriate; in granting sanctions of attorney fees against the citizen pursuant to the factors set out in the Litigation Accountability Act, Miss. Code Ann. § 11-55-7, and Rule 11(b), the trial court found that the action was a frivolous action filed without substantial notification in order to harass the city, municipal court, and municipal court judge. Prewitt v. City of Oxford, 44 So. 3d 922, 2010 Miss. LEXIS 184 (Miss. 2010), cert. denied, 2010 Miss. LEXIS 274 (Miss. June 3, 2010), cert. denied, 562 U.S. 893, 131 S. Ct. 294, 178 L. Ed. 2d 142, 2010 U.S. LEXIS 6224 (U.S. 2010).

Refusal to award attorney fees to the employer after the deceased employee's personal-injury suit was dismissed was proper under Miss. R. Civ. P. 11 and the Litigation Accountability Act of 1988, Miss. Code Ann. §§ 11-55-1 to 11-55-15, because, although the filing of a claim for a deceased person was frivolous since the claim had no hope of success, the decision to award sanctions was within the discretion of the trial court and the trial court was within its discretion to deny sanctions. The deceased employee's counsel filed the lawsuit and tried to follow up on it, and the employee was alive when it was originally filed; when counsel was unable to contact the employee, counsel pursued the lawsuit on the employee's behalf in order to avoid being barred by the statute of limitations. Ill. Cent. R.R. v. Broussard, 19 So. 3d 821, 2009 Miss. App. LEXIS 745 (Miss. Ct. App. 2009).

Chancellor's decision not to award attorney's fees to the landowner was not an abuse of discretion where there was no evidence that the county filed the title claim in bad faith or without justification; to the contrary, the county presented ample evidence to support its claim. Knight v. Covington County, 27 So. 3d 1163, 2009 Miss. App. LEXIS 216 (Miss. Ct. App. 2009), cert. dismissed, 2010 Miss. LEXIS 76 (Miss. Feb. 18, 2010).

Trial court did not err in denying a car purchaser's Miss. R. Civ. P. 60(b)(6) motion for relief from judgment and finding his breach of contract suit against a car dealership was frivolous, where the dealer prepared a cash worksheet, which was not a contract, and the purchaser left with it stating he would return with the purchase money; he returned without the money and, without offering any payment, demanded the car be released to him, and he then filed the instant suit because the dealer refused to release the car to him. Guinn v. Wilkerson, 963 So. 2d 555, 2006 Miss. App. LEXIS 824 (Miss. Ct. App. 2006), cert. denied, 962 So. 2d 38, 2007 Miss. LEXIS 490 (Miss. 2007), cert. denied, 553 U.S. 1022, 128 S. Ct. 2088, 170 L. Ed. 2d 823, 2008 U.S. LEXIS 3738 (U.S. 2008).

In a wrongful death action filed by the parents of two passengers who were killed during a police pursuit of the driver of a stolen vehicle, the parents were ordered to pay the county's attorney fees that were incurred in defending the action on appeal because the appeal was frivolous, as they had no hope of success against the county. McCoy v. City of Florence, 949 So. 2d 69, 2006 Miss. App. LEXIS 526 (Miss. Ct. App. 2006), cert. denied, 949 So. 2d 37, 2007 Miss. LEXIS 113 (Miss. 2007).

Refusal to award attorney's fees to the mother in a child custody action was proper pursuant to the Mississippi Litigation Accountability Act, Miss. Code Ann. § 11-55-1 et seq., because the father's claim for custody was not frivolous pursuant Miss. R. Civ. P. 11. He was and remained the legal father of the children because the parties voluntarily signed an acknowledgment of paternity knowing that the father was not the biological father of the children. Adcock v. Van Norman, 918 So. 2d 747, 2005 Miss. App. LEXIS 208 (Miss. Ct. App.), aff'd in part and rev'd in part, 917 So. 2d 86, 2005 Miss. LEXIS 830 (Miss. 2005).

Where a paternal grandmother sought and was granted temporary custody of her minor grandchild through an ex parte proceeding based on claims that the child was sexually abused by the attorney of the child's mother, the trial court did not abuse its discretion in denying the mother's claims for attorney's fees under Miss. R. Civ. P. 11 for filing a frivolous claim. E. J. M. v. A. J. M., 846 So. 2d 289, 2003 Miss. App. LEXIS 397 (Miss. Ct. App. 2003).

The court did not abuse its discretion in determining that a complaint alleging injuries arising from a 12-car pileup was frivolous because the plaintiff sued an employer based upon no greater knowledge than the fact that the alleged tortfeasor was employed by the employer. Eatman v. City of Moss Point, 809 So. 2d 591, 2000 Miss. LEXIS 206 (Miss. 2000).

A prisoner's action asserting that his constitutional rights were violated when he was transferred from a state prison to a private prison facility over his objection was properly determined to be frivolous where the court found that the prisoner had 20 years' experience as a writwriter and that he was capable of distinguishing a meritorious claim from a frivolous one, and the petition failed to cite any constitutional guarantee or right which had been violated. Tubwell v. Grant, 760 So. 2d 687, 2000 Miss. LEXIS 54 (Miss. 2000).

Since there was no legitimate reason for naming attorneys of mass tort plaintiffs as parties in bill of peace, there could have been no hope of success nor any viable claim with regard to those attorneys, and there also could have been no hope of success as to those parties not served, and therefore the action was frivolous and sanctions were appropriate. Leaf River Forest Prods. v. Deakle, 661 So. 2d 188, 1995 Miss. LEXIS 455 (Miss. 1995).

Where depositions yielded no proof of alleged conspiracy, plaintiff's pleadings and motions were frivolous and sanctions were correctly imposed, since a reasonable person would not have had hope of success in pursuing the suit. Roussel v. Hutton, 638 So. 2d 1305, 1994 Miss. LEXIS 338 (Miss. 1994).

This rule did not place continuing duty on attorney to immediately abandon claim if it later appeared frivolous, and complaint was not frivolous at time it was filed, where attorney believed that case had merit based on information that he had, and that belief was not unreasonable when objectively viewed. Bean v. Broussard, 587 So. 2d 908, 1991 Miss. LEXIS 707 (Miss. 1991).

Although plaintiff had a weak case, it was hardly so devoid of any claim of liability as to be frivolous, and moreover judge had refused to grant defendant a directed verdict at the close of plaintiff's case, and therefore circuit judge erred in assessing sanctions against plaintiff for pursuing a frivolous lawsuit. Nichols v. Munn, 565 So. 2d 1132, 1990 Miss. LEXIS 295 (Miss. 1990).

Because there was a very real dispute over status of school districts in question, and circuit court's own order stated that Mississippi law was unclear, plaintiff's pleading could not be called frivolous and court abused its discretion in imposing sanctions. Greenville Public School Dist. v. Western Line Consol. School Dist., 575 So. 2d 956, 1990 Miss. LEXIS 829 (Miss. 1990), cert. denied, 503 U.S. 950, 112 S. Ct. 1512, 117 L. Ed. 2d 649, 1992 U.S. LEXIS 1927 (U.S. 1992).

Filing is that which triggers the possibility of sanctions; parties and attorneys do not have a continuing duty to monitor their pleadings and motions and abandon them if subsequent events or information coming to their attention suggest that a claim or defense is frivolous. Nationwide Mut. Ins. Co. v. Evans, 553 So. 2d 1117, 1989 Miss. LEXIS 478 (Miss. 1989).

**Particular cases.**

Chancellor abused its discretion in awarding property owners attorney's fees and expenses in an adverse possession action because the neighbors had a colorable claim, and their action was not frivolous or intended to harass the owners. The neighbors submitted an affidavit in which their former attorney indicated that the attorney evaluated the neighbors' claim for adverse possession and visited the contested site before filing suit and that the neighbors acted at all times on the attorney's professional advice and not in bad faith. Winters v. Billings, 281 So. 3d 75, 2019 Miss. App. LEXIS 16 (Miss. Ct. App. 2019).

County court did not abuse its discretion by failing to award sanctions against a county that employed a public defender who represented an indigent client in a criminal matter because, although the client alleged that the county's failure to admit the public defender's employment status resulted in additional expenses and hardship in the client's legal malpractice case, the county at first believed that the public defender was an independent contractor, but later learned that public defenders were considered county employees. Bacallao v. Madison Cty., 269 So. 3d 139, 2018 Miss. App. LEXIS 8 (Miss. Ct. App.), cert. denied, 258 So. 3d 285, 2018 Miss. LEXIS 515 (Miss. 2018).

Chancellor did not err in denying a husband's request for sanctions and attorney's fees for defending the wife's attacks on the validity of the prenuptial agreement where, in light of the unavailability of the original prenuptial agreement, the wife's attacks on the validity of the photocopied duplicates were neither frivolous nor without substantial justification. Black v. Black, 240 So. 3d 1226, 2017 Miss. App. LEXIS 629 (Miss. Ct. App. 2017).

By signing the petition as an "attorney for the petitioner" in a pleading to the court that listed plaintiff as a "petitioner," defendant attorney not only represented to plaintiff that he was his attorney, but he made that same representation to the court. In accordance with Miss. R. Civ. P. 11, when defendant signed the petition as "attorney for petitioner," he certified to the court that this representation was true and accurate. Gibson v. Williams, 186 So. 3d 836, 2016 Miss. LEXIS 108 (Miss. 2016).

Chancery court properly dismissed a first wife's motion to vacate because the wife's attorney was not licensed to practice law in the United States and could not use power of attorney to circumvent the statutory requirements; the attorney was not regularly admitted to practice in the State, was not admitted pro hac vice, and was also the only person who signed the motion to vacate. Fernando v. Sapukotana (In re Estate of Sapukotana), 179 So. 3d 1105, 2015 Miss. LEXIS 636 (Miss. 2015).

Chancery court did not abuse its discretion in denying a husband's motion to alter or amend the award of sanctions because the husband's motion for recusal was without substantial justification; sanctions were awarded because the husband admitted that allegations in his first motion to recuse and attached affidavit were false or beyond his knowledge. Boatwright v. Boatwright, 184 So. 3d 952, 2015 Miss. App. LEXIS 351 (Miss. Ct. App. 2015), cert. denied, 185 So. 3d 385, 2016 Miss. LEXIS 72 (Miss. 2016), cert. denied, 185 So. 3d 385, 2016 Miss. LEXIS 73 (Miss. 2016), cert. denied, 185 So. 3d 385, 2016 Miss. LEXIS 74 (Miss. 2016).

Imposition of sanctions against the customers' attorney under Miss. R. Civ. P. 11 was not an abuse of discretion where the circuit court gave each party ample opportunity to present evidence and arguments regarding their cases for and against the imposition of sanctions, the law was clear as to the tolling of the statute of limitations, and thus, it was evident when the second suit was filed that it was time-barred. Hudson v. Lowe's Home Ctrs., Inc., 170 So. 3d 602, 2014 Miss. App. LEXIS 731 (Miss. Ct. App. 2014), cert. denied, 168 So. 3d 962, 2015 Miss. LEXIS 384 (Miss. 2015).

Husband was properly ordered to pay $ 1,000 of his wife's attorney's fees as a sanction under this rule since the issues he presented in his motion for relief from judgment had been addressed and rejected, and the motion was frivolous. McNeese v. Graves, 129 So. 3d 125, 2013 Miss. App. LEXIS 670 (Miss. Ct. App. 2013).

In a defamation case arising out of a publication of a book, sanctions were not awarded to an author under this rule because the complaint was not frivolous or filed for the purpose of harassment, even though summary judgment was granted to the author. Neilson v. Dawson, 155 So. 3d 920, 2014 Miss. App. LEXIS 501 (Miss. Ct. App. 2014).

Trial court abused its discretion in granting a timber company's request for sanctions after the property owners over which the company had been granted a private road easement were unsuccessful on their post-trial motion. It was not hopeless to ask the trial court to change its mind based on the property owners' argument that the trial court had misapplied the law regarding the necessity of the private road. May v. Adirondack Timber I, LLC, 129 So. 3d 219, 2013 Miss. App. LEXIS 433 (Miss. Ct. App. 2013).

Appellant's attorney was properly ordered to pay an estate's attorneys' fees under Miss. R. Civ. P. 11, as counsel's arguments on the issue of his standing to contest the will were frivolous, his filings contained misrepresented facts, and the estate was forced to incur unnecessary attorney's fees in responding to those filings. Covington v. McDaniel (In re Estate of Necaise), 126 So. 3d 49, 2013 Miss. App. LEXIS 108 (Miss. Ct. App.), cert. denied, 125 So. 3d 658, 2013 Miss. LEXIS 598 (Miss. 2013), cert. denied, 125 So. 3d 658, 2013 Miss. LEXIS 601 (Miss. 2013), cert. denied, 125 So. 3d 658, 2013 Miss. LEXIS 610 (Miss. 2013).

Bona fide purchaser (BFP) for value's claim for attorneys fees under Miss. R. Civ. P. 11(b) was properly denied as while the former owner's claim was weak, it was not frivolous, and there was no evidence that the claim was intended to harass the BFP. Tenn. Props. Inc. v. Gillentine, 66 So. 3d 695, 2011 Miss. App. LEXIS 329 (Miss. Ct. App. 2011).

Complaint by a Mississippi resident against an insurer arising out of uninsured motorist provisions of a policy was properly dismissed as time barred; the original complaint was properly refused by the circuit court clerk because it was signed by a Louisiana attorney who was not licensed to practice in Mississippi, and who had not been admitted pro hac vice. Mitchell v. Progressive Ins. Co., 965 So. 2d 679, 2007 Miss. LEXIS 542 (Miss. 2007).

In a breach of contract case between a rehabilitative services company, a nursing home, and their two owners, the services company was not entitled to recover attorney fees for the defense of a withdrawn counterclaim under Miss. R. Civ. P. 11(b) and Miss. Code Ann. § 11-55-5(1) because, even though the counterclaim was weak, there was no showing that it lacked any hope of success. Cain v. Cain, 967 So. 2d 654, 2007 Miss. App. LEXIS 445 (Miss. Ct. App. 2007).

In a suit for alleged asbestos-related injuries, the trial court's order granting plaintiffs' proposed case management order was reversed, where plaintiffs submitted pleadings which did not, at the very least, include the name or names of the defendants against whom each plaintiff alleged a claim, the time and location of exposure, and the medical condition caused by such exposure; this was a clear failure to comply with Miss. R. Civ. P. 8, 9, 10, and 11. 3M Co. v. Hinton, 910 So. 2d 526, 2005 Miss. LEXIS 111 (Miss. 2005).

Distinction addressed by the trial court in granting the landowner's motion to dismiss his trespass and unjust enrichment action, was that the landowner's claims were dismissed with prejudice rather than without prejudice. The trial court determined the dismissal with prejudice to be a final adjudication of the issues, and therefore, the telecommunications company (originally named as a defendant along with the Mississippi Power Company), obtained a favorable final adjudication on the merits of the case; however, the trial court was in the best position to consider the telecommunication company's ore tenus motion for attorney's fees and costs and did not abuse its discretion in denying same where it found the circumstances may have been unusual, but that they were not exceptional. Miss. Power Co. v. Hanson, 905 So. 2d 547, 2005 Miss. LEXIS 2 (Miss. 2005).

Executor's misrepresentation of the true facts to the chancery court (his brother's known claims of ownership to the livestock and the evidence of a valid inter vivos gift by the decedent), amounted to "improper conduct" under Miss. Code Ann. § 91-7-85, and his removal as executor of the estate was proper. Further, the chancellor properly found that the executor (and his attorney), violated the Mississippi Litigation Accountability Act, Miss. Code Ann. §§ 11-55-1 to 11-55-15 (Rev. 2002), and Miss. R. Civ. P. 11(b), by their misrepresentations in obtaining an order from the chancery court, permitting them to retrieve the subject livestock, and the chancellor's award of attorney's fees and expenses was proper. In re Estate of Ladner v. Ladner, 909 So. 2d 1051, 2004 Miss. LEXIS 1356 (Miss. 2004) (Miss. – 2004).

Under Miss. R. Civ. P. 5(d), only proof of service of discovery responses, and not the responses themselves, need be filed with the court, and a plaintiff's motion for judgment based on the defendant's failure to file discovery responses with the court was thus clearly frivolous and justified sanctions under Miss. R. Civ. P. 11(b). McIntosh v. Victoria Corp., 877 So. 2d 519, 2004 Miss. App. LEXIS 21 (Miss. Ct. App.), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 860 (Miss. 2004).

Although the wife manipulated the judicial system by filing for divorce first in one county, and then, dissatisfied with the results, in a second county, the latter court of which incorporated the former court's orders on child custody and property division, because the divorce judgment was void pursuant to the jurisdiction and venue requirements of Miss. Code Ann. § 93-5-11, the trial court was also without jurisdiction to enter orders for contempt and attorney fees, although a hearing on sanctions was called for. Roberts v. Roberts, 866 So. 2d 474, 2003 Miss. App. LEXIS 915 (Miss. Ct. App. 2003), cert. denied, 866 So. 2d 473, 2004 Miss. LEXIS 169 (Miss. 2004), cert. denied, 2004 Miss. LEXIS 170 (Miss. Feb. 5, 2004).

Though the circuit court's ruling approving the Mississippi Department of Corrections' (MDOC) suspension of an employee was reversed on appeal, the appellate court declined to award the employee attorney's fees as a sanction under Miss. R. Civ. P. 11(b) because it found, given the nature and course of the proceedings, that, even though ultimately lost, MDOC's appeal was not subject to sanctions. Hemba v. Miss. Dep't of Corr., 848 So. 2d 909, 2003 Miss. App. LEXIS 567 (Miss. Ct. App. 2003).

In wife's contempt action against former husband, the wife presented no evidence that the husband issued the 23 checks for child support, which the wife did not present to the bank for months, with fraudulent intent. Rather, the record showed the wife rebuffed the husband's efforts to make good on the checks, and wanted to file yet another complaint causing the husband yet more financial problems and emotional distress, and the wife was properly held in contempt. Broome v. Broome, 832 So. 2d 1247, 2002 Miss. App. LEXIS 858 (Miss. Ct. App. 2002).

Though the Mississippi Life and Health Guaranty Association "stretched the limits" in various defenses it raised to defeat a trustee's claim for coverage for sums lost under an annuity contract with an insolvent insurer, the circuit court did not abuse its discretion by denying the trustee's request for attorney's fees. Bank of Miss. v. Miss. Life & Health Ins. Guar. Ass'n, 850 So. 2d 127, 2003 Miss. App. LEXIS 137 (Miss. Ct. App. 2003).

Circuit court employed incorrect legal standards in considering and imposing sanctions against both parties to insurance dispute, and thus neither sanction order could stand. Nationwide Mut. Ins. Co. v. Evans, 553 So. 2d 1117, 1989 Miss. LEXIS 478 (Miss. 1989).

**Review.**

Trial court specifically addressed and rejected appellant's requests for sanctions on the merits of his claims, and there was no merit to his argument that the trial court employed the wrong legal standard in denying sanctions. Russell v. Beachwalk Condominums Ass'n, 193 So. 3d 657, 2016 Miss. App. LEXIS 311 (Miss. Ct. App. 2016).

Any failure of the trial court to specifically address potential sanctions claims stemmed from the lack of specificity in appellant's motion, which lacked a clear statement of the issues presented; the trial court addressed the contentions that were presented in detail, and the court would not hold the trial court in error for other matters not properly presented by appellant. Russell v. Beachwalk Condominums Ass'n, 193 So. 3d 657, 2016 Miss. App. LEXIS 311 (Miss. Ct. App. 2016).

Trial court did not err in not considering all of appellant's claims for sanctions on their own individual merits because appellant's contentions were not distinctly identified in the statement of issues or separately and distinctly argued and were therefore procedurally barred. Russell v. Beachwalk Condominums Ass'n, 193 So. 3d 657, 2016 Miss. App. LEXIS 311 (Miss. Ct. App. 2016).

This rule vests trial courts with discretionary authority to impose sanctions upon parties or attorneys; where trial court has employed correct legal standards, reviewing court may reverse only where it finds an abuse of discretion. Nationwide Mut. Ins. Co. v. Evans, 553 So. 2d 1117, 1989 Miss. LEXIS 478 (Miss. 1989).

**Sanctions.**

Judge did not abuse her discretion in sanctioning an attorney and his client because a standing order merely implemented Miss. Unif. Ch. Ct. R. 1.06(C), which authorized the opponent's Miss. R. Civ. P 81(d) summons; thus, the attorney's motion to quash and request for sanctions against the opponent had no hope for success. Garner v. Smith, 277 So. 3d 536, 2019 Miss. LEXIS 241 (Miss. 2019).

There was no "clear error of judgment" on the chancery court's part in imposing sanctions against a daughter relating to her response to the motion to dismiss filed by a granddaughter and her husband because the record contained a detailed attorney billing record supporting the time spent in addressing the assertions contained in the daughter's response; that was sufficient support for the chancery court's imposition of reasonable attorney fees. Oliver v. Oliver (In re Estate of Oliver), — So. 3d —, 2019 Miss. App. LEXIS 155 (Miss. Ct. App. Apr. 16, 2019), cert. denied, 287 So. 3d 218, 2020 Miss. LEXIS 24 (Miss. 2020), cert. denied, — So. 3d —, 2020 Miss. LEXIS 201 (Miss. 2020), cert. denied, — U.S. —, 141 S. Ct. 266, 208 L. Ed. 2d 34, 2020 U.S. LEXIS 3956 (U.S. 2020).

There was no "clear error of judgment" on the chancery court's part in imposing sanctions against a daughter relating to her response to the motion to dismiss filed by a granddaughter and her husband because the daughter was aware of the motion, and the record contained no factual basis for her assertion that false statements and motions caused an estate claim to never be heard or litigated. Oliver v. Oliver (In re Estate of Oliver), — So. 3d —, 2019 Miss. App. LEXIS 155 (Miss. Ct. App. Apr. 16, 2019), cert. denied, 287 So. 3d 218, 2020 Miss. LEXIS 24 (Miss. 2020), cert. denied, — So. 3d —, 2020 Miss. LEXIS 201 (Miss. 2020), cert. denied, — U.S. —, 141 S. Ct. 266, 208 L. Ed. 2d 34, 2020 U.S. LEXIS 3956 (U.S. 2020).

Chancery court did not abuse its discretion in imposing sanctions against a daughter because the statements a granddaughter and her husband made in their motion provided ample notice that they were seeking sanctions against the daughter; the granddaughter and husband cited subsection (b) as authority for their request for sanctions and explicitly requested sanctions due to the alleged "scandalous and untrue" statements in the daughter's response to their motion to dismiss. Oliver v. Oliver (In re Estate of Oliver), — So. 3d —, 2019 Miss. App. LEXIS 155 (Miss. Ct. App. Apr. 16, 2019), cert. denied, 287 So. 3d 218, 2020 Miss. LEXIS 24 (Miss. 2020), cert. denied, — So. 3d —, 2020 Miss. LEXIS 201 (Miss. 2020), cert. denied, — U.S. —, 141 S. Ct. 266, 208 L. Ed. 2d 34, 2020 U.S. LEXIS 3956 (U.S. 2020).

Denying an election winner's Miss. R. Civ. P. 11 motion for attorneys' fees in an election contest brought by the unsuccessful candidate was proper where the confusion caused by the misdelivery of election boxes, including the pollbooks, to the wrong wards gave the unsuccessful candidate some hope that she had received more legal votes. Perkins v. McAdams, 234 So. 3d 413, 2017 Miss. LEXIS 419 (Miss. 2017).

Circuit court did not err by failing to sanction a boat insurer for making a frivolous claim for defense costs and expenses where although the cases it cited in support of its position were distinguishable, its position was neither frivolous nor interposed for delay or harassment. Cont'l Cas. Co. v. Allstate Prop. & Cas. Ins. Co., 235 So. 3d 40, 2017 Miss. LEXIS 340 (Miss. 2017).

Chancery court properly dismissed, for lack of jurisdiction, an injured customer's bill of discovery regarding her personal injury and premises liability claims against a grocery store because she had an adequate opportunity for discovery in circuit court where the discovery she desired was only incidental to an action at law for which a justiciable claim already has been articulated in her complaint, avoidance of sanctions for a frivolous suit did not provide support for her bill of discovery, and she failed to make a showing that the information sought could not be obtained by other methods. Kuljis v. Winn-Dixie Montgomery, LLC, 214 So. 3d 283, 2017 Miss. LEXIS 120 (Miss. 2017).

Appellant argued that appellee lacked authority or standing to sue, but these arguments were all premised on the unsupported assertion that appellant was a lawful tenant when appellee filed suit; there was some evidence in the record suggesting the potential for a factual dispute, and the denial of sanctions was proper. Russell v. Beachwalk Condominiums Ass'n, 193 So. 3d 657, 2016 Miss. App. LEXIS 311 (Miss. Ct. App. 2016).

Reservation of the issue of sanctions does not prevent an appeal of an otherwise final order on the merits. Therefore, in an easement dispute, an appellate court was able to reach the issue of whether an out-of-time appeal should have been granted because an order enforcing a settlement was final and appealable; only the issue of sanctions remained to be resolved, which was collateral to the merits. Crosby v. Mittelstaedt, 186 So. 3d 415, 2016 Miss. App. LEXIS 95 (Miss. Ct. App. 2016).

Although defendant bore the burden of designating those parts of the record necessary for the appeal, defendant designated no transcript, and no testimony of the trial was made a part of the record. The record contained insufficient evidence to analyze defendant's argument the trial court should have granted his motion for sanctions. Hampton v. Blackmon, 145 So. 3d 632, 2014 Miss. LEXIS 309 (Miss. 2014).

Because appellant's complaint presented a viable legal theory regarding the amount of damages she sustained after she was sprayed with gasoline from a leaking gas-pump hose at a gas station owned by appellee, the award of sanctions was inappropriate. Dyse v. BKS, Inc., 135 So. 3d 166, 2013 Miss. App. LEXIS 568 (Miss. Ct. App. 2013), cert. denied, 136 So. 3d 437, 2014 Miss. LEXIS 190 (Miss. 2014).

Trial court did not abuse its discretion in awarding attorneys fee sanction against plaintiff and his counsel in a quiet title action because the record established that both plaintiff and his counsel were fully aware of the fact that the quiet title claim, based on adverse possession and regarding a parcel that was held by the United States, could not be successful under 28 U.S.C.S. § 2409a. Sullivan v. Maddox, 122 So. 3d 75, 2013 Miss. App. LEXIS 26 (Miss. Ct. App.), cert. denied, 119 So. 3d 328, 2013 Miss. LEXIS 453 (Miss. 2013).

Trial court erred in awarding attorneys' fees to appellee's sons and a corporation pursuant to Miss. R. Civ. P. 11(b) because it denied their motion for summary judgment. Knights' Piping, Inc. v. Knight, 123 So. 3d 451, 2012 Miss. App. LEXIS 814 (Miss. Ct. App. 2012), cert. denied, 123 So. 3d 450, 2013 Miss. LEXIS 521 (Miss. 2013), cert. denied, 2013 Miss. LEXIS 526 (Miss. Oct. 3, 2013).

Doctor's motion for sanctions under Miss. R. Civ. P. 11 and Miss. Code Ann. § 11-55-5 against a patient's attorney in a wrongful death action that alleged medical malpractice was properly denied as the attorney had a reasonable hope of success and had performed due diligence in determining the validity of the claim against the doctor. Todd v. Clayton, 53 So. 3d 827, 2011 Miss. App. LEXIS 51 (Miss. Ct. App. 2011).

Based on the lack of evidence in the record, the fact that a grantee's brother was not a movant in the grantee's motion for Miss. R. Civ. P. 11 sanctions, and ambiguity regarding the calculation of the judgment, there was plain error in a chancellor's award of attorney's fees. Walton v. Walton, 44 So. 3d 1035, 2010 Miss. App. LEXIS 208 (Miss. Ct. App. 2010).

Appellate court could not find that the chancery court erred in concluding that sanctions under neither Miss. R. Civ. P. 11(b) nor the Litigation Accountability Act, Miss. Code Ann. § 11-55-5(1) were warranted because while the chancellor had ordered the property owner to pay the county's fees for producing the records, it was unclear whether the property owner was to pay the bill within 20 days of the hearing or the final judgment. However, once the property owner paid the fees and the county withdrew its motion, the issue became moot. LaCroix v. Marshall County Bd. of Supervisors, 28 So. 3d 650, 2009 Miss. App. LEXIS 537 (Miss. Ct. App. 2009), cert. denied, 27 So. 3d 404, 2010 Miss. LEXIS 90 (Miss. 2010).

In a will-contest action, even if the matter were properly before the appellate court, the girlfriend of the decedent's motion for sanctions and attorney fees under Miss. Code Ann. § 11-55-5(1) and Miss. R. Civ. P. 11(b) was waived since she filed no notice of appeal for her "counter-appeal" as required by Miss. R. App. P. 4(a). Moreover, once the chancellor held the matter in abeyance, the record did not reflect that the girlfriend raised the motion for sanctions again until her appellate brief and she did not file her notice of appeal until 28 days after entry of the final judgment; at any time in the interim, the girlfriend could have requested a ruling on her motion for sanctions, but she failed to do so. Frazier v. Loew (In re Caspelich), 22 So. 3d 1199, 2009 Miss. App. LEXIS 200 (Miss. Ct. App. 2009).

Violations under the Litigation Accountability Act, Miss. Code Ann. § 11-55-5(1) had to be brought in motion form; thus, the Legislature did not create a separate cause of action by virtue of Miss. R. Civ. P. 11, and the doctor's claim against the attorney was properly dismissed; the attorney did not act in manner that was improper or would warrant sanctions. Rose v. Tullos, 994 So. 2d 734, 2008 Miss. LEXIS 573 (Miss. 2008).

Attorney was liable for attorneys' fees and costs under Miss. R. Civ. P. 11 where the several pleadings filed by the attorney constituted "harassment" under the Rule. In re Spencer, 985 So. 2d 330, 2008 Miss. LEXIS 327 (Miss.), cert. denied, 555 U.S. 1046, 129 S. Ct. 629, 172 L. Ed. 2d 610, 2008 U.S. LEXIS 8600 (U.S. 2008).

Chancellor abused her discretion by awarding a judgment of fees and expenses greater than that supported by the record as there was nothing in the Litigation Accountability Act, Miss. Code Ann. § 11-55-1 et seq., or Miss. R. Civ. P. 11 that supported awarding attorneys' fees and expenses in excess of those actually incurred. In re Spencer, 985 So. 2d 330, 2008 Miss. LEXIS 327 (Miss.), cert. denied, 555 U.S. 1046, 129 S. Ct. 629, 172 L. Ed. 2d 610, 2008 U.S. LEXIS 8600 (U.S. 2008).

Chancellor did not abuse her discretion in finding the several pleadings filed by the attorney constituted "harassment" under Miss. R. Civ. P. 11; therefore, the attorney was liable for attorneys' fees and costs under Rule 11. In re Spencer, 2008 Miss. LEXIS 126 (Miss. Feb. 28, 2008), sub. op., op. withdrawn, 985 So. 2d 330, 2008 Miss. LEXIS 327 (Miss. 2008).

Chancellor committed plain error and therefore abused her discretion by awarding a judgment of fees and expenses greater than that supported by the record; there was nothing in the Litigation Accountability Act (Act) or Miss. R. Civ. P. 11 that supported awarding attorneys' fees and expenses in excess of those actually incurred as both the Act and the Rule allowed only for the recovery of "reasonable" fees and costs; the punitive functions of both the Act and the Rule were served by simply awarding reasonable attorneys' fees and costs, not an amount in excess of them. In re Spencer, 2008 Miss. LEXIS 126 (Miss. Feb. 28, 2008), sub. op., op. withdrawn, 985 So. 2d 330, 2008 Miss. LEXIS 327 (Miss. 2008).

Trial court's failure to award attorney fees was not an abuse of discretion when the parties did not address attorney fees in their agreement; further, the trial court did not abuse its discretion in refusing to impose sanction or monetary damages. Johnston v. Palmer, 963 So. 2d 586, 2007 Miss. App. LEXIS 531 (Miss. Ct. App. 2007).

Trial court erred in dismissing plaintiffs' case without prejudice pursuant to Miss. R. Civ. P. 11(a) and 41(b) based on the fact that plaintiffs were originally represented by a foreign attorney, who had not been admitted pro hac vice pursuant to Miss. R. App. P. 46 because a subsequent appearance bya member of the Mississippi bar cured the error; the foreign attorney's violation of Miss. R. App. P. 46 and La. St. Bar art. XVI, R. 5.5(a), which prohibited the unauthorized practice of law, warranted sanctions against the attorney and notification of the violation to the Louisiana state bar. Dinet v. Gavagnie, 948 So. 2d 1281, 2007 Miss. LEXIS 35 (Miss. 2007).

In an appeal of a judgment terminating his parental rights, there was no evidence in the record that the father pursued litigation in the sole attempt to harass the mother, and the father sought relief for a fundamental right, that of being a parent to his two children; therefore, the appellate court found no abuse of discretion by the chancellor and affirmed the trial court's orders denying the mother's request for reasonable expenses and attorney fees. C.M. v. R.D.H., 947 So. 2d 1023, 2007 Miss. App. LEXIS 29 (Miss. Ct. App. 2007).

Sanctions were not proper where law firm filed an interpleader to determine ownership of attorney fees it held in a county after other attorneys had commenced litigation over the funds the law firm held in another county. Scruggs, Millette, Bozeman & Dent, P.A. v. Merkel & Cocke, P.A., 804 So. 2d 1000, 2001 Miss. LEXIS 317 (Miss. 2001).

Trial court improperly awarded sanctions against the Mississippi Department of Human Services in a suit seeking to establish that a divorce decree that did not include a child support award was either void or insufficiently supported; neither argument was necessarily frivolous, and the trial court failed to set forth its reasons for awarding sanctions. Miss. Dep't of Human Servs. v. Shelby, 2001 Miss. LEXIS 209 (Miss. Aug. 23, 2001), op. withdrawn, sub. op., 802 So. 2d 89, 2001 Miss. LEXIS 326 (Miss. 2001).

Sanctions were properly awarded to the defendant in an action for intentional infliction of emotional distress based on an allegation that the plaintiff's former wife set out on a course of conduct calculated to lead to the total destruction of the parent-child/grandparent-child relationship between the parties' child and her father's side of the family where the trial court found that the plaintiffs had no hope of sucess in the case. Little v. Collier, 759 So. 2d 454, 2000 Miss. App. LEXIS 103 (Miss. Ct. App. 2000).

Sanctions under this rule were inappropriate in a proceeding arising from a city's failure to act on a request for a building permit because the issue was finally deemed moot due to the expiration of the applicant's option on the property at issue and subsequent sale of the property; when the case was determined to be moot, the issue of sanctions also became moot. City of Madison v. Bryan, 763 So. 2d 162, 2000 Miss. LEXIS 114 (Miss. 2000).

As the appellant had a viable claim concerning the type of alimony awarded in the final judgment of divorce, the appellee was not entitled to sanctions, notwithstanding her assertion that the appellant was attempting to harass her by filing a frivolous appeal. Murray v. Murray, 1999 Miss. App. LEXIS 265 (Miss. Ct. App. May 4, 1999), aff'd in part and rev'd in part,

754 So. 2d 1200, 2000 Miss. LEXIS 51 (Miss. 2000).

Sanctions were inappropriate in dispute between collection agency and its client, where it was conceivable that collection agency thought it had an arguable claim. Milliken & Michaels, Inc. v. Fred Netterville Lumber Co., 676 So. 2d 266, 1996 Miss. LEXIS 305 (Miss. 1996).

Substantial justification existed to support personal representative's filing of complaint alleging undue influence on part of principal beneficiary to will, and there was no evidence that claim was unnecessarily expanded or brought to delay or harass, and therefore sanctions against representative were unwarranted. Pallatin v. Jones (In re Will of Fankboner), 638 So. 2d 493, 1994 Miss. LEXIS 314 (Miss. 1994).

There was nothing in record to suggest that plaintiffs or their attorneys acted in bad faith, and case set forth by plaintiffs' attorneys was not so lacking in any hope for success as to render it frivolous; therefore trial court's imposition of sanctions was reversed. Stevens v. Lake, 615 So. 2d 1177, 1993 Miss. LEXIS 73 (Miss. 1993).

Trial court erroneously applied a theory of "continuing duty" to assess merits of lawsuit, and where record failed to demonstrate that plaintiff and her attorney knew of lack of proximate cause at time complaint was filed, sanctions were not warranted. January v. Barnes, 621 So. 2d 915, 1992 Miss. LEXIS 832 (Miss. 1992).

Suit filed by candidate in mayoral election could not be deemed frivolous where lower court misapplied the law, and sanctions against candidate were unjustified since there was no evidence that she had harassment or delay in mind when she instituted proceedings. Stringer v. Lucas, 608 So. 2d 1351, 1992 Miss. LEXIS 657 (Miss. 1992).

Sanctions were improperly imposed where plaintiff filed suit in chancery court in good faith; by virtue of prior precedent, plaintiff was following what it believed to be the correct procedure for trying questions of title. McDonald's Corp. v. Robinson Industries, Inc., 592 So. 2d 927, 1991 Miss. LEXIS 526 (Miss. 1991).

Circuit judge did not err in assessing $500 sanction against plaintiff for his false answer to interrogatory, which neither he nor his counsel ever attempted to correct. Nichols v. Munn, 565 So. 2d 1132, 1990 Miss. LEXIS 295 (Miss. 1990).

Sanctions against plaintiff were appropriate, where plaintiff had no hope of success on its claim for injunctive relief, and defendant had a complete defense to plaintiff's claim for repayment of bank note and advances on commissions. Tricon Metals & Services, Inc. v. Topp, 537 So. 2d 1331, 1989 Miss. LEXIS 3 (Miss. 1989).

Award of attorney's fees was reversed, where case involved one of the most litigated issues in state for the preceding eight years, and the public concern was meritorious. Hill v. Thompson, 564 So. 2d 1, 1989 Miss. LEXIS 458 (Miss. 1989).

Although pro se parties should be held to same rules of procedure and substantive law as represented parties, plaintiff would not be penalized via sanctions for exaggerating her claim, where defendant was put to no additional expense and plaintiff had a justifiable claim. Dethlefs v. Beau Maison Dev. Corp., 511 So. 2d 112, 1987 Miss. LEXIS 2629 (Miss. 1987).

## RESEARCH REFERENCES

**ALR.**

When statute of limitations begins to run upon action against attorney for legal malpractice–deliberate wrongful acts or omissions. 67 A.L.R.5th 587.

**Law Reviews.**

Taming an Elephant: A Closer Look at Mass Tort Screening and the Impact of Mississippi Tort Reforms, 26 Miss. C. L. Rev. 253, 2006/2007.

## Rule 12. Defenses and objections — when and how presented — by pleading or motion — motion for judgment on the pleadings.

(a) *When presented.* — A defendant shall serve his answer within thirty days after the service of the summons and complaint upon him or within such time as is directed pursuant to Rule 4. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within thirty days after the service upon him. The plaintiff shall serve his reply to a counter-claim in the answer within thirty days after service of the answer or, if a reply is ordered by the court, within thirty days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court:

(1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action;

(2) if the court grants a motion for a more definite statement, the responsive pleading shall be served within ten days after the service of the more definite statement.

The times stated under this subparagraph may be extended, once only, for a period not to exceed ten days, upon the written stipulation of counsel filed in the records of the action.

(b) *How presented.* — Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) Lack of jurisdiction over the subject matter,
(2) Lack of jurisdiction over the person,
(3) Improper venue,
(4) Insufficiency of process,
(5) Insufficiency of service of process,
(6) Failure to state a claim upon which relief can be granted,
(7) Failure to join a party under Rule 19.

No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56; however, if on such a motion matters outside the pleadings are not presented, and if the motion is granted, leave to amend shall be granted in accordance with Rule 15(a).

(c) *Motion for judgment on the pleadings.* — After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56; however, if on such a motion matters outside the pleadings are not presented, and if the motion is granted, leave to amend shall be granted in accordance with Rule 15 (a).

(d) *Preliminary hearings.* — The defenses specifically enumerated (1) through (7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment on the pleadings (subdivision (c) of this rule), shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) *Motion for more definite statement.* — If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) *Motion to strike.* — Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within thirty days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) *Consolidation of defenses in motion.* — A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) *Waiver or preservation of certain defenses.* —

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by a motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15 (a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion that the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action or transfer the action to the court of proper jurisdiction.

**HISTORY: Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

## ADVISORY COMMITTEE NOTE

The motion for a more definite statement requires merely that-a more definite statement-and not evidentiary details. The motion will lie only when a responsive pleading is required, and is one remedy for a vague or ambiguous pleading. A defendant may also file a Rule 12(b)(6) motion as a means of challenging a vague or ambiguous pleading.

Ordinarily, Rule 12(f) will require only the objectionable portion of the pleadings to be stricken, and not the entire pleading. Motions going to redundant or immaterial allegations, or allegations of which there is doubt as to relevancy, should be denied, the issue to be decided being whether the allegation is prejudicial to the adverse party. Motions to strike a defense for insufficiency should, if granted, be granted with leave to amend.

Rule 12(g) provides that a partymaking a pre-answer motion pursuant to Rule 12 may join with such motion any other available Rule 12 pre-answer motions. If a party makes a Rule 12 pre-answer motion and omits an available Rule 12 defense or objection, the party may only raise such omitted defense or objection as allowed by Rule 12(h)(2). Rule 12(h)(2) allows a party to raise the defense of failure to state a claim and/or the defense of failure to join a party indispensable under Rule 19 by asserting such defenses in the answer, by raising such defenses in a motion for judgment on the pleadings, or by raising such defenses at the trial on the merits. Rule 12(g) encourages a party to consolidate all available Rule 12 motions so as to avoid successive motions.

Rule 12(h)(1) states that certain specified defenses which are available to a party when the party makes a pre-answer motion, but which are omitted from the pre-answer motion, are waived. The specified defenses include: (1) lack of personal jurisdiction; (2) improper venue; (3) insufficiency of process; and (4) insufficiency of service of process. In addition, Rule 12(h)(1) further provides that if a party answers rather than filing a pre-answer motion, the party must raise any of these specified defenses in the answer or an amended answer made as a matter of course pursuant to Rule 15(a) to avoid waiver of such defenses.

Under Rule 12(h)(3) a question of subject matter jurisdiction may be presented at any time, either by motion or answer. Further, it may be asserted as a motion for relief from a final judgment under Rule 60(b)(4) or may be presented for the first time on appeal. The provision directing a court lacking subject matter jurisdiction to transfer the action to a court having jurisdiction preserves the traditional Mississippi practice of transferring actions between the circuit and chancery courts, as provided by Miss. Const. §§157 (all causes that may be brought in the circuit court whereof the chancery court has jurisdiction shall be transferred to the chancery court) and 162 (all causes that may be brought in chancery court whereof the circuit court has exclusive jurisdiction shall be transferred to the circuit court), but not reversing for a court's improperly exercising its jurisdiction, Miss. Const. §147.

## JUDICIAL DECISIONS

### ANALYSIS

Construction.
Affirmative defenses.
Costs.
Discovery.
Dismissal.
Failure to state a claim.
Hearings.
Motions.
Necessary parties.
Personal jurisdiction.
Pleadings.
Service of process.
Stipulation.
Subject matter jurisdiction.
Summary judgment.
Venue.
Waiver.

**Construction.**

A court's inquiries under M.R.C.P. Rule

12(b)(2) are not only separate from, but also precede, consideration of Rule 12(b)(6) inquiries. Petters v. Petters, 560 So. 2d 722, 1990 Miss. LEXIS 201 (Miss. 1990).

When a complaint is tested via motion to dismiss for failure to state a claim, its sufficiency in substantial part is determined by reference to M.R.C.P. Rules 8(a) and (e). Grantham v. Mississippi Dep't of Corrections, 522 So. 2d 219, 1988 Miss. LEXIS 117 (Miss. 1988).

When a complaint is tested via motion under M.R.C.P. Rule 12(b)(6) for failure to state a claim upon which relief may be granted, sufficiency of complaint is in substantial part determined by reference to subdivisions (a) and (e) of Rule 8. Luckett v. Mississippi Wood, Inc., 481 So. 2d 288, 1985 Miss. LEXIS 2425 (Miss. 1985).

**Affirmative defenses.**

In a breach of contract action brought by the employee, the employer did not assert any affirmative defenses in his answer to the employee's complaint; rather, the employer waited and asserted them in his motion for summary judgment, which was more than four years later. When a responsive pleading was required, all affirmative defenses must be raised in that pleading, Miss. R. Civ. P. 12(b); therefore, the chancellor erred in relying on those affirmative defenses in reaching his judgment. Harris v. Tom Griffith Water Well & Conductor Serv., 26 So. 3d 352, 2009 Miss. App. LEXIS 39 (Miss. Ct. App. 2009), rev'd, 26 So. 3d 338, 2010 Miss. LEXIS 46 (Miss. 2010).

**Costs.**

Trial court did not err in failing to award plaintiff her expenses, costs and attorney's fees when defendants' M.R.C.P. Rule 12 motions to dismiss were denied; provision in Rule 56 (h) of award of costs to prevailing party was not applicable to motions under Rule 12. Joseph v. Tennessee Partners, Inc., 501 So. 2d 371, 1987 Miss. LEXIS 2271 (Miss. 1987), overruled, Churchill v. Pearl River Basin Dev. Dist., 619 So. 2d 900, 1993 Miss. LEXIS 74 (Miss. 1993).

**Discovery.**

Trial court did not abuse its discretion in staying discovery when a judge raised judicial immunity in a motion to dismiss. Newsome v. Shoemake, 234 So. 3d 1215, 2017 Miss. LEXIS 367 (Miss. 2017).

**Dismissal.**

Dismissal for insufficiency of service of process should be entered without prejudice, but a summary judgment is with prejudice and precludes refiling of the complaint. Thornton v. Freeman, 242 So. 3d 188, 2018 Miss. App. LEXIS 138 (Miss. Ct. App. 2018).

Although plaintiff contended that he sufficiently alleged violation of several statutes, particularly Miss. Code Ann. §§ 43-19-37 and 43-19-61, which plaintiff argued required the establishment of a special fund that would be used for (among other things) paying his salary as a child support enforcement attorney, the trial court did not err in dismissing these claims pursuant to Miss. R. Civ. P. 12(b)(6). Satterfield v. State, 158 So. 3d 380, 2015 Miss. App. LEXIS 98 (Miss. Ct. App. 2015).

Three cases were properly dismissed for insufficiency of process and insufficiency of service of process, under Miss. R. Civ. P. 12(b)(4)-(5), where the process issued to defendants was deficient and not in substantial compliance with Miss. R. Civ. P. 4(b), a pro se response by one defendant might have constituted an appearance under Miss. R. Civ. P. 55, but was not a valid answer because it did not comport with the filing requirement of Miss. R. Civ. P. 5(d). Fletcher v. Limeco Corp., 996 So. 2d 773, 2008 Miss. LEXIS 598 (Miss. 2008).

Because Miss. Code Ann. § 15-1-36(15) clearly and unambiguously stated that no action against a health care provider could be commenced without providing a 60-day pre-suit notice and because the personal representative of a decedent's estate failed to provide any written notice to a nursing care facility concerning her intent to commence a wrongful death suit, the nursing care facility was entitled to a dismissal. Forest Hill Nursing Ctr. & Long Term Care Mgmt., LLC v. Brister, 992 So. 2d 1179, 2008 Miss. LEXIS 521 (Miss. 2008).

Although the state legislature could not promulgate statutes dictating to the judiciary what a party was required to attach to pleadings filed in court, the legislature had constitutional authority to set out pre-suit requirements such as the requirement that a litigant obtain an expert consultation prior to commencing a medical malpractice suit. Where the attorney representing the personal representative of the estate of a decedent in a wrongful death suit against a nursing care facility admitted that he did not consult an expert prior to commencing the lawsuit, the nursing care facility was entitled to a dismissal. Forest Hill Nursing Ctr. & Long Term Care Mgmt., LLC v. Brister, 992 So. 2d 1179, 2008 Miss. LEXIS 521 (Miss. 2008).

Trial court properly dismissed individuals' complaint against the Supreme Court chief justice for appointing a special chancellor to hear outstanding matters regarding two underlying cases as the chief justice enjoyed judicial immunity and the appointment was a judicial act. Vinson v. Prather, 879 So. 2d 1053, 2004 Miss. App. LEXIS 555 (Miss. Ct. App. 2004).

In initial suit by homeowners against a seller, for fraud, where the homebuilder appeared for a deposition pursuant to a subpoena, the homebuilder did not make an appearance when the homebuilder was not yet named as a party. Thus, when the homebuilder was later added as defendant in the homeowners' negligence action, and failed to timely answer, entry of default judgment was proper; further, the homebuilder's alleged inability to contact the homeowners' counsel did not annul the homebuilder's obligation to timely answer under Miss. R. Civ. P. 12. Williams v. Kelly, 872 So. 2d 783, 2004 Miss. App. LEXIS 420 (Miss. Ct. App. 2004).

Motion to dismiss a breach of contract claim was improper and was reversed on de novo review. A company properly pled a breach where it pled that a partnership with which it had a contract for the sale of land materially breached the contract first and where it pled that the partnership took actions, including wrongfully withholding a legal description of the property, that violated the covenant of good faith and fair dealing by preventing the company from fulfilling the terms of the agreement. Favre Prop. Mgmt., LLC v. Cinque Bambini, 863 So. 2d 1037, 2004 Miss. App. LEXIS 32 (Miss. Ct. App. 2004).

Dismissal, pursuant to Miss. R. Civ. P. 12(b)(6), of an inmate's claim against the employees of the Missouri Department of Corrections was proper where the employees were acting within the course and scope of their employment; the inmate's negligence action was barred by the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq. Whitt v. Gordon, 872 So. 2d 71, 2004 Miss. App. LEXIS 56 (Miss. Ct. App. 2004).

In a suit filed by a former employer against a former employee, the employment agreement that was presented to the chancery court was not a valid enforceable contract as it had lapsed by its own terms without renewal more than a year before the lawsuit was filed. As it was simple contract law that a valid and enforceable contract was required to maintain an action for breach of contract or injunctive relief thereon, the chancery court did not err in granting a motion to dismiss. HeartSouth, PLLC v. Boyd, 865 So. 2d 1095, 2003 Miss. LEXIS 695 (Miss. 2003).

In a suit filed by a former employer against a former employee, the employment agreement was not ambiguous, and by its own language the employment agreement had in fact lapsed one year before the employee left the employer's organization and one year and 16 days before the employer filed its complaint for breach of contract. Therefore, the court did not err in finding that the contract had in fact expired and was invalid and unenforceable. HeartSouth, PLLC v. Boyd, 865 So. 2d 1095, 2003 Miss. LEXIS 695 (Miss. 2003).

Court properly dismissed a suit filed by a former employer against a former employee, where the covenant not to compete expired 16 days before the filing of the complaint, and the agreement lapsed for want of renewal. HeartSouth, PLLC v. Boyd, 865 So. 2d 1095, 2003 Miss. LEXIS 695 (Miss. 2003).

Trial court properly dismissed the dependents' suit against the municipal officials under Miss. R. Civ. P. 12(c) where, before municipal officials could be found negligent, thereby entitling a plaintiff to recover, the plaintiff had to show the existence of a legal duty owed to him by the municipal officials; any assertion that the municipal officials breached a duty to the decedent because they failed to guarantee his safety and well-being was unrealistic and untenable, given that the municipal officials were not present when the threat on the decedent's life was made, and the municipal officials, acting in their individual capacity, owed no duty to the decedent. Dependants of Reid v. City of Canton, 858 So. 2d 163, 2003 Miss. App. LEXIS 912 (Miss. Ct. App. 2003).

While truck owner's claim to determine insurance coverage under Miss. R. Civ. P. 57(b)(2) was futile because the insurance company did not deny coverage, and dismissal as to that claim was proper, the trial court abused its discretion in denying the truck owner's motions to compel discovery, and for leave to file a first amended complaint, to add a claim of intentional infliction of emotional distress based on the plain language of Miss. R. Civ. P. 15(a). Poindexter v. S. United Fire Ins. Co., 838 So. 2d 964, 2003 Miss. LEXIS 86 (Miss. 2003).

Action for wrongful death of inmate was properly dismissed; fact that medical treatment was inadequate for severity of inmate's condition did not indicate that doctors in question committed "willful wrongs or malicious acts" sufficient to overcome defendants' qualified immunity. Sparks v. Kim, 701 So. 2d 1113, 1997 Miss. LEXIS 619 (Miss. 1997).

Governor's contested actions were discretionary and, as such, mandamus could not lie, and citizens' challenge to permit for building of hazardous waste treatment facility should have been dismissed for failure to state a claim. USPCI of Mississippi v. State ex rel. McGowan, 688 So. 2d 783, 1997 Miss. LEXIS 42 (Miss. 1997).

Chancery court did not err in dismissing plaintiff's suit against surveyor without stating any grounds for the dismissal, where it was obvious that plaintiff had merely claimed error or negligence, but failed to specifically show in what way defendant was negligent. Weeks v. Thomas, 662 So. 2d 581, 1995 Miss. LEXIS 498 (Miss. 1995).

Board of supervisors can only make a county liable for a contract by a valid order duly entered upon its minutes, and where there was a clear absence of such approval the trial court's dismissal was proper. Butler v. Board of Supervisors, 659 So. 2d 578, 1995 Miss. LEXIS 385 (Miss. 1995).

Dismissal of action against school district for negligent retention and supervision of employee was premature, and required remand for further discovery and development of facts. T.M. v. Noblitt, 650 So. 2d 1340, 1995 Miss. LEXIS 15 (Miss. 1995).

As a matter of law, prisoner's civil rights complaint did not state a claim upon which relief could be granted, since being housed with inmate diagnosed with active tuberculosis was responsibility of classification committee, not the five named defendants, and prisoner's complaint was not properly pled since it did not state acts or omissions by named defendants which demonstrated conduct amounting to deliberate indifference. Bilbo v. Thigpen, 647 So. 2d 678, 1994 Miss. LEXIS 598 (Miss. 1994).

In view of notice pleading requirements of M.R.C.P. Rule 8, client's complaint against his former attorney stated at least one actionable cause upon which relief could be granted, and therefore summary judgment in favor of attorney was reversed. Owen v. Pringle, 621 So. 2d 668, 1993 Miss. LEXIS 291 (Miss. 1993).

Trial court properly granted defendant's motion to dismiss, since plaintiffs received full satisfaction of their claim when default judgment was paid by a co-defendant, together with interest; plaintiffs were thus estopped from pursuing any claim for relief against defendant. Evans v. Sharpley, 607 So. 2d 1210, 1992 Miss. LEXIS 601 (Miss. 1992).

Proper motion for defendant to make at the close of plaintiffs' case was a motion to dismiss pursuant to M.R.C.P. Rule 41(b), rather than Rule 12(b)(6); under Rule 41(b), judge must consider the evidence fairly, rather than in the light most favorable to the plaintiff. Century 21 Deep South Properties, Ltd. v. Corson, 612 So. 2d 359, 1992 Miss. LEXIS 804 (Miss. 1992).

Since circuit court acted entirely within the pleadings and struck all affidavits before ruling, supreme court would treat judgment below as though court had dismissed complaint for failure to state a claim upon which relief could be granted, as opposed to one disposed of on summary judgment. State ex rel. Moore v. Molpus, 578 So. 2d 624, 1991 Miss. LEXIS 186 (Miss. 1991).

Motion for dismissal under subdivision (b)(6) of this rule raises an issue of law, over which supreme court conducts de novo review. Tucker v. Hinds County, 558 So. 2d 869, 1990 Miss. LEXIS 173 (Miss. 1990).

To grant a motion under subdivision (b)(6) of this rule, it must appear to a certainty that plaintiff is entitled to no relief under any set of facts that could be provided in support of his claim. Martin v. Phillips, 514 So. 2d 338, 1987 Miss. LEXIS 2820 (Miss. 1987).

Defendant had no right of appeal from refusal of trial judge to grant his M.R.C.P. Rule 12(b)(6) motion to dismiss the plaintiff's complaint; any defects had been cured procedurally by subsequent proceedings in the case. The complaint, when conformed with the proof, stated a totally viable claim. Stanton & Associates, Inc. v. Bryant Constr. Co., 464 So. 2d 499, 1985 Miss. LEXIS 1916 (Miss. 1985).

**Failure to state a claim.**

Contractor had no estoppel claim based on the unfulfilled promise to raise sewer rates where there that promise was not in the city council's minutes, and thus, the contractor could not have reasonably relied upon it. Groundworx, LLC v. Blanton, 234 So. 3d 363, 2017 Miss. LEXIS 290 (Miss. 2017).

Contractor's breach of contract claim against a city was properly dismissed for failure to state a claim where no language in the contract required the city to identify a revenue stream for the debt-service payments, the contract clearly provided that the city's obligations did not begin until the contractor secured financing for a land-application treatment system for sewage and wastewater and had to start servicing its debt, the contractor had not secured funding, and if the contractor failed to secure financing, the contract authorized the city to cancel the project without owing anything. Groundworx, LLC v. Blanton, 234 So. 3d 363, 2017 Miss. LEXIS 290 (Miss. 2017).

Circuit court properly dismissed a husband's breach of contract, bad-faith denial of insurance benefits, and civil conspiracy claims against an insurer where the insurer had paid all of the proceeds due under a homeowner's insurance policy. Breeden v. Buchanan, 164 So. 3d 1057, 2015 Miss. App. LEXIS 45 (Miss. Ct. App.), cert. denied, 160 So. 3d 704, 2015 Miss. LEXIS 210 (Miss. 2015).

Circuit court properly dismissed a negligent infliction of emotional distress claim against an insurer where the complaint, as a matter of law, failed to plead any such conduct that would have constituted the tort of negligent infliction of emotional distress against the insurer. Breeden v. Buchanan, 164 So. 3d 1057, 2015 Miss. App. LEXIS 45 (Miss. Ct. App.), cert. denied, 160 So. 3d 704, 2015 Miss. LEXIS 210 (Miss. 2015).

Circuit court properly dismissed an intentional infliction of emotional distress claim against an insurer where the complaint alleged that insurer failed to pay the husband the insurance proceeds, delayed the claim, refused to discuss it with him, and provided information to his former wife, who was not a party to the contract. Breeden v. Buchanan, 164 So. 3d 1057, 2015 Miss. App. LEXIS 45 (Miss. Ct. App.), cert. denied, 160 So. 3d 704, 2015 Miss. LEXIS 210 (Miss. 2015).

It was not error for the circuit court to consider the entire insurance policy in considering the insurer's motion to dismiss where the husband's complaint sought to enforce the terms of the insurance policy, and only a few pages of the policy were attached. Breeden v. Buchanan, 164 So. 3d 1057, 2015 Miss. App. LEXIS 45 (Miss. Ct. App.), cert. denied, 160 So. 3d 704, 2015 Miss. LEXIS 210 (Miss. 2015).

Court of Appeals of Mississippi finds that a motion to dismiss for failure to state a claim limits the matters that the trial court may consider. However, the court may certainly consider the contents of the complaint, the documents attached to the complaint, and the documents that are referred to in the complaint if they are central to the plaintiff's claim, even though they are not attached to the complaint. Breeden v. Buchanan, 164 So. 3d

1057, 2015 Miss. App. LEXIS 45 (Miss. Ct. App.), cert. denied, 160 So. 3d 704, 2015 Miss. LEXIS 210 (Miss. 2015).

Because father's claim on a promissory note against a son would still be futile if a trial court allowed him to amend it under Miss. R. Civ. P. 15 due to the running of the statute of limitations, trial court did not err in denying the father's motion to amend and granting the son's motion to dismiss under Miss. R. Civ. P. 12(b)(6). Merideth v. Merideth, 987 So. 2d 477, 2008 Miss. App. LEXIS 393 (Miss. Ct. App. 2008).

Medical malpractice suit was properly dismissed for failure to state a claim because plaintiffs did comply with Miss. Code Ann. § 11-1-58 by filing with their complaint either an expert disclosure or a certificate of counsel stating that an expert disclosure had not yet been obtained because of the running of the statute of limitations under Miss. Code Ann. § 15-1-36; strict compliance with Miss. Code Ann. § 11-1-58 was mandatory, and defendants, a medical center and the estate of a deceased doctor, which had been substituted as a defendant under Miss. R. Civ. P. 25(a)(1) after the doctor's death and reasserted the defenses raised by the doctor, had both raised as an affirmative defense plaintiffs' failure to comply with the statute. Caldwell v. N. Miss. Med. Ctr., Inc., 956 So. 2d 888, 2007 Miss. LEXIS 280 (Miss. 2007), overruled in part, Wimley v. Reid, 991 So. 2d 135, 2008 Miss. LEXIS 456 (Miss. 2008).

Clearly, more than 90 days after the first notice to creditors had elapsed when plaintiff (a surviving child), filed his claim against the estate, claiming he was entitled to all the insurance proceeds per the decedent's property settlement with a former wife. However, when the decedent died, plaintiff was a minor, and according to the terms of the decedent's will, the decedent's second and surviving spouse had been appointed testamentary guardian of plaintiff's person and estate; defendant was in a fiduciary relationship with plaintiff, and in that capacity, she not only had an obligation to initiate any and all claims which plaintiff may have had, but she had an obligation to initiate them timely, and therefore, the chancery court erred in granting defendant's Miss. R. Civ. P. 12(b) motion. Thornhill v. Thornhill, 905 So. 2d 747, 2004 Miss. App. LEXIS 1083 (Miss. Ct. App. 2004).

Court did not err in granting an insurer's motion to dismiss an insured's action pursuant to Miss. R. Civ. P. 12(b)(6) because the insured pled no facts to support a contention that the insurer interfered with proper payment under a policy. Ngo v. Centennial Ins. Co., 893 So. 2d 1076, 2005 Miss. App. LEXIS 1 (Miss. Ct. App. 2005).

Issue on appeal was whether the officers were entitled to equitable review of their claims relating to compensation and retirement benefits, which were excluded from state service grievance procedure. However, the Mississippi Supreme Court had already found that Miss. Code Ann. § 25-13-11(e) (Rev. 2003) was constitutional after an appeal by one of said officers; as such, the officers' grievances (in a subsequent combined action), were barred by the traditional notions of res judicata, collateral estoppel, and/or for failure to exhaust all administrative remedies and the trial court properly granted the Mississippi Department of Public Safety's Miss. R. Civ. P. 12(b)(6) motion to dismiss. Farmer v. State Dep't of Pub. Safety, 907 So. 2d 981, 2005 Miss. App. LEXIS 156 (Miss. Ct. App.), cert. denied, 910 So. 2d 574, 2005 Miss. LEXIS 461 (Miss. 2005).

Finding in favor of the deceased purchaser's wife and against the seller was proper pursuant to Miss. R. Civ. P. 12(b)(6) where the seller did not allege that the wife transferred or conveyed the money. She simply chose not probate her husband's will when the estate was insolvent. Greenville Lumber Co. v. Hammett, 889 So. 2d 502, 2004 Miss. LEXIS 1323 (Miss. 2004).

Trial court did not err in dismissing the client's claim against the first lawyer pursuant to Miss. R. Civ. P. 12(b)(6) where he had neither personally participated in a negligent act nor directly supervised anyone who had committed wrongful conduct; there was nothing in the record to suggest that the attorney had any contact whatsoever with the client, and the client's bare allegations that the partners, including the first attorney, regularly consulted one another on the cases being handled by the firm were not supported by the record. Keszenheimer v. Boyd, 897 So. 2d 190, 2004 Miss. App. LEXIS 874 (Miss. Ct. App. 2004), cert. denied, 896 So. 2d 373, 2005 Miss. LEXIS 196 (Miss. 2005).

Where the car owner's vehicle, a total loss, was stored at the premises of a towing company, and where the car owner had refused to accept the insurer's offer of settlement, the car owner had no viable claim for intentional infliction of emotional distress when the insurer refused to include towing or storage expenses; the car owner did suffer from very severe health problems (unrelated to the accident), but his claim that the insurer took advantage of his condition and engaged in bullying tactics, telling him to "take it or leave it," with respect to the settlement offer, did not constitute conduct that was so egregious as to "shock the conscience." Thus, the trial court properly granted the insurer's motion to dismiss pursuant to Miss. R. Civ. P. 12(b)(6). Poindexter v. Southern United Fire Ins. Co., 880 So. 2d 373, 2004 Miss. App. LEXIS 805 (Miss. Ct. App. 2004).

Court erred in dismissing, pursuant to Miss. R. Civ. P. 12(b)(6), a student's personal injury lawsuit against a university and two of its police officers on the ground that the action was barred by the statute of limitations; applying the statute as written, the student timely filed the lawsuit. Page v. Univ. of S. Miss., 878 So. 2d 1003, 2004 Miss. LEXIS 972 (Miss. 2004).

Where two parents were unable to produce evidence to rebut the presumption that a principal acted in good faith by reporting suspected child abuse, a trial court properly granted a motion to dismiss for failure to state a claim since the principal had immunity in an action alleging defamation, slander, libel, intentional infliction of emotional distress, and false light. Howe v. Andereck, 882 So. 2d 240, 2004 Miss. App. LEXIS 230 (Miss. Ct. App.), cert. denied, 882 So. 2d 772, 2004 Miss. LEXIS 1179 (Miss. 2004).

Dismissal under Miss. R. Civ. P. 12(b)(6) of plaintiffs' claims was proper as to the potential wrongful death claims because the child was still alive; therefore, there was no claim upon which relief could be granted. In re Brantley v. Brantley, 865 So. 2d 1126, 2004 Miss. LEXIS 184 (Miss. 2004).

County was not estopped from asserting the statute of limitations defense in a case involving a claim filed under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 to 11-46-23, because the statements of a county employee regarding the payment of medical bills were not fraudulent since the injured party had failed to submit any valid medical claims; therefore, the trial court did not err in dismissing the case for failing to state a cause of action. Williams v. Clay County, 861 So. 2d 953, 2003 Miss. LEXIS 659 (Miss. 2003), overruled, Page v. Univ. of S. Miss., 878 So. 2d 1003, 2004 Miss. LEXIS 972 (Miss. 2004), overruled in part, Univ. of Miss. Med. Ctr. v. Easterling, 928 So. 2d 815, 2006 Miss. LEXIS 177 (Miss. 2006).

Trial court did not err in dismissing, pursuant to Miss. R. Civ. P. 12(b)(6), a patient's complaint against a state hospital and physicians for failure to comply with Miss. Code Ann. § 11-46-11 of the Mississippi Tort Claims Act; the court found that (1) the record did not reflect that the patient had complied with the notice of claim requirements under § 11-46-11(3), and (2) the patient waited over two years to file his action, which fell outside the limitations period. Southern v. Miss. State Hosp., 853 So. 2d 1212, 2003 Miss. LEXIS 410 (Miss. 2003).

Because a citizen failed to file a notice of claim against the city pursuant to Miss. Code Ann. § 11-46-11(1) of the Mississippi Tort Claims Act, and because a document agreed to between the citizen and the city four years earlier did not serve as proper notice, the citizen failed to comply with the Act and the action was properly dismissed under Miss. R. Civ. P. 12(b)(6). Black v. City of Tupelo, 853 So. 2d 1221, 2003 Miss. LEXIS 414 (Miss. 2003).

Because parents waited over one year after their son's death to file an action under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 to -23, against the State and state agencies, and nothing operated to toll the statute of limitations under Miss. Code Ann. § 11-46-11, the action was time-barred and properly dismissed pursuant to Miss. R. Civ. P.

12(b)(6). Stockstill v. State, 854 So. 2d 1017, 2003 Miss. LEXIS 449 (Miss. 2003).

As a hazardous condition allegedly causing plaintiff's decedent's death did not arise out of the condition of the property created by the owner or existing in a concealed state, but was a hazard created by the general contractor, the trial court properly granted the owner's motion to dismiss under Miss. R. Civ. P. 12(b)(6). Bevis v. Linkous Constr. Co., 856 So. 2d 535, 2003 Miss. App. LEXIS 445 (Miss. Ct. App.), cert. denied, 860 So. 2d 1223, 2003 Miss. LEXIS 845 (Miss. 2003).

Where a shareholder sued a corporation that allegedly acted wrongfully to freeze her out of her 10 percent ownership interest, in light of the compelling evidence presented by the shareholder on her mismanagement claim, the trial court did not abuse its discretion in denying the corporation's motion under Miss. R. Civ. P. 12 (b)(6) to dismiss that count for failure to state a claim. Missala Marine Servs. v. Odom, 861 So. 2d 290, 2003 Miss. LEXIS 284 (Miss. 2003).

Defendant's motion to dismiss a breach of contract case for failure to state a claim, based on an arbitration clause in the parties' contract, was properly denied; defendant, by failing to pay its half of the arbitration fees as required by the contract, breached the arbitration provision and therefore waived its right to compel its protections. Sanderson Farms, Inc. v. Gatlin, 848 So. 2d 828, 2003 Miss. LEXIS 309 (Miss. 2003).

Other than the guest's reference to the general law on fraud, the guest did not present any meaningful arguments and no legal support for a civil claim with regard to misrepresentations in discovery by the store; thus, the trial court properly dismissed the guest's claim for fraud under Miss. R. Civ. P. 12(b) for failure to state a claim. Gamble v. Dollar Gen. Corp., 852 So. 2d 5, 2003 Miss. LEXIS 352 (Miss. 2003).

Dismissal for failure to state a claim of a retired state employee's equal protection challenge to the Legislature's establishment of a supplemental retirement plan for legislators was proper; since the different treatment of retired legislators had a rational basis in the financial uncertainties they risked, the proper course in seeking a remedy was political, not judicial. Dillard v. Musgrove, 838 So. 2d 261, 2003 Miss. LEXIS 60 (Miss. 2003).

Trial court did not err in dismissing with prejudice a fraud and misrepresentation case against an insurer because the claim was barred by the six-year statute of limitations in Miss. Code Ann. § 722; the cause of action was not tolled by Miss. Code Ann. § 15-1-67 because the insurer did nothing to prevent two insureds from discovering their cause of action. Stephens v. Equitable Life Assur. Soc'y of the United States, 850 So. 2d 78, 2003 Miss. LEXIS 117 (Miss. 2003).

Where a cancer patient died while a medical malpractice suit he filed was pending, and his daughter was substituted as plaintiff and was appointed executrix of his estate, the trial court erred in dismissing the suit for failing to state a claim, as the amended complaint filed by the daughter on behalf of the estate sought recovery for injuries the patient suffered during his lifetime. Necaise v. Sacks, 841 So. 2d 1098, 2003 Miss. LEXIS 137 (Miss. 2003).

Under subsection (b)(6), it was beyond doubt that the father would be unable to prove any set of facts in support of his allegations against the Department of Human Services; as such, dismissal by the circuit judge was appropriate and mandated by law. Little v. Miss. Dep't of Human Servs., 835 So. 2d 9, 2002 Miss. LEXIS 333 (Miss. 2002), cert. denied, 540 U.S. 878, 124 S. Ct. 296, 157 L. Ed. 2d 142, 2003 U.S. LEXIS 6253 (U.S. 2003), overruled in part, Stuart v. Univ. of Miss. Med. Ctr., 21 So. 3d 544, 2009 Miss. LEXIS 396 (Miss. 2009).

On a motion to dismiss a third party complaint against an insurance company seeking defense and indemnification in the main action against the third party plaintiff, the court properly examined the third party plaintiff's insurance policy as the policy was specifically referred to in the third party complaint, the policy was central and necessary to the third party action, the defendant tendered the entire policy, and the policy directly refuted the third party complaint's assertions. Sennett v. United States Fid. & Guar. Co., 757

So. 2d 206, 2000 Miss. LEXIS 47 (Miss. 2000).

**Hearings.**

Because a citizen's failure to file a notice of claim under Miss. Code Ann. § 11-46-11(1) of the Mississippi Tort Claims Act and the dismissal of the citizen's previous lawsuit were not in dispute, and because the only remaining questions were ones of law, the trial court's error in failing to hold a hearing prior to granting the city's motion to dismiss under Miss. R. Civ. P. 12(b)(6) was harmless error only. Black v. City of Tupelo, 853 So. 2d 1221, 2003 Miss. LEXIS 414 (Miss. 2003).

**Motions.**

Although the parties argued about a genuine issue of material fact as to the service of the summons, the question of sufficiency of process should have been addressed in a motion to dismiss rather than a motion for summary judgment. The circuit court should have held a preliminary hearing and was free to make its own findings of fact, even if the facts were contested. Thornton v. Freeman, 242 So. 3d 188, 2018 Miss. App. LEXIS 138 (Miss. Ct. App. 2018).

Trial court's grant of the employer's motion to dismiss or, in the alternative, motion for summary judgment, was proper where the letter in question was not sufficient to place an affirmative duty on the employer to preserve the machine; further, the Supreme Court refused to recognize a separate tort of negligent spoliation of evidence. Richardson v. Sara Lee Corp., 847 So. 2d 821, 2003 Miss. LEXIS 270 (Miss. 2003).

A Rule 12(c) motion is premature until all necessary responsive pleadings have been filed. Fortenberry v. City of Hattiesburg, 758 So. 2d 1023, 2000 Miss. App. LEXIS 50 (Miss. Ct. App. 2000).

A moving party has a choice of making a M.R.C.P. 4(h) objection to process by (1) filing a M.R.C.P. 12(b)(4) or (5) motion prior to filing a responsive pleading, (2) by asserting other general affirmative defenses, or (3) by filing them simultaneously therewith; thus, where the issue of service of process was raised in the defendant's initial responsive pleading, it was properly and timely pled. Collom v. Senholtz, 767 So. 2d 215, 2000 Miss. App. LEXIS 84 (Miss. Ct. App. 2000).

A formal response is not required to contest a motion to dismiss as the court may examine only the complaint itself in determining whether to grant or deny the motion. Moore ex rel. City of Aberdeen v. Byars, 757 So. 2d 243, 2000 Miss. LEXIS 77 (Miss. 2000).

**Necessary parties.**

Trial court did not err in dismissing claim for sub-surface trespass and conversion, due to plaintiff's failure to join all affected mineral interest holders. Ladner v. Quality Exploration Co., 505 So. 2d 288, 1987 Miss. LEXIS 2440 (Miss. 1987).

**Personal jurisdiction.**

Complaint alleging a piercing of the corporate veil will survive a Miss. R. Civ. P. 12(b)(2) motion to dismiss only when the complaint sets forth factual allegations indicating: (1) some frustration of expectations regarding the party to whom he looked for performance; (2) the flagrant disregard of corporate formalities by the defendant corporation and its principals; and (3) a demonstration of fraud or other equivalent misfeasance on the part of the corporate shareholder. Canadian Nat'l Ry. Co. v. Waltman, 94 So. 3d 1111, 2012 Miss. LEXIS 385 (Miss. 2012).

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As a company's business contacts with the state were not systematic and continuous, and the personal injury lawsuit filed by an individual did not arise from the company's contacts in the state, the company's motion to dismiss for lack of personal jurisdiction was affirmed. Williams

v. Bud Wilson's Mobile Home Serv., 887 So. 2d 830, 2004 Miss. App. LEXIS 670 (Miss. Ct. App.), cert. denied, 888 So. 2d 1177, 2004 Miss. LEXIS 1437 (Miss. 2004).

Notwithstanding Miss. Code Ann. § 93-25-9(b), the chancellor could have exercised jurisdiction over the child support question if the father, a resident of California, had voluntarily entered a general appearance, or filed a responsive pleading that effectively waived the issue of jurisdiction. However, while it was correct that the father filed a written answer, with leave of court, he filed an amended answer, which contested jurisdiction; same related back to the filing date of the original answer, and despite his written entry of appearance, and a motion for guardian ad litem, the facts did not suffice for a general appearance or for personal jurisdiction over the father for the purpose of modifying child support. Scaife v. Scaife, 880 So. 2d 1089, 2004 Miss. App. LEXIS 851 (Miss. Ct. App. 2004).

Supreme Court of Mississippi finds that the majority position is the better rule; that is, a Miss. R. Civ. P. 12(b)(2) motion to dismiss for lack of personal jurisdiction is not converted to a motion for summary judgment when the trial court considers matters outside the pleadings. Horne v. Mobile Area Water & Sewer Sys., 897 So. 2d 972, 2004 Miss. LEXIS 846 (Miss. 2004), cert. denied, 544 U.S. 922, 125 S. Ct. 1652, 161 L. Ed. 2d 479, 2005 U.S. LEXIS 2480 (U.S. 2005), cert. denied, 544 U.S. 922, 125 S. Ct. 1662, 161 L. Ed. 2d 480, 2005 U.S. LEXIS 2484 (U.S. 2005).

Trial court erred in dismissing, pursuant to Miss. R. Civ. P. 12, a purchaser's action to recover for defects in a mobile home; the purchaser's act of filing an amended complaint within the relevant statute of limitations, Miss. Code Ann. § 63-17-159(6), was sufficient to defeat defendants' motion to dismiss, as the amended complaint, filed pursuant to Miss. R. Civ. P. 15, provided defendants with the required notice under Miss. R. Civ. P. 4. King v. Am. RV Ctrs., Inc., 862 So. 2d 558, 2003 Miss. App. LEXIS 1195 (Miss. Ct. App. 2003), overruled in part, Wilner v. White, 929 So. 2d 315, 2006 Miss. LEXIS 267 (Miss. 2006).

Question of personal jurisdiction initially turns on the well-pleaded allegations of the complaint; on a motion to dismiss for lack of personal jurisdiction, all allegations of the complaint, together with reasonable inferences flowing therefrom, are accepted as true. R.C. Constr. Co. v. National Office Sys., 622 So. 2d 1253, 1993 Miss. LEXIS 319 (Miss. 1993).

A non-resident defendant may, on a motion to dismiss for lack of personal jurisdiction, litigate the inherent factual questions through the use of live testimony or affidavits; if the court finds facts that sustain his defense, it should dismiss. R.C. Constr. Co. v. National Office Sys., 622 So. 2d 1253, 1993 Miss. LEXIS 319 (Miss. 1993).

Personal injury action against railroad should have been dismissed for lack of personal jurisdiction; railroad was a nonresident corporation not amenable to suit in Mississippi, where it had not qualified to do business in state and had no agent for process in state, nor did record reflect name of any other officer, agent, employee, or personnel within state. Southern Pacific Transp. Co. v. Fox, 609 So. 2d 357, 1992 Miss. LEXIS 421 (Miss. 1992).

Trial court obtained jurisdiction over nonresident defendant by virtue of fact that it qualified to do business in Mississippi and appointed an agent for service of process; court erred in dismissing complaint for lack of personal jurisdiction. Read v. Sonat Offshore Drilling, Inc., 515 So. 2d 1229, 1987 Miss. LEXIS 2929 (Miss. 1987).

**Pleadings.**

Trial court erred in dismissing plaintiff's action against defendant under Miss. R. Civ. P. 12(b)(6) and/or (c) because, as permitted by Miss. R. Civ. P. 8(a)(2) and (e)(2), plaintiff permissibly pleaded a claim of both negligence and assault, notwithstanding that the claims were inconsistent. Jordan v. Wilson, 5 So. 3d 442, 2008 Miss. App. LEXIS 461 (Miss. Ct. App. 2008), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 130 (Miss. 2009).

Judgment was properly awarded to plaintiffs in their suit against defendants for encroachment on their property where nothing in defendants' motion for a new trial indicated that the chancery court erred in not requiring a deraignment of title, or in ruling the way it did in the absence of a deraignment of title; no Miss. R. Civ. P. 12(e) motion was ever filed to request that plaintiffs deraign their title. Crosswhite v. Golmon, 939 So. 2d 831, 2006 Miss. App. LEXIS 738 (Miss. Ct. App. 2006).

In a confirmation of title case, the failure to deraign title is not grounds for dismissal, but a party may file a Miss. R. Civ. P. 12(e) motion to force the complainant to do so. Crosswhite v. Golmon, 939 So. 2d 831, 2006 Miss. App. LEXIS 738 (Miss. Ct. App. 2006).

Products liability suit against cigarette companies was properly dismissed on the pleadings under Miss. R. Civ. P. 12(c), as the Mississippi Product Liability Act, Miss. Code Ann. § 11-1-63 (2001), precluded all product liability actions against tobacco companies. Lane v. R. J. Reynolds Tobacco Co., 853 So. 2d 1144, 2003 Miss. LEXIS 211 (Miss. 2003), overruled in part, R. J. Reynolds Tobacco Co. v. King, 921 So. 2d 268, 2005 Miss. LEXIS 423 (Miss. 2005).

Customer who suffered injuries after voluntarily consuming alcohol is not part of the protected class of Miss. Code Ann. § 67-3-73; therefore, a casino's motion to dismiss a negligence action was properly granted since there was no liability under either § 67-3-73 or Miss. Code Ann. § 67-1-83. Bridges v. Park Place Entm't, Inc., 860 So. 2d 811, 2003 Miss. LEXIS 758 (Miss. 2003).

Trial court did not err in refusing to grant a default judgment based on defendant's alleged failure to answer the complaint within 30 days; defendant had placed the answer in the mail in a timely fashion and the plaintiff could not refuse to accept it and then claim defendant had not answered. Slaydon v. Hansford, 830 So. 2d 686, 2002 Miss. App. LEXIS 477 (Miss. Ct. App. 2002), overruled, Blake v. Estate of Clein, 37 So. 3d 622, 2010 Miss. LEXIS 322 (Miss. 2010).

The plaintiffs were properly denied leave to amend the complaint on a motion to dismiss where the proposed amendment was futile in the light of statutory and case law pertaining to their claim. Jones v. Lovett, 755 So. 2d 1243, 2000 Miss. App. LEXIS 34 (Miss. Ct. App. 2000).

**Service of process.**

Pursuant to Miss. R. Civ. P. 12(h)(1), certain defendants waived the defenses of insufficiency of service of process and insufficiency of process by omitting these defenses from their answer and motion to dismiss. Therefore, under Miss. R. Civ. P. 54(b) and 58, the order dismissing those defendants fully adjudicated the case as to all parties and it was a final, appealable judgment. Sauvage v. Meadowcrest Living Ctr., LLC, 28 So. 3d 589, 2010 Miss. LEXIS 93 (Miss. 2010).

Three cases were properly dismissed for insufficiency of process and insufficiency of service of process, under Miss. R. Civ. P. 12(b)(4)-(5), where the process issued to defendants was deficient and not in substantial compliance with Miss. R. Civ. P. 4(b), a pro se response by one defendant might have constituted an appearance under Miss. R. Civ. P. 55, but was not a valid answer because it did not comport with the filing requirement of Miss. R. Civ. P. 5(d). Fletcher v. Limeco Corp., 996 So. 2d 773, 2008 Miss. LEXIS 598 (Miss. 2008).

In a medical malpractice suit, a hospital did not waive its affirmative defense of insufficient service of process by the failure of the hospital to include the affirmative defense in a subsequent motion for a change or venue or by its active participation in the litigation. Lucas v. Baptist Mem. Hosp. - N. Miss., Inc., 997 So. 2d 226, 2008 Miss. App. LEXIS 720 (Miss. Ct. App. 2008).

In a medical malpractice/wrongful death case, defendant doctor's motion to dismiss for failure to timely effect service of process under Miss. R. Civ. P. 4(h) was properly denied because the trial court found good cause for the failure where plaintiff's counsel retained local counsel, who was to effect service of process; where local counsel failed to do so; where counsel learned of local counsel's failure on day 118, took immediate action, and effected service on day 121; and where local counsel withdrew from the case. Foss v. Williams, 993 So. 2d 378, 2008 Miss. LEXIS 448 (Miss. 2008).

Where a county obtained an injunction to allow its surveyor to enter landowners' property, the circuit court did not have personal jurisdiction over the landowners and thus the injunction was improperly granted because there was no proof that the landowners had been properly served with process. Blakeney v. Warren County, 973 So. 2d 1037, 2008 Miss. App. LEXIS 63 (Miss. Ct. App. 2008).

Claimant's argument that the driver's active participation in the underlying litigation constituted a tacit waiver of the service of process defense was without merit because the defense was not waived by the mere submission of other pleadings in the case, nor even by participation in a trial on the merits, and the error was preserved until its resolution by the court. Page v. Crawford, 883 So. 2d 609, 2004 Miss. App. LEXIS 780 (Miss. Ct. App. 2004).

**Stipulation.**

When the pleadings included the complaint and exhibits jointly submitted by the parties through a stipulation providing that the exhibits were exhibits to the property owners' complaint for all purposes, as well as the neighbor's answer and motion to dismiss, the chancellor properly limited consideration to these items in ruling on the neighbor's motion to dismiss for failure to state a cause of action. Smith v. Sims, 281 So. 3d 1069, 2019 Miss. App. LEXIS 234 (Miss. Ct. App. 2019).

**Subject matter jurisdiction.**

Although a former spouse alleged on appeal that the chancery court lacked subject-matter jurisdiction, the appellate court declined to reverse the chancellor's judgment because the spouse's factual assertions were only raised in the spouse's brief on appeal and were not evidence that the appellate court could use to reverse the trial court's judgment. Abercrombie v. Abercrombie, 193 So. 3d 680, 2016 Miss. App. LEXIS 379 (Miss. Ct. App. 2016).

Motion for relief under Miss. R. Civ. P. 60(b)(4) was properly dismissed because an alleged descendant waited more than six years to challenge an adverse ruling in an ejectment action filed against a record title holder; there was no reason for his failure to file an appeal or his decision to wait so long to file the motion, and moreover there was no basis for arguing that the chancery court lacked subject matter jurisdiction over a property case. Netterville v. Weyerhaeuser Co., 963 So. 2d 38, 2007 Miss. App. LEXIS 534 (Miss. Ct. App. 2007).

Where appellant filed an appeal of the chancery court's order finding a prescriptive easement across his property for an access road, there was no was justifiable basis for appellant's argument that a chancery court did not have jurisdiction over matters involving property; such authority was conferred by Miss. Const. Art. 6, § 160, history, and precedent. Graves v. Dudley Maples, L.P., 950 So. 2d 1017, 2007 Miss. LEXIS 129 (Miss. 2007).

The plaintiffs were entitled to have their breach of contract action transferred from the chancery court to the circuit court as the action was legal in nature and as their right to a jury trial would be infringed upon if the action was heard in chancery court. Burnette v. Hartford Underwriters Ins. Co., 770 So. 2d 948, 2000 Miss. LEXIS 218 (Miss. 2000).

Chancellor did not err in declining jurisdiction in child custody dispute where, although Mississippi was the new "home state" of children involved, chancery court in Arkansas retained continuing jurisdiction over the parties by virtue of having entered the original decree. Johnson v. Ellis, 621 So. 2d 661, 1993 Miss. LEXIS 289 (Miss. 1993).

**Summary judgment.**

In a fraud action, dismissal under Miss. R. Civ. P. 12(b)(6) was improper because the trial court considered matters outside the pleadings when it took into account a pretrial settlement agreement. Having done so, the trial court was required to convert the motion into a Miss. R. Civ. P. 56 motion for summary judgment, which it failed to do. State v. Bayer Corp., 32 So. 3d 496, 2010 Miss. LEXIS 201 (Miss. 2010).

When a party introduces evidence outside of the pleadings in defense or support of a Miss. R. Civ. P. 12(b)(6) motion, the motion is converted into one for summary judgment. Sullivan v. Tullos, 20 So. 3d 1, 2008 Miss. App. LEXIS 673 (Miss. Ct. App. 2008), rev'd, 19 So. 3d 1271, 2009 Miss. LEXIS 501 (Miss. 2009).

Even though a motion to dismiss should have been treated as a motion for summary judgment because facts outside of the pleadings were considered, the error was harmless because, even though an employment contract attached to the motion was considered, another almost identical contract was referenced in the pleadings. Therefore, a chancellor did not become privy to any knowledge by virtue of one contract that he did not already have from the other contract. Winters v. Calhoun County Sch. Dist., 990 So. 2d 238, 2008 Miss. App. LEXIS 193 (Miss. Ct. App. 2008).

In an action alleging defendants published slanderous statements against plaintiffs on a radio talk show program, the trial court's exclusion of the radio show transcript allowed the trial court to refine its review of a motion for summary judgment based only on the pleadings and dismiss the complaint pursuant to Miss. R. Civ. P. 12(b)(6). Chalk v. Bertholf, 980 So. 2d 290, 2007 Miss. App. LEXIS 468 (Miss. Ct. App. 2007).

In her negligence action against a homeowner, decided in the homeowner's favor on summary judgment, on appeal, the worker asserted that Miss. R. Civ. P. 8(c) clearly set forth that the defense of statute of limitations was an affirmative defense which had to be set forth in responsive pleadings and that Miss. R. Civ. P. 12(b) required every defense to be asserted in responsive pleadings, except the seven which could be made by motion, and that the statute of limitations defense was not included therein; however, the defense of statute of limitations was proper for summary judgment where there existed no genuine issues of material fact on the issue. Robertson v. Moody, 918 So. 2d 787, 2005 Miss. App. LEXIS 327 (Miss. Ct. App. 2005).

Letters did show that the father's attorney failed to serve notice of the subpoena immediately under Miss. R. Civ. P. 45, but the father's attorney's failure to follow correct procedure did not rise to the level of abuse of process. The trial court properly granted summary judgment in favor of the father and his attorney as to the abuse of process claim; moreover, the mother's argument that the father was required to hand deliver the notice to her attorney under Miss. R. Civ. P. 5(b) was without merit, as service was allowed by mail under the plain language of Miss. R. Civ. P. 5(b). Ayles v. Allen, 907 So. 2d 300, 2005 Miss. LEXIS 361 (Miss. 2005).

Dismissal of the claimant's petition for declaratory relief in an action involving the liquidation of an insurance company was improper pursuant to Miss. R. Civ. P. 12(c) and Miss. R. Civ. P. 56 where the trial judge erred in converting a motion for judgment on the pleadings into a motion for summary judgment without giving the claimants 10-days notice of that intention. Huff-Cook, Inc. v. Dale, 913 So. 2d 988, 2005 Miss. LEXIS 296 (Miss. 2005).

Language of Miss. R. Civ. P. 12 granting the respondent to a motion to dismiss that was subsequently converted into one for summary judgment an opportunity to present further material, is not self-executing; litigant desiring to avail herself of the right to present more evidentiary material has an affirmative duty to timely raise the issue with the trial court or be deemed to have waived objection to the court proceeding on the motion. Champluvier v. Beck, 909 So. 2d 1061, 2004 Miss. LEXIS 1457 (Miss. 2004).

Where defendant waited for twenty-seven years before suing doctors who negligently operated on his leg causing a misalignment of his femur, the doctors filed motions to dismiss the suit as barred by the statute of limitations. The circuit court considered some material outside of the pleadings, transformed the doctors' motions into a motion for summary judgment, and properly granted the motions. Russell v. Williford, 907 So. 2d 362, 2004 Miss. App. LEXIS 1111 (Miss. Ct. App. 2004), cert. denied, 910 So. 2d 574, 2005 Miss. LEXIS 449 (Miss. 2005).

Appellate court reviewed defendants' Miss. R. Civ. P. 12(b)(6)motion to dismiss under the summary judgment standard as the trial court considered exhibits, including deposition testimony, to the motion along with defendants' answer. Gulledge

v. Shaw, 880 So. 2d 288, 2004 Miss. LEXIS 777 (Miss. 2004).

Trial court properly dismissed claims against a contractor on summary judgment, but improperly labeled its decision as a dismissal for failure to state a claim under Miss. R. Civ. P. 12(b)(6); as the court made its decision after reviewing the complaint, the answer, the motion to dismiss, the response to it, and the accompanying exhibits, its decision was properly labeled a summary judgment under Miss. R. Civ. P. 56. Rein v. Benchmark Constr. Co., 2003 Miss. LEXIS 282 (Miss. June 12, 2003), op. withdrawn, sub. op., 865 So. 2d 1134, 2004 Miss. LEXIS 180 (Miss. 2004).

Defendant's motion was a motion for summary judgment rather than a motion to dismiss for failure to state a claim or for judgment on the pleadings since the motion, even though it was not accompanied by affidavits or responses to discovery, dealt with the merits of the plaintiff's case. Hartford Cas. Ins. Co. v. Halliburton Co., 826 So. 2d 1206, 2001 Miss. LEXIS 247 (Miss. 2001).

When a party is given an opportunity to amend and the trial court states that dismissal will occur otherwise, the failure to amend and the seeking of an appeal abandons the opportunity to amend and, once the period allowed for an amendment passes and the party pursues an appeal, the partial summary judgment, partial only because the opportunity to amend remained open, becomes a complete and final judgment. Hobgood v. Koch Pipeline Southeast, Inc., 769 So. 2d 838, 2000 Miss. App. LEXIS 123 (Miss. Ct. App. 2000), cert. denied, 531 U.S. 1073, 121 S. Ct. 766, 148 L. Ed. 2d 666, 2001 U.S. LEXIS 174 (U.S. 2001).

The trial judge properly complied with subsection (b) of this rule and Rule 56(c) in treating a motion to dismiss filed by the defendants as a motion for summary judgment; the plaintiff and her counsel were made aware that the judge reviewed a videotape of the incident at issue and the judge postponed making his final ruling for over three months, granting ample time for the plaintiff to respond and gather additional discovery, notwithstanding that no specific decree regarding the conversion of the motion was made. Jones v. Jackson Pub. Sch., 760 So. 2d 730, 2000 Miss. LEXIS 121 (Miss. 2000).

The language of the rule granting a respondent to a motion to dismiss subsequently converted to a summary judgment motion an opportunity to present further material is not self-executing; a litigant desiring to avail herself of the right to present more evidentiary material has an affirmative duty to timely raise the issue with the trial court or be deemed to have waived objection to the court proceeding on the motion. Koestler v. Mississippi College, 749 So. 2d 1122, 1999 Miss. App. LEXIS 482 (Miss. Ct. App. 1999).

Due to extensive court filings, including interrogatory responses and other discovery tools, court considered that matters outside the pleadings had been presented and therefore action was reviewed as a summary judgment motion, despite plaintiff's assertions of error indicating that appeal was from a dismissal for failure to state a claim upon which relief can be granted. Westbrook v. City of Jackson, 665 So. 2d 833, 1995 Miss. LEXIS 454 (Miss. 1995).

Plaintiff should have been allowed time to file affidavits or other pertinent material in opposition to motion for summary judgment; since trial court considered "matters outside the pleadings" in ruling on defendant's motion for judgment on the pleadings, M.R.C.P. Rule 12(c) required that plaintiff be given an opportunity to present all pertinent material, and since plaintiff's request was timely made, it should have been allowed. Cunningham v. Lanier, 555 So. 2d 685, 1989 Miss. LEXIS 506 (Miss. 1989).

Defendant's answer and amended answer each raised matters of affirmative defense, and thus plaintiff was not clearly entitled to judgment, and trial court properly denied plaintiff's motion for judgment on the pleadings. Millican v. Turner, 503 So. 2d 289, 1987 Miss. LEXIS 2365 (Miss. 1987).

Issues of res judicata resulting from the entire course of proceedings and final judgment of dismissal entered in plaintiff's previous lawsuit meant that there were no factual points to be developed in the subsequent one. The circuit court thus correctly exercised authority granted it under M.R.C.P. Rule 12(b) and considered defendants' motion to dismiss as one for summary judgment. Walton v. Bourgeois, 512 So. 2d 698, 1987 Miss. LEXIS 2680 (Miss. 1987).

**Venue.**

When a defendant is sued in both a paternity and support proceeding, he has right to have case heard in county in which he resides, if he is a resident of Mississippi; defendant must timely assert this right via a M.R.C.P. Rule 12(b)(3) motion, and his failure to do so amounts to waiver. Belk v. State Dep't of Public Welfare, 473 So. 2d 447, 1985 Miss. LEXIS 2179 (Miss. 1985).

**Waiver.**

Property owner's former paramour waived the issue of improper venue in a replevin action because the paramour failed to plead improper venue as an affirmative defense or to raise the issue in a timely filed motion. The paramour first raised the issue of venue in the paramour's post-trial motion to set aside the circuit court's final judgment. Massey v. Neely, 309 So. 3d 138, 2021 Miss. App. LEXIS 25 (Miss. Ct. App. 2021).

Failure to adequately raise the defense of insufficiency of service in the answer or a pre-answer motion should have barred the issue from consideration. Nonetheless, the plaintiff made no objection to the sufficiency of the raising of the defense in the defendant's answer, and thus the plaintiff waived the issue as waiver of a defense could itself be waived. Thornton v. Freeman, 242 So. 3d 188, 2018 Miss. App. LEXIS 138 (Miss. Ct. App. 2018).

Trial court erred in dismissing a plaintiff's personal injury case without prejudice for insufficiency of process because the defendants waived the defense of insufficiency of process by failing to assert it in their answer, their motions to amend their answers to include the defense were filed outside the 30 days allowed for amendment as a matter of course, and, while the motions to amend the answers were not moot, it could not be said that the trial court could have exercised its discretion to grant the motion for leave to amend. Cox v. SMG, 226 So. 3d 1246, 2017 Miss. App. LEXIS 524 (Miss. Ct. App. 2017).

In a negligence case, the defense of lack of personal jurisdiction was waived under Miss. R. Civ. P. 12(h)(1) because an out-of-state resident made a general appearance when he sought relief from a default judgment without raising that objection; therefore, the case was improperly dismissed for a failure timely serve process. Courtney v. McCluggage, 991 So. 2d 642, 2008 Miss. App. LEXIS 571 (Miss. Ct. App. 2008).

Custody award of the mother's and father's child to the father was appropriate, in part because the mother waived her jurisdictional arguments when she failed to timely seek resolution of the issue and when she participated in the hearing without first seeking an adjudication of her jurisdictional issue. Price v. McBeath, 989 So. 2d 444, 2008 Miss. App. LEXIS 497 (Miss. Ct. App. 2008).

Even if a buyer from a tax sale was a necessary and indispensable party under Miss. R. Civ. P. 19 to a proceeding where the redemption period in Miss. Code Ann. § 27-45-3 was extended for 60 days, the buyer's successor in interest was procedurally barred from bringing its Miss. R. Civ. P. 19 objection on appeal since the issue was not raised. The issue was not heard sua sponte in accordance with Shaw v. Shaw, 603 So. 2d 287 (Miss. 1992), because the buyer was notified by letter of the foreclosure sale and the possibility that the tax redemption period could be extended, this knowledge was imputed to the successor in interest, and neither the buyer nor the successor in interest chose to challenge the joinder issue until after the conclusion of the trial court proceedings. Marathon Asset Mgmt., LLC v. Otto, 977 So. 2d 1241, 2008 Miss. App. LEXIS 178 (Miss. Ct. App. 2008).

In a wrongful death matter arising out of a high speed chase that occurred in Mississippi, an Alabama city, its police chief, and an Alabama city police officer all filed responsive pleadings, and then filed motions to dismiss 20 months later, alleging lack of personal jurisdiction; the three defendants waived the defense. City of Cherokee v. Parsons, 944 So. 2d 886, 2006 Miss. LEXIS 583 (Miss. 2006).

When a New York commuter van company filed its answer and defenses in the wrongful death action of Mississippi residents following an accident that occurred in New York, the company did not waive its defense of lack of personal jurisdiction under Miss. R. Civ. P. 12(b)(2) when it included a motion to dismiss for lack of personal jurisdiction, although the company filed 21 months after being served with process, thereby failing to meet the thirty-day answer requirement of Miss. R. Civ. P. 12(a). Miss. R. Civ. P. 12(h) governs the waiver of defenses and while Rule 12(h) provides for certain circumstances in which a defense may be waived, it creates no overlap of the 30-day answer requirement of Miss. R. Civ. P. 12(a) and defenses that are coupled with an untimely answer. Rockaway Commuter Line, Inc. v. Denham, 897 So. 2d 156, 2004 Miss. LEXIS 1325 (Miss. 2004).

Where appellant's counsel appeared for trial and participated by cross-examining appellee and by calling a witness during her case-in-chief, but appellant did not object to or challenge any irregularities in the service of process, her failure to raise these challenges in the court below waived these defenses under Miss. R. Civ. P. 12(h)(1). Venegas v. Gurganus, 911 So. 2d 562, 2005 Miss. App. LEXIS 868 (Miss. Ct. App.), cert. denied, 920 So. 2d 1008, 2005 Miss. LEXIS 639 (Miss. 2005).

In a contempt proceeding on the husband's failure to pay child support, the affirmative defense of the statute of limitations was not waived because, although the husband filed an answer, no such pleading was required under Miss. R. Civ. P. 12(b) and 81(d)(2), (4); thus, the husband had the right to raise the defense at any stage and the statute of limitations would bar any claims filed seven years after the youngest child reached the age of 21 pursuant to Miss. Code Ann. § 15-1-59. Miss. Dep't of Human Servs. v. Guidry, 830 So. 2d 628, 2002 Miss. LEXIS 320 (Miss. 2002).

Respondent waived defenses of lack of personal jurisdiction or insufficiency of service of process where she failed to assert them by motion within prescribed 20 days, or in a responsive pleading or amendment thereof, and default judgment was properly entered where she failed to plead or otherwise defend a claim asserted against her. Terrell v. The Mississippi Bar, 635 So. 2d 1377, 1994 Miss. LEXIS 203 (Miss. 1994).

Divorce defendant could not raise for the first time on appeal that decree was void for insufficiency of process and lack of personal jurisdiction; because defendant waited seven years before raising such a defense, his claim was waived. Manning v. Tanner, 594 So. 2d 1164, 1992 Miss. LEXIS 70 (Miss. 1992).

Objections to venue are waived if not timely asserted. Sawyer v. Illinois C. G. R. Co., 606 So. 2d 1069, 1992 Miss. LEXIS 466 (Miss. 1992).

Venue disputes must be settled early on, as a defendant waives any objection to venue unless he asserts it early on; if venue is proper when and where suit is filed, it may not be ousted by later events. Flight Line, Inc. v. Tanksley, 608 So. 2d 1149, 1992 Miss. LEXIS 447 (Miss. 1992).

Where defendant's answer asserted that court lacked jurisdiction over him, the fact that he did not label this assertion an "affirmative defense" was of no moment, and where he followed this with a motion to dismiss for lack of personal jurisdiction, his jurisdictional challenge was not waived. Jones v. Chandler, 592 So. 2d 966, 1991 Miss. LEXIS 984 (Miss. 1991).

Defendant waived his defense of insufficiency of service of process, where his answer made no mention of any such defense, and it was only in response to plaintiff's summary judgment motion that defendant finally raised his defense. Young v. Huron Smith Oil Co., 564 So. 2d 36, 1990 Miss. LEXIS 288 (Miss. 1990).

Lack of in personam jurisdiction is a matter that may be waived if not timely asserted. Scribner v. Scribner, 556 So. 2d 350, 1990 Miss. LEXIS 23 (Miss. 1990).

Defendant waived defense of improper venue when he failed to assert it in his motion to quash and set aside decree. Lowrey v. Last Will & Testament of Smith, 543 So. 2d 1155, 1989 Miss. LEXIS 185 (Miss. 1989).

Divorce defendant's motion for continuance under Soldiers' and Sailors' Civil Relief Act did not waive his defense of lack of in personam jurisdiction; his motion amounted to no more than an application to stay proceedings and was not to be construed as an appearance, nor was his subsequent pleading reasserting this defense to be considered as a waiver of that defense. O'Neill v. O'Neill, 515 So. 2d 1208, 1987 Miss. LEXIS 2922 (Miss. 1987).

Objections to venue are deemed waived when they are not asserted in defendant's answer or in a M.R.C.P. Rule 12 motion. H & W Transfer & Cartage Service, Inc. v. Griffin, 511 So. 2d 895, 1987 Miss. LEXIS 2610 (Miss. 1987).

## Rule 13. Counter-claim and cross-claim.

(a) *Compulsory counter-claims.* — A pleading shall state as a counter-claim any claim which at the time of serving the pleading the pleader has against any opposing party if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction. But the pleader need not state the claim if:

(1) at the time the action was commenced the claim was the subject of another pending action; or

(2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counter-claim under this Rule 13; or

(3) the opposing party's claim is one which an insurer is defending.

In the event an otherwise compulsory counter-claim is not asserted in reliance upon any exception stated in paragraph (a), re-litigation of the claim may nevertheless be barred by the doctrines of res judicata or collateral estoppel by judgment in the event certain issues are determined adversely to the party electing not to assert the claim.

(b) *Permissive counter-claims.* — A pleading may state as a counter-claim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) *Counter-claim exceeding opposing claim.* — A counter-claim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) *Counter-claim against the state of Mississippi.* — These rules shall not be construed to enlarge beyond the limits fixed by law the right to assert counter-claims or to claim credits against the State of Mississippi, a political subdivision, or an officer in his representative capacity or agent of either.

(e) *Counter-claim maturing or acquired after pleading.* — A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counter-claim by supplemental pleading.

(f) *Omitted counter-claim.* — When a pleader fails to set up a counter-claim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counter-claim by amendment on such terms as the court deems just.

(g) *Cross-claim against co party.* — A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counter-claim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of the claim asserted in the action against the cross-claimant.

(h) *Claims exceeding court's jurisdiction.* — Upon the filing in the county court by any party of a counter-claim or cross-claim which exceeds the jurisdictional limits of that court, and upon the motion of all parties filed within twenty days after the filing of such counter-claim or cross-claim, the county court shall transfer the action to the circuit or chancery court wherein the county court is situated and which would otherwise have jurisdiction.

(i) *Joinder of additional parties.* — Persons other than those made parties to the original action may be made parties to a counter-claim or cross-claim in accordance with the provisions of Rules 19 and 20.

(j) *Separate trials; separate judgment.* — If the court orders separate trials as provided in Rule 42(b), judgment on a counter-claim or cross-claim may be rendered in accordance with the terms of Rule 54(b) when the court has jurisdiction so to do, even if the claims of the opposing parties have been dismissed or otherwise disposed of.

(k) *Appealed actions.* — When an action is commenced in the justice court or in any other court which is not subject to these rules and from which an appeal for a trial de novo lies to a court subject to these rules, any counter-claim made compulsory by subdivision (a) of this rule shall be stated as an amendment to the pleading within thirty days after such appeal has been perfected or within such further time as the court may allow; and other counter-claims and cross-claims shall be permitted as in an original jurisdiction action. When a counter-claim or cross-claim is asserted by a defendant in such an appealed case, the defendant shall not be limited in amount to the jurisdiction of the lower court but shall be permitted to claim and recover the full amount of its claim irrespective of the jurisdiction of the lower court.

**HISTORY: Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

## ADVISORY COMMITTEE NOTE

The purpose of Rule 13 is to grant the court broad discretion to allow claims to be joined in order to expedite the resolution of all the controversies between the parties in one suit and to eliminate the inordinate expense occasioned by circuity of action and multiple litigation.

Subject to the exceptions stated in Rule 13(a), counterclaims are compulsory if they arise out of the same transaction or occurrence that is the subject matter of the opposing party's claim. Compulsory counterclaims are so closely related to the claims already raised, that they can be adjudicated in the same action without creating confusion and should be adjudicated in the same action so as to avoid unnecessary expense and duplicative litigation. Rule 13 generally requires compulsory counterclaims to be asserted in the pending litigation to avoid waiver.

All other counterclaims are permissive and may be asserted by the defending party. If trying the permissive counterclaim in the same case as the original claim is tried will create confusion, prejudice, unnecessary delay or increased costs, the court has the discretion to order that the counterclaim be tried separately pursuant to Rule 42(b).

Pursuant to Rule 13(g), a party may assert a cross-claim against a co-party if the cross-claim arises out of the same transaction or occurrence that is the subject matter of the complaint or a counterclaim thereto or relates to any property that is the subject matter of the complaint. Cross-claims may be derivative claims that assert that the party against whom the cross-claim is asserted is or may be liable to the cross-claimant for a ll or part of the claim against the cross-claimant. Pursuant to Rule 13, cross-claims are permissive rather than compulsory.

A party asserting a counterclaim or cross-claim may join additional parties as defendants to the counterclaim or cross-claim pursuant to Rules 19 and 20.

## JUDICIAL DECISIONS

### ANALYSIS

Construction.
Compulsory counterclaims.
Interpleader.
Scope of a cross-claim.
Waiver.

**Construction.**

When a husband filed his counterclaim 36 days after the final judgment in his divorce was entered, without a motion asking the court to allow him to amend the pleadings or to allow the untimely counterclaim, the counterclaim was not properly before the court under Miss. R. Civ. P. 7(b)(1) and Miss. R. Civ. P. 13(e) and (f). McNeese v. McNeese, 119 So. 3d 264, 2013 Miss. LEXIS 172 (Miss. 2013).

Federal district court dismissed, on grounds of res judicata, the claims of a foreign corporation, even though the prior dismissal of its claims by a State court had been erroneous where the corporation had not been authorized to do business at that time under Miss. Code Ann. § 79-4-15.02(a), but the State court should have stayed the proceedings under Miss. Code Ann. § 79-4-15.02(c). Cuba Timber Co., Plaintiff v. Boswell, 339 F. Supp. 2d 773, 2004 U.S. Dist. LEXIS 20289 (S.D. Miss. 2004).

Where defendant in partition suit filed answer also claiming for partition, but never served a cross-claim upon her co-defendants, she was required to file and serve a cross-claim before she could obtain relief from a co-defendant. Johnson v. Franklin, 481 So. 2d 812, 1985 Miss. LEXIS 2331 (Miss. 1985).

**Compulsory counterclaims.**

Circuit court erred in transferring a suit to the chancery court based on the first-to-file rule because, while most of the claims were properly transferred, it was error to transfer the claims against the plaintiff's attorneys because the motion to transfer was only as to the claims against the plaintiff, the identity of the action and the subject matter were the same, but the attorneys were not themselves parties, and it was not compulsory for the defendant to assert his claims against the attorneys. Biegel v. Gilmer, 329 So. 3d 431, 2020 Miss. LEXIS 33 (Miss. 2020).

Chancery court had personal jurisdiction to divide a husband's military retirement benefits under the Federal Uniformed Services Former Spouse Protection Act because the husband voluntarily subjected himself to the wife's compulsory counterclaim for equitable distribution by filing suit in the chancery court requesting sale of the marital home and division of marital debts in Mississippi. Pierce v. Pierce, 132 So. 3d 553, 2014 Miss. LEXIS 122 (Miss. 2014).

Where defendant in an automobile negligence case failed to file an answer to plaintiff's complaint but filed a counterclaim, the trial court did not err in granting plaintiff's motion to dismiss because the submission of a counterclaim without filing a responsive pleading was procedurally improper. A counterclaim was a claim asserted against a party in a responsive pleading; because defendant failed to file an answer to plaintiff's complaint, his counterclaim was not properly before the trial court. Keyes v. Berry, 995 So. 2d 861, 2008 Miss. App. LEXIS 699 (Miss. Ct. App. 2008).

Although the company argued that Miss. R. Civ. P. 13(a) applied to its counterclaim against the corporation, because both it and the corporation were represented by their respective insurance companies in the prior suit, Fed. R. Civ. P. 13 applied to the company's counterclaim, because the prior suit was pending in the federal court, and Fed. R. Civ. P. 13 had no insurer exception; the company's claim should have been brought as a compulsory counterclaim in the prior suit rather than as an independent state court claim; the company's claim fit squarely within the definition of a compulsory counterclaim set forth by Fed. R. Civ. P. 13(a). Tyler Marine Servs. v. Aqua Yacht Harbor Corp., 920 So. 2d 493, 2006 Miss. App. LEXIS 55 (Miss. Ct. App. 2006).

Because a net lease agreement at issue between a partnership and a corporation arose from the same complex business arrangement made by the parties that were being litigated in the partnership's circuit court action against the corporation, the claims asserted by the corporation in its chancery court action should have been submitted as a compulsory counterclaim against the partnership in the partnership's circuit court action. Copiah Med. Assocs. v. Miss. Baptist Health Sys., 898 So. 2d 656, 2005 Miss. LEXIS 259 (Miss. 2005).

Interpleader action was available to law firm to facilitate payment of the attorney fees in its possession into the registry of the court; however, the action for interpleader should have been brought as a compulsory counterclaim to pending litigation in another county between the same parties involving the same attorney fees. Scruggs, Millette, Bozeman & Dent, P.A. v. Merkel & Cocke, P.A., 804 So. 2d 1000, 2001 Miss. LEXIS 317 (Miss. 2001).

In asserting their compulsory counterclaim argument, plaintiffs were asserting a claim in bar which was in the nature of an affirmative defense; as such, plaintiffs had burden of proof at trial as well as on summary judgment. Atkinson v. National Bank of Commerce, 530 So. 2d 163, 1988 Miss. LEXIS 358 (Miss. 1988).

**Interpleader.**

Chancery court erred in dismissing as moot the counterclaims filed by an insured's father because the father permissibly filed counterclaims in the insurer's interpleader action; the father's counterclaims were separate and independent tort claims against the insurer. Pulliam v. Alfa Ins. Co., 238 So. 3d 620, 2018 Miss. App. LEXIS 40 (Miss. Ct. App. 2018).

**Scope of a cross-claim.**

Because the agreement at issue arose from the same complex business arrangement made by the parties, the claims asserted in the chancery court action should have been submitted as a compulsory counterclaim in the circuit court action. Copiah Med. Assocs. v. Miss. Baptist Health Sys., 2004 Miss. LEXIS 463 (Miss. May 6, 2004), op. withdrawn, sub. op., 898 So. 2d 656, 2005 Miss. LEXIS 259 (Miss. 2005).

Defendant insurance agent's motion for leave to file a cross-claim against defendant insurer was properly denied because the far-reaching allegations of the proposed cross-claim were only tangential to the subject matter of the complaint, thus, the proposed cross-claim exceeded the definition of a cross-claim under Miss. R. Civ. P. 13(g). Edwards v. Jackson Nat'l Life Ins. Co., 860 So. 2d 842, 2003 Miss. App. LEXIS 1137 (Miss. Ct. App. 2003).

**Waiver.**

Grant of summary judgment in favor of the appellee neighbors in their boundary-dispute action was proper because the appellant neighbor had waived the defense of adverse possession, Miss. R. Civ. P. 13(f). Appellant offered no reason for the six-month delay between the filing of her answer and her motion to amend the answer to raise the affirmative defense of adverse possession; further, the affirmative defense of adverse possession would have existed prior to the filing of the lawsuit, so it was not a fact that would have been found only through discovery. Charlot v. Henry, 45 So. 3d 1237, 2010 Miss. App. LEXIS 561 (Miss. Ct. App. 2010).

## Rule 14. Third-party practice.

(a) *When defendant may bring in third party.* — After commencement of the action and upon being so authorized by the court in which the action is pending on motion and for good cause shown, a defending party may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counter-claims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counter-claims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

(b) *When plaintiff may bring in third party.* — When a counter-claim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

(c) *Admiralty and maritime claims [Omitted].*

**HISTORY: Former Rule 14 deleted effective May 1, 1982; new Rule 14 adopted effective July 1, 1986; Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 1986, a new Rule 14 was adopted. 486-490 So. 2d XVII (West Miss. Cas. 1986).

Effective May 1, 1982, Rule 14 was abrogated. 410-416 So. 2d XXI (West Miss. Cas. 1982).

## ADVISORY COMMITTEE NOTE

It is essential that the third-party claim be for some form of derivative or secondary liability of the third-party defendant to the third-party plaintiff. Impleader is not available for the assertion of an independent action by the defendant against a third party, even if the claim arose out of the same transaction or occurrence as the main claim. Once a third-party claim is properly asserted, however, the third-party plaintiff may assert whatever additional claims the third-party plaintiff has against the third-party defendant under Rule 18(a).

The requirement that the third-party claim be for derivative or secondary liability may be met by, for example, an allegation of a right of indemnity (contractual or otherwise), contribution, subrogation, or warranty. The rules does not, however create any such rights. It merely provides a procedure for expedited consideration of these rights where they are available under substantive law. An insured party has a derivative claim for indemnity against the insured party's liability insurer, and may implead the party's liability insurer, if the insured is being sued for damages allegedly covered by the liability policy and the insurer is disclaiming coverage pursuant to the liability policy.

A defendant who is subject to joint and several liability for a plaintiff's damages may have a claim against joint tortfeasors for contribution. Generally, in Mississippi, liability for damages imposed in civil cases based upon "fault" is several only and not joint and several, thereby obviating the need or basis for contribution claims. Mississippi Code Annotated section 85-5-7(4), however, provides that '[j]oint and several liability shall be imposed on all who consciously and deliberately pursue a common plan or design to commit a tortuous act, or who actively take part in it." The statute further provides that "[a]ny person held jointly and severally liable under [such] section shall have a right of contribution from his fellow defendants acting in concert." Thus, Mississippi law grants a defendant who has been held jointly and severally liable for acting in concert a right of contribution against codefendants who were also acting in concert.

A first-party insurer against loss, sued by its policyholder for such loss, has a derivative claim for subrogation against, and may implead the person who allegedly caused the loss, where a right of subrogation would arise from the insurer's payment of the insured plaintiff's claim.

Because the rule expressly allows third-party claims against one who "may be liable," it is not an objection to implead that the third party's liability is contingent on the original plaintiff's recovery against the defendant hird-party plaintiff.

M.R.C.P. 14 differs from Fed. R. Civ. P. 14 in that M.R.C.P. 14 requires a defending party to obtain authorization from the court based upon a showing of good cause before such defending party may serve a summons and third-party complaint upon a nonparty. Pursuant to Fed. R. Civ. P. 14, a defending party must obtain leave of court only if it is filing a thirdparty complaint more than 14 days after serving its original answer.

## JUDICIAL DECISIONS

### ANALYSIS

Application.
Implied consent.

**Application.**

When a general contractor sued an owner for failed cables, the owner's warranty and product-liability claims against the cables' manufacturer were properly brought as additional third-party claims because (1) the claims arose out of the same transaction as the general contractor's suit against the owner, and (2) any breach of warranty by the manufacturer caused the loss the general contractor alleged. Premier Entm't Biloxi, LLC v. P.T.E. Sys. Int'l, LLC, 225 So. 3d 1213, 2017 Miss. App. LEXIS 541 (Miss. Ct. App. 2017).

When a general contractor sued an owner for failed cables, the owner's indemnity claim against the cables' manufacturer was a proper third-party claim because, under the owner's contract with the general contractor, the owner was liable to the contractor for any loss, whether or not covered by insurance, so the indemnity claim was not an independent cause of action. Premier Entm't Biloxi, LLC v. P.T.E. Sys. Int'l, LLC, 225 So. 3d 1213, 2017 Miss. App. LEXIS 541 (Miss. Ct. App. 2017).

Federal district court dismissed, on grounds of res judicata, the claims of a foreign corporation, even though the prior dismissal of its claims by a State court had been erroneous where the corporation had not been authorized to do business at that time under Miss. Code Ann. § 79-4-15.02(a), but the State court should have stayed the proceedings under Miss. Code Ann. § 79-4-15.02(c). Cuba Timber Co., Plaintiff v. Boswell, 339 F. Supp. 2d 773, 2004 U.S. Dist. LEXIS 20289 (S.D. Miss. 2004).

Although the defendant may implead a liability insurer if the insurer is disclaiming liability, the defendant may not implead the insurer if the court determines that the insurer, pursuant to the policy terms, is not liable. Sennett v. United States Fid. & Guar. Co., 757 So. 2d 206, 2000 Miss. LEXIS 47 (Miss. 2000).

The trial court did not abuse its discretion when it refused to allow the defendant commission to file a third-party complaint on the basis that the commission had taken no steps whatsoever to expeditiously resolve the action, even though it noted in its argument that time was of the essence in completing the project at issue. Mississippi Transp. Comm'n v. SCI, Inc., 717 So. 2d 332, 1998 Miss. LEXIS 338 (Miss. 1998).

**Implied consent.**

Trial court erred in concluding that the landowners' complaint did not contain a description of the lands claimed to have been adversely possessed and that their claim failed because the trial court could have ordered a survey to describe boundaries of the tracts of land by metes and bounds; even if the landowners had not alleged adverse possession at all, the receipt of the kind of evidence offered and accepted without objection on the question of possession would constitute a trial by consent, and no amendment would be needed, Miss. R. Civ. P. 15(b). Benefield v. Swords, 857 So. 2d 782, 2003 Miss. App. LEXIS 963 (Miss. Ct. App. 2003).

## Rule 15. Amended and supplemental pleadings.

(a) *Amendments.* — A party may amend a pleading as a matter of course at any time before a responsive pleading is served, or, if a pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within thirty days after it is served. On sustaining a motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6), or for judgment on the pleadings, pursuant to Rule 12(c), leave to amend shall be granted when justice so requires upon conditions and within time as determined by the court, provided matters outside the pleadings are not presented at the hearing on the motion. Otherwise a party may amend a pleading only by leave of court or upon written consent of the adverse party; leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.

(b) *Amendment to conform to the evidence.* — When issues not raised by the pleadings are tried by expressed or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the maintaining of the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence. The court is to be liberal in granting permission to amend when justice so requires.

(c) *Relation back of amendments.* —

(1) Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to

be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(2) An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by Rule 4(h) for service of the summons and complaint, the party to be brought in by amendment:

(a) has received such notice of the institution of the action that the party will not be prejudiced in maintaining the party's defense on the merits, and

(b) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

(3) An amendment pursuant to Rule 9(h) is not an amendment changing the party against whom a claim is asserted and such amendment relates back to the date of the original pleading.

(d) *Supplemental pleadings.* — Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions, occurrences, or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

**HISTORY: Amended effective July 1, 1998; amended effective April 17, 2003 to allow amendments on dismissal under Rule 12(b)(6) or judgment on the pleadings under Rule 12(c) where the court determines that justice so requires; amended effective July 1, 2014; amended rule, advisory committee historical note and advisory committee note, effective July 1, 2020.**

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 1998, Rule 15(c) was amended to state that the relation back period includes the time permitted for service of process under Rule 4(h).

Effective July 1, 2020, the subsections within Rule 15 (c) were reorganized and renumbered.

## ADVISORY COMMITTEE NOTE

Mississippi Rule 15(a) varies from Federal Rule 15(a) in that the federal rule permits a party to amend the pleading only once as a matter of course. The Mississippi rule places no limit on the number of such amendments.

If a party files an amended pleading without leave of court when leave of court was required by M.R.C.P. 15(a), such amendment is improper and the amended pleading will be struck. *See D.P. Holmes Trucking, LLC v. Butler*, 94 So. 3d 248, 255 (Miss. 2012).

An amended complaint that adds additional defendants must also comply with M.R.C.P. 21. *See Veal v. J.P. Morgan Tr. Co., NA.* , 955 So. 2d 843, 847 (Miss. 2007) ("Where . . . the amendment sought is to add new defendants. Mississippi Rule of Civil Procedure 21 is applicable, and requires an order from the court to add a new defendant").

An amended pleading adding a new claim or defense among existing parties relates back to the original pleading when the claim or defense in the amended pleading arises from the same conduct, transaction or occurrence set forth in the original pleading.

An amended pleading changing the name of the defending party relates back to the original pleading if the requirements ofM.R.C.P. 15(c)(l) and (2) are met.

An amendment substituting a named party for a fictitious party pursuant to M.R.C.P. 9(h) relates back only if the plaintiff exercised reasonable diligence to discover the true identity of the fictitious party. See *Bedford Health Properties. LLC v. Estate of Williams ex rel Hawthorne*, 946 So. 2d 335, 342 (Miss. 2006).

An amended pleading adding an additional defendant does not relate back to the original pleading unless: (i) it is an amendment changing the defending party's name and the requirements of M.R.C.P. 15(c)(1) and (2) are met: or (ii) is an amendment substituting a named defendant for a fictitious defendant pursuant to M.R.C.P. 9(h) and the reasonable diligence standard is met.

[Advisory Committee Note adopted effective July 1, 2014: amended effective July 1, 2020.]

## JUDICIAL DECISIONS

### ANALYSIS

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**In general.**

Parties manifested their consent to the chancellor's modification of the original judgment and division of the marital property on numerous occasions during the years covered in the appeal, and no surprise or prejudice was occasioned as a result of the judge's decision to grant the agreed request of the parties; although the parties' pleadings were for the contempt of the original judgment, the parties consented to the chancellor's authority to modify and decide issues not resolved by the Virginia divorce, including division of the marital property. Chapel v. Chapel, 876 So. 2d 290, 2004 Miss. LEXIS 759 (Miss. 2004).

In a child support matter, more than seven years had passed since the eldest child had reached 21; therefore, his claim was barred by the statute of limitations, but the claim of his sister was still viable, and the father did not waive the defense by failing to raise it as an affirmative defense in the pleadings when no pleading was required. Brown v. Brown, 822 So. 2d 1119, 2002 Miss. App. LEXIS 403 (Miss. Ct. App. 2002).

This rule places granting of motions to amend pleadings in the sound discretion of the trial court. Broadhead v. Terpening, 611 So. 2d 949, 1992 Miss. LEXIS 824 (Miss. 1992).

**Construction.**

Failure of incorporators to include page three when they filed a first petition for incorporation was a clerical error and not a failure to comply with the specific requirements of Miss. Code Ann. § 21-1-13; incorporation pleadings were amendable pursuant to Miss. R. Civ. P. 15. City of Jackson v. Byram Incorporators, 16 So. 3d 662, 2009 Miss. LEXIS 145 (Miss. 2009).

Fair reading of the annexation statutes, Miss. R. Civ. P. 15(a), Miss. R. Civ. P. 81(a)(11), and applicable case law leaves no doubt that, in most instances, annexation pleadings are amendable pursuant to Miss. R. Civ. P. 15. The court here clarifies that in annexation proceedings, when errors appear in the legal description of the territory proposed to be annexed and/or in the legal description of the entire boundary as changed after enlargement/annexation, such errors may be amended pursuant to the Mississippi Rules of Civil Procedure and case law. Lamar County v. City of Hattiesburg (In re Extension of the Boundaries of Hattiesburg ), 840 So. 2d 69, 2003 Miss. LEXIS 41 (Miss. 2003).

Subdivision (b) of this rule is nothing more than a rule of waiver: where a party offers no timely objection to his opponent's proof on an issue not pleaded, issue is treated as having been tried by implied consent. Queen v. Queen, 551 So. 2d 197, 1989 Miss. LEXIS 363 (Miss. 1989).

M.R.C.P. Rule 54(c) does not preclude a Rule 15(b) amendment after judgment has been entered; phrase "amended pleadings" in Rule 54(c) refers to and contemplates pleadings amended in accordance with procedures, including timeliness, authorized in Rule 15(b). Queen v. Queen, 551 So. 2d 197, 1989 Miss. LEXIS 363 (Miss. 1989).

Nothing in statutes governing election contests conflicted with rules of civil procedure respecting amendments, and trial court did not err when it allowed petition for judicial review to be amended. Pearson v. Parsons, 541 So. 2d 447, 1989 Miss. LEXIS 143 (Miss. 1989).

Defendants' motion to amend their answer would have been granted if it had been considered by lower court; justice required that it be added, and there would be no prejudice. Defendants were therefore not procedurally barred from raising issue first presented in their amended answer. Haygood v. First Nat'l Bank, 517 So. 2d 553, 1987 Miss. LEXIS 2923 (Miss. 1987).

**Applicability.**

Trial court did not abuse its discretion in denying the buyers leave to amend to assert a cause of action for the alleged violation of Miss. Code Ann. § 73-35-21(1)(a) where any amendment would be futile based on the fact that the original owners and buyers never consummated their real-estate transaction by closing on the home. Fletcher v. Lyles, 999 So. 2d 1271, 2009 Miss. LEXIS 7 (Miss. 2009).

Grant of summary judgment in favor of employee's employer was proper where denial of her leave to amend was justified, since she had nine months in which to amend her complaint, yet she waited to do so until two months before the trial where the claim had been ongoing since 1995. Harris v. Miss. Valley State Univ., 873 So. 2d 970, 2004 Miss. LEXIS 492 (Miss. 2004).

Miss. R. Civ. P. 15(d) deals with the supplementation of additional, unforeseeable or latent injuries and not additional legal theories, and even if the customer's amendment actually was a supplement, the standard for allowance was met because there was reasonable notice to the enterprise, and there were just terms; the customer's motion was made six months before trial, and the enterprise had ample time to prepare for the additional legal theories. CEF Enters. v. Betts, 838 So. 2d 999, 2003 Miss. App. LEXIS 9 (Miss. Ct. App. 2003).

While leave to amend is to be liberally granted, where plaintiff twice failed to amend its complaint after two agreed scheduling orders, denial of a subsequent leave to amend was proper. Hartford Cas. Ins. Co. v. Halliburton Co., 826 So. 2d 1206, 2001 Miss. LEXIS 247 (Miss. 2001).

The trial court's denial of a motion to amend a complaint two days before trial did not abuse discretion. Marchbanks v. Borum, 806 So. 2d 278, 2001 Miss. App. LEXIS 316 (Miss. Ct. App. 2001).

Leave to amend pursuant to subsection (a) does not apply to a case dismissed for lack of jurisdiction. Esco v. Scott, 735 So. 2d 1002, 1999 Miss. LEXIS 104 (Miss. 1999), overruled in part, Jackson v. Bell, 123 So. 3d 436, 2013 Miss. LEXIS 549 (Miss. 2013).

**Ad damnum clause.**

County court has the authority to grant an amendment to the ad damnum clause even though by doing so it will divest itself of jurisdiction and require the matter to be transferred to either the chancery or circuit court. Wal-Mart Super Ctr. v. Long, 852 So. 2d 568, 2003 Miss. LEXIS 312 (Miss. 2003).

Plaintiff should have been permitted to amend ad damnum clause of his complaint to increase amount of his demand, both at conclusion of his case on first trial and before beginning of second trial. Bradley v. Findley, 502 So. 2d 1181, 1986 Miss. LEXIS 2730 (Miss. 1986).

**Adding parties.**

To invoke the relation-back principle of Miss. R. Civ. P. 9(h) and 15(c), a plaintiff, after filing suit, must proceed in a reasonably diligent manner to determine the true identity of a fictitiously named defendant and to amend the plaintiff's complaint accordingly. Anderson v. ALPS Auto., Inc., 51 So. 3d 929, 2010 Miss. LEXIS 603 (Miss. 2010).

Wife's delay in seeking leave under Miss. R. Civ. P. 9(h) and 15(c)(2) to substitute a manufacturer for a fictitious defendant in a wrongful death suit of more than nine months after discovering the true identity of the fictitious defendant was unreasonable as Rule 9(h) contemplated a plaintiff amending the plaintiff's complaint in a reasonably diligent manner once the plaintiff learned the true identity of a fictitious party. Anderson v. ALPS Auto., Inc., 51 So. 3d 929, 2010 Miss. LEXIS 603 (Miss. 2010).

Addition of defendants' names in plaintiff's amended complaint without the court's leave was improper, even though plaintiff had obtained written consent from the original defendants, because the new names were not substituted for fictitious parties, but rather were those of new defendants whose addition required court approval under Miss. R. Civ. P. 21. Veal v. J. P. Morgan Trust Co., N.A., 955 So. 2d 843, 2007 Miss. LEXIS 368 (Miss. 2007).

Patient's amended complaint, adding a doctor and clinic as defendants, could not relate back to the original complaint; because only the motion to amend the complaint pursuant to Miss. R. Civ. P. 15(a) was considered filed prior to expiration of the statute of limitations, the putative amended complaint itself was held to be a nullity and dismissed since there were no timely proceedings to allow the amendment, nor was consent of the adverse party given. Wilner v. White, 929 So. 2d 315, 2006 Miss. LEXIS 267 (Miss. 2006).

Although Miss. R. Civ. P. 9(h) pleadings are not considered amendments changing a party against whom a claim was asserted and are allowed under Miss. R. Civ. P. 15(c) to relate back to the date of the original pleading, the rule did not apply to a patient's malpractice case because, in order for Rule 9(h)to apply, there had to be a substitution of a true party name for a fictitious one; the patient did not substitute the doctor's name for a "John Doe," but simply added his name. Wilner v. White, 929 So. 2d 315, 2006 Miss. LEXIS 267 (Miss. 2006).

Patient's amended complaint, which atempted to add a doctor and a clinic as defendants, failed to meet the test in Miss. R. Civ. P. 15(c)(2) because there was no mistake as to the parties' identities; the doctor's name actually appeared in the body of the original complaint itself, and the patient was well aware of the possibility of a claim she might have against him. Wilner v. White, 929 So. 2d 315, 2006 Miss. LEXIS 267 (Miss. 2006).

The plaintiff should have been allowed to amend her complaint so as to add new defendants under the "freely given where justice so requires" standard as there was no undue prejudice given that the additional defendants gave deposition testimony in connection with the action prior to the filing of the amended complaint and thereby were aware of the action. Wilner v. White, 788 So. 2d 822, 2001 Miss. App. LEXIS 165 (Miss. Ct. App. 2001).

In an action arising from a motor vehicle accident, the court improperly denied leave to the plaintiff to amend her complaint where (1) the accident occurred on February 25, 1993, (2) she filed suit against the defendant on February 24, 1994, and (3) she asserted that her attorney only learned that the defendant's minor son was driving the car on April 8, 1997 and filed a motion to amend two days later. Estes v. Starnes, 732 So. 2d 251, 1999 Miss. LEXIS 74 (Miss. 1999).

Trial judge did not err in denying plaintiff's motion to amend pleadings to add defendant's parent corporation; defendant was a corporate subsidiary separate and distinct from its parent, and parent corporation was not to be held responsible for any liability of the subsidiary. MBF Corp. v. Century Business Communications, 663 So. 2d 595, 1995 Miss. LEXIS 580 (Miss. 1995).

Chancellor erred in denying plaintiffs' motion for leave to amend complaint, where party sought to be added alleged causes of action which arose out of a series of transactions including those which created issues between existing parties. McDonald v. Holmes, 595 So. 2d 434, 1992 Miss. LEXIS 93 (Miss. 1992), overruled in part, Capital City Ins. Co. v. G.B. "Boots" Smith Corp., 889 So. 2d 505, 2004 Miss. LEXIS 1329 (Miss. 2004).

**Amendment of pleadings.**

Because a motor vehicle accident failed to properly serve the other motorist and a delivery company, thereby leading to the dismissal of the victim's original complaint as time-barred, the motorist's motion for leave to amend the complaint to include the independent contractor for which the motorist actually worked was rendered moot. As such, the circuit court was within its discretion to deny the victim's motion for leave to amend the complaint. Hadley v. FedEx Ground Package Sys., Inc., — So. 3d —, 2019 Miss. App. LEXIS 453 (Miss. Ct. App. Sept. 17, 2019).

Trial court abused its discretion by denying a state university head football coach's motion for leave to amend the coach's complaint against the university to allow the coach specifically to pursue a claim that the university breached the coach's contract by firing the coach without cause because the coach's original complaint put the university on notice that the coach was alleging that the coach's termination was a breach of the coach's employment contract and the university failed to show that it would have been prejudiced by the amendment. Jones v. Miss. Insts. of Higher Learning, 264 So. 3d 9, 2018 Miss. App. LEXIS 378 (Miss. Ct. App. 2018), cert. denied, 263 So. 3d 666, 2019 Miss. LEXIS 70 (Miss. 2019).

Leave to amend the homeowners' complaint was properly denied as they were essentially asking the court to remove claims that the court had already ruled failed as a matter of law. Elliott v. AmeriGas Propane, L.P., 249 So. 3d 389, 2018 Miss. LEXIS 325 (Miss. 2018).

Chancellor did not abuse its discretion by denying a motion for leave to amend a complaint because the movant failed to inform the chancellor of what facts or acts, other than bare allegations, constituted alleged fraud or negligence per se by the attorneys who represented the interests of a decedent's estate, a testamentary trust, and a guardianship. Moreover, the chancellor dismissed the attorneys from the litigation because the movant failed to obtain the court's leave to join them, and the movant filed no appeal of the attorneys' dismissal. Flowers v. Estate of Flowers (In re Estate of Flowers), 269 So. 3d 198, 2018 Miss. App. LEXIS 56 (Miss. Ct. App. 2018), aff'd in part and rev'd in part, 264 So. 3d 775, 2019 Miss. LEXIS 95 (Miss. 2019).

It was not an abuse of discretion to deny a daughter's motion to amend the daughter's petition in a probate proceeding because (1) the daughter did not state how the daughter proposed to amend the petition, (2) fraud claims alluded to were not stated with required specificity, and (3) the daughter sought to add attorneys as parties without required leave of court. Flowers v. Flowers (In re Estate of Flowers), 269 So. 3d 120, 2018 Miss. App. LEXIS 2 (Miss. Ct. App. 2018).

Chancery judge did not abuse his discretion in ruling on a bank's motion to dismiss a borrower's complaint prior to ruling on the borrower's motion to amend the complaint because the proposed amendment was futile. Crater v. Bank of N.Y. Mellon, 203 So. 3d 16, 2016 Miss. App. LEXIS 668 (Miss. Ct. App. 2016).

Amended postconviction relief motion was not untimely because, (1) under Miss. R. Civ. P. 15(a), the motion related back to an original motion that was timely under Miss. Code Ann. § 99-39-5(2), and, (2) if the motion were considered a supplement under Miss. R. Civ. P. 15(d), the motion was excepted from the limitation period, since the motion raised an intervening Mississippi Supreme Court decision, under Miss. Code Ann. § 99-39-5(2)(a)(i). Jackson v. State, 163 So. 3d 317, 2015 Miss. App. LEXIS 249 (Miss. Ct. App. 2015).

It was error to dismiss an inmate's postconviction motion for not obtaining permission to amend the motion because (1) the inmate was proceeding pro se, (2) the State was able to respond, and (3) the State did not allege allowing the amendment would prejudice the State. Jackson

v. State, 163 So. 3d 317, 2015 Miss. App. LEXIS 249 (Miss. Ct. App. 2015).

Circuit court erred in dismissing a husband's assault and intentional infliction of emotional distress claims against his former wife pursuant to Miss. R. Civ. P. 12(b)(6) where it denied the husband an opportunity to amend the complaint, but offered no explanation as to why an amendment would have been futile. Breeden v. Buchanan, 164 So. 3d 1057, 2015 Miss. App. LEXIS 45 (Miss. Ct. App.), cert. denied, 160 So. 3d 704, 2015 Miss. LEXIS 210 (Miss. 2015).

Trial court did not abuse its discretion by denying a vehicular accident victim's motion to amend to amend the victim's complaint to assert that the victim's sibling was a resident of their parent's home, and thus that the victim was entitled to coverage under the sibling's insurance policy, because defendant did not explore that issue. Howell v. USAA Cas. Ins. Co., 122 So. 3d 800, 2013 Miss. App. LEXIS 601 (Miss. Ct. App. 2013).

Grant of summary judgment in favor of the appellee neighbors in their boundary-dispute action was proper because the appellant neighbor had waived the defense of adverse possession, Miss. R. Civ. P. 15(a). Appellant offered no reason for the six-month delay between the filing of her answer and her motion to amend the answer to raise the affirmative defense of adverse possession; further, the affirmative defense of adverse possession would have existed prior to the filing of the lawsuit, so it was not a fact that would have been found only through discovery. Charlot v. Henry, 45 So. 3d 1237, 2010 Miss. App. LEXIS 561 (Miss. Ct. App. 2010).

Dismissal of two doctors in a medical-malpractice action brought by the patient and her spouse was inappropriate pursuant to Miss. Code Ann. § 15-1-36(15) because the patient's rejoinder of the doctors as defendants via an amended complaint after statutory notice was provided cured the initial failure to give notice. Hans v. Mem'l Hosp., 40 So. 3d 1270, 2010 Miss. App. LEXIS 143 (Miss. Ct. App. 2010).

Trial court did not abuse its discretion in allowing a former employer to file an untimely-amended answer because the employees could show no prejudice from the trial court's decision since the employer pleaded the statute of limitations in its original answer. Jones v. Fluor Daniel Servs. Corp., 32 So. 3d 417, 2010 Miss. LEXIS 72 (Miss. 2010), overruled in part, Geico Cas. Co. v. Stapleton, 315 So. 3d 464, 2021 Miss. LEXIS 100 (Miss. 2021).

Trial court abused its discretion in denying the buyers' motion to amend to include the additional claims of negligent inducement and negligent misrepresentation in determining that the buyers could not have proven by a preponderance of the evidence a lack of care on the part of the sellers; the sellers' alleged knowledge of the two inspection reports did not of necessity preclude a claim of negligence. Fletcher v. Lyles, 999 So. 2d 1271, 2009 Miss. LEXIS 7 (Miss. 2009).

In a negligence case, an amended complaint was timely filed, and seeking leave of court for the amendment was not required because no responsive pleading had been filed yet. Courtney v. McCluggage, 991 So. 2d 642, 2008 Miss. App. LEXIS 571 (Miss. Ct. App. 2008).

Amendment substituting a plaintiff relates back to the date of the original complaint under Miss. R. Civ. P. 15(c) if the new plaintiff is the real party in interest. MS Comp Choice, SIF v. Clark, Scott & Streetman, 981 So. 2d 955, 2008 Miss. LEXIS 220 (Miss. 2008).

Trial court erred in granting a law firm's motion for summary judgment in a legal malpractice suit because whether an insurance company adequately alleged in its amended complaint that it was the assignee of the insurance company's third party administrator's claims against the firm, and thus the real party in interest, was a genuine issue. MS Comp Choice, SIF v. Clark, Scott & Streetman, 981 So. 2d 955, 2008 Miss. LEXIS 220 (Miss. 2008).

Miss. R. Civ. P. 15(a) allows a plaintiff to amend his complaint without having first served the complaint on a defendant. MS Comp Choice, SIF v. Clark, Scott & Streetman, 981 So. 2d 955, 2008 Miss. LEXIS 220 (Miss. 2008).

While plaintiffs erred under Miss. Code Ann. §11-46-1(i) in naming a sheriff's department as a defendant in a personal injury suit, the trial court erred in denying plaintiffs' motion for leave to amend the complaint pursuant to Miss. R. Civ. P. 15(c) to add a county as a defendant where plaintiffs' notice of claim letter put the proper county official on notice that, except for the mistake of naming the wrong party, the action would have been brought against the county. Mieger v. Pearl River County, 986 So. 2d 1025, 2008 Miss. App. LEXIS 21 (Miss. Ct. App.), cert. denied, 987 So. 2d 451, 2008 Miss. LEXIS 371 (Miss. 2008).

Where an estate mistakenly named a nursing home and personnel, and the estate failed to properly substitute any defendant for a fictitious party under Miss. R. Civ. P. 9(h), the amended complaint related back as to four of the defendants because they were the same owners and managers as the amended nursing home and had notice under Miss. R. Civ. P. 15(c), but the amended complaint did not relate back as to two defendants that did not have notice of the original complaint; therefore, those two defendant's were not timely served under Miss. R. Civ. P. 4(h). Bedford Health Props., LLC v. Estate of Williams, 946 So. 2d 335, 2006 Miss. LEXIS 632 (Miss. 2006).

In an action alleging waste, a trial court should have allowed an amendment to join two owners of property that gave permission to cut timber since they might have been indispensable parties under Miss. R. Civ. P. 19. Tolbert v. Southgate Timber Co., 943 So. 2d 90, 2006 Miss. App. LEXIS 868 (Miss. Ct. App. 2006).

After an original complaint has been filed, an amended complaint, except as otherwise provided by rule, may be filed only upon seeking and receiving leave of the court to do so, as set forth in Miss. R. Civ. P. 15; therefore, a putative amended complaint could not have been anything more than an attachment to the motion to amend until the court had ruled on that motion. Wilner v. White, 929 So. 2d 315, 2006 Miss. LEXIS 267 (Miss. 2006).

Amount of award to a corporation in a contract dispute was tried by consent, even though it was not in the corporation's complaint in its suit against a county. The trial by consent acted to amend the complaint. Southland Enters., Inc. v. Newton County, 940 So. 2d 937, 2006 Miss. App. LEXIS 101 (Miss. Ct. App.), cert. denied, 939 So. 2d 805, 2006 Miss. LEXIS 739 (Miss. 2006).

Plaintiff is required to make a "reasonably diligent inquiry" into the identity of an unknown defendant within the limitations period in order to substitute the defendant for a fictitious party under Miss. R. Civ. P. 9(h) and Miss. R. Civ. P.15(c)(2). Santangelo v. Green, 920 So. 2d 521, 2006 Miss. App. LEXIS 75 (Miss. Ct. App. 2006).

Court did not err in denying defendant's motion to supplement his petition for postconviction relief because nothing he sought to add to his petition occurred since the date of pleading; while the affidavits sought to be added to the petition were executed since the date of the original petition, the allegations contained therein all related to events that occurred prior to the date of the original petition. Hence, defendant's reliance upon Miss. R. Civ. P. 15(d) was misplaced. Sanchez v. State, 913 So. 2d 1024, 2005 Miss. App. LEXIS 313 (Miss. Ct. App.), cert. dismissed, 920 So. 2d 1008, 2005 Miss. LEXIS 605 (Miss. 2005).

Miss. Code Ann. § 23-15-927 is silent regarding the amendment of pleadings. Therefore, Miss. R. Civ. P. 15(a) controls and amendments are allowed at any time before a responsive pleading is served; in the case at bar, no responsive pleading from the County Democratic Executive Committee was on record, and even if there was a response by the Committee served upon the candidate (who opposed the holding of a new primary election), in the record, Miss. R. Civ. P. 15(a) allowed the amendment of pleadings after a responsive pleading was served "by leave of the court." Jefferson Davis County v. Davies, 912 So. 2d 837, 2005 Miss. LEXIS 212 (Miss. 2005).

Trial court erred in dismissing, pursuant to Miss. R. Civ. P. 12, a purchaser's action to recover for defects in a mobile home; the purchaser's act of filing an amended complaint within the relevant statute of limitations, Miss. Code Ann. § 63-17-159(6), was sufficient to defeat defendants' motion to dismiss, as the amended complaint, filed pursuant to

Miss. R. Civ. P. 15, provided defendants with the required notice under Miss. R. Civ. P. 4. King v. Am. RV Ctrs., Inc., 862 So. 2d 558, 2003 Miss. App. LEXIS 1195 (Miss. Ct. App. 2003), overruled in part, Wilner v. White, 929 So. 2d 315, 2006 Miss. LEXIS 267 (Miss. 2006).

Trial court did not err in dismissing defendant's motion to amend his postconviction petition for relief; since the State was not required to file a responsive pleading, defendant had 30 days, pursuant to Miss. R. Civ. P. 15(a), to file his motion to amend from the time he served his postconviction relief motion, and since he did not file his motion within that time, the trial court did not err in dismissing his motion to amend. Faye v. State, 859 So. 2d 393, 2003 Miss. App. LEXIS 905 (Miss. Ct. App. 2003).

While truck owner's claim to determine insurance coverage under Miss. R. Civ. P. 57(b)(2) was futile because the insurance company did not deny coverage, and dismissal as to that claim was proper, the trial court abused its discretion in denying the truck owner's motions to compel discovery, and for leave to file a first amended complaint, to add a claim of intentional infliction of emotional distress based on the plain language of Miss. R. Civ. P. 15(a). Poindexter v. S. United Fire Ins. Co., 838 So. 2d 964, 2003 Miss. LEXIS 86 (Miss. 2003).

Bank had reason to be on notice of the variance in the acreage figures before the trial commenced and even before the buyer's counsel tried to repair the error, namely, upon taking the depositions of the agents and the buyer's theory of the case and damages were for the land the bank had purchased while the buyer was trying to secure a loan with the bank; thus, any prejudice suffered by the bank with regard to the amendment of the buyer's pleadings pursuant to Miss. R. Civ. P. 15(b) did not amount to reversible error. AmSouth Bank v. Gupta, 838 So. 2d 205, 2002 Miss. LEXIS 357 (Miss. 2002).

In a suit for negligence, trial court did not abuse its discretion in permitting one psychiatrist to amend his answer in a suit for negligence to include a notice and statute of limitation defense, or in permitting another psychiatrist to raise the same defenses for the first time in his motion for summary judgment. Bennett v. Madakasira, 821 So. 2d 794, 2002 Miss. LEXIS 107 (Miss. 2002).

In a firefighter's employment dispute with a city, the trial court abused its discretion when refusing to allow the firefighter to amend the complaint following the city's motion to dismiss or, in the alternative, move for summary judgment; the firefighter sought to add a new theory of recovery arising from the same transaction and series of events in response to the city's assertion of governmental immunity. Pratt v. City of Greenville, 804 So. 2d 972, 2001 Miss. LEXIS 261 (Miss. 2001).

The plaintiffs were properly denied leave to amend the complaint on a motion to dismiss where the proposed amendment was futile in the light of statutory and case law pertaining to their claim. Jones v. Lovett, 755 So. 2d 1243, 2000 Miss. App. LEXIS 34 (Miss. Ct. App. 2000).

Court did not abuse its discretion in allowing defendant to amend her pleadings during the trial by adding counterclaims; defendant did not prevail on some of these claims and plaintiff could show no actual prejudice caused by the addition of the other claims. Merchants Acceptance, Inc. v. Jamison, 752 So. 2d 422, 1999 Miss. App. LEXIS 687 (Miss. Ct. App. 1999).

Defendant in replevin action should have been granted leave to file amended response and counterclaim, where his motion to amend was timely, did not alter the gist of his allegations, and neither plaintiff nor trial court identified any undue prejudice that would be suffered by plaintiff if amendment were to be granted. Simmons v. Thompson Mach., 631 So. 2d 798, 1994 Miss. LEXIS 51 (Miss. 1994).

Trial court erred in denying plaintiff leave to amend her complaint to include RICO claims arising out of the same series of events as her original complaint, and therefore court's grant of summary judgment was premature. Frank v. Dore, 635 So. 2d 1369, 1994 Miss. LEXIS 138 (Miss. 1994).

Trial court was correct in refusing to hear petition for writ of habeas corpus, where mother sought to amend her pleading a mere two days before trial in termination of parental rights proceeding. Natural Mother v. Paternal Aunt, 583 So. 2d 614, 1991 Miss. LEXIS 386 (Miss. 1991).

Plaintiffs alleging false arrest and false imprisonment were not entitled to amend their complaint to include claim for malicious prosecution, where they failed to properly move for leave to amend, defendants' motion for summary judgment had already been sustained, and allowing plaintiffs to circumvent statute of limitations by their proposed amendment would be unduly prejudicial to defendants. Parker v. Mississippi Game & Fish Com., 555 So. 2d 725, 1989 Miss. LEXIS 513 (Miss. 1989).

**Compelling reason.**

Policy to freely grant amendments is not allowed to encourage delay, laches and negligence; examples of when a motion to amend may be prejudicial include where it would burden the adverse party with more discovery, preparation, and expense, particularly where the adverse party would have little time to investigate and acquaint itself with the matter; lack of diligence is not a compelling reason to amend, and applications to amend the pleadings should be prompt. Webb v. Braswell, 930 So. 2d 387, 2006 Miss. LEXIS 284 (Miss. 2006).

Defendant insurance agent's motion for leave to file a cross-claim against defendant insurer was properly denied because there was no compelling reason under Miss. R. Civ. P. 15(a) why the cross-claim had to be filed in this suit as the agent was not seeking to hold the insurer liable for any damages that the insureds may have recovered against the agent and and when the motion was heard the lawsuit had already been dismissed. Edwards v. Jackson Nat'l Life Ins. Co., 860 So. 2d 842, 2003 Miss. App. LEXIS 1137 (Miss. Ct. App. 2003).

**Conforming to evidence.**

In a landowner's property dispute with adjoining property owners regarding a fence, a chancery court did not abuse its discretion in not permitting a landowner to amend his complaint to conform to the evidence, pursuant to Miss. R. Civ. P. 15(b), because the proposed amendment would have prejudiced the adjoining property owners; the proposed amendment would have allowed the landowner to completely abandon his initial argument of deed confirmation and adopt the alternative argument of deed reformation. Mahaffey v. Maner, 47 So. 3d 1190, 2010 Miss. App. LEXIS 605 (Miss. Ct. App. 2010).

Although the developers did not affirmatively plead equitable estoppel in their answer, the record was replete with particular facts that reverberated with the tenets of equitable estoppel, Miss. R. Civ. P. 15(b). Accordingly, they were sufficient to support the chancellor's finding. David M. Cox, Inc. v. Pitts, 29 So. 3d 795, 2009 Miss. App. LEXIS 468 (Miss. Ct. App. 2009), cert. denied, 29 So. 3d 774, 2010 Miss. LEXIS 138 (Miss. 2010).

Despite the fact that a county failed to set forth the affirmative defense of contributory negligence in the pleadings as required under Miss. R. Civ. P. 8(c), neither a car driver nor a passenger mother voiced an objection at either request by the county to apply comparative negligence during the trial and thus, the defense could be treated as if it had been raised in the pleadings under Miss. R. Civ. P. 15(b). Callahan v. Ledbetter, 992 So. 2d 1220, 2008 Miss. App. LEXIS 547 (Miss. Ct. App. 2008).

Question of a constructive trust was properly before the appellate court pursuant to Miss. R. Civ. P. 15(b) because when the husband and wife introduced the evidence and the administratrix did not object, the pleadings were amended by operation of the rules of civil procedure; even were the appellate court to consider the husband and wife "the other side," the husband and wife consented, since they were the ones who introduced evidence outside the pleadings. Horne v. Parker (In re Estate of Hood), 955 So. 2d 943, 2007 Miss. App. LEXIS 291 (Miss. Ct. App. 2007).

Because a former adoptive mother's husband was both a legal custodian and a legal parent of a child, he was entitled to notice of a prospective adoptive mother's attempts to adopt; although the father was not named in the first adoption decree, he was a de facto party to such due to a chancery court's questioning of him, the recognition in the final decree that he was married to the former adoptive mother, and the fact that the child was taking his last name. In re J.D.S., 953 So. 2d 1133, 2007 Miss. App. LEXIS 224 (Miss. Ct. App. 2007).

There was no error in allowing the Mississippi State Bar to amend its formal complaint at the close of its case-in-chief under Miss. R. Civ. P. 15(b) to include an allegation that an attorney violated another rule of professional conduct based on evidence received at a formal hearing because there was no objection to testimony regarding this violation or the introduction of a client's receipts. Shah v. Miss. Bar, 962 So. 2d 514, 2007 Miss. LEXIS 5 (Miss. 2007).

Trial court's grant of divorce to a wife was proper in a case where there was no surprise or prejudice occasioned as a result of the trial court's decision to grant a divorce requested by both parties based on the husband's admission of adultery. Ward v. Ward, 825 So. 2d 713, 2002 Miss. App. LEXIS 502 (Miss. Ct. App. 2002).

Because the issue of adverse possession was tried by consent, the failure to amend the pleadings to make them conform to the evidence did not affect the result of the trial on these issues. Stewart v. Graber, 754 So. 2d 1281, 1999 Miss. App. LEXIS 711 (Miss. Ct. App. 1999).

The trial court did not abuse its discretion when it refused to allow the plaintiff to amend its complaint to conform the pleadings to proof and include a cause of action for commercial bribery on the basis that the plaintiff lacked due diligence in amending the complaint and because the defendants would have been adversely prejudiced if the motion to amend was granted at such a late date, on the last day of a four-day trial. Par Indus. v. Target Container Co., 708 So. 2d 44, 1998 Miss. LEXIS 41 (Miss. 1998).

The plaintiff wife was properly permitted to amend the complaint in her divorce action to conform to evidence already presented in her trial testimony where (1) the amendment occurred in the middle of her testimony and before the defendant husband was called as a witness, (2) the only contested issues in the amended pleadings were increased requests in the amount of the lump sum and periodic alimony, and (3) the husband was required to put on the same evidence to defend the request for alimony, regardless of the amount in the pleadings. Robison v. Robison, 722 So. 2d 601, 1998 Miss. LEXIS 531 (Miss. 1998).

Where the defendant offered no objection to evidence offered by the plaintiff of a deficiency in child support greater than the amount set forth in her pleadings, the pleadings would be deemed amended, especially since (1) the amount sought was a liquidated amount which the defendant could reasonably calculate based on his own knowledge of the decree versus the amount paid by him, and (2) the defendant knew that he was not currently paying the full amount of child support due and that, therefore, the outstanding amount thereof would continue to increase until trial. Lahmann v. Hallmon, 722 So. 2d 614, 1998 Miss. LEXIS 528 (Miss. 1998).

Chancellor did not err in denying defendant's motion to amend to conform pleadings to proof presented at trial, where defendant's proof, even if admitted under an amended pleading, would have been inadequate to support a claim. Bowser v. Tootle, 556 So. 2d 1373, 1990 Miss. LEXIS 46 (Miss. 1990).

Plaintiff's motion, at close of defendant's case, to amend medical malpractice complaint to conform to evidence presented in case was correctly denied, where new theory of recovery was not tried by implied consent, and had motion been granted, it would have resulted in undue prejudice to defendant. McCarty v. Kellum, 667 So. 2d 1277, 1995 Miss. LEXIS 483 (Miss. 1995).

**Dismissal.**

Because homeowners failed to seek leave to amend their complaint in litigation with a contractor, their amendment was improper and thus was stricken. Accordingly, the improperly filed and later stricken amended complaint did not operate to toll the statute of limitations on their intentional tort claims in a later action against the contractor. Johnson v. Rhett, 250 So. 3d 486, 2018 Miss. App. LEXIS 11 (Miss. Ct. App. 2018).

Trial court correctly held that the patient's second amended complaint had to be dismissed, because under this rule, a party may amend a pleading as a matter of course at any time before a responsive pleading is served, and because, even though no responsive pleadings had been served to the first amended complaint, the doctor and the clinic had served responsive pleadings to the original complaint. Meeks v. Hologic, Inc., 179 So. 3d 1127, 2015 Miss. LEXIS 610 (Miss. 2015).

As a veteran did not seek to amend his complaint after it was dismissed pursuant to Miss. R. Civ. P. 12(b)(6) and 15(a), an appellate court's review of the dismissal was limited to the allegations in the complaint, which were taken as true. Cook v. Wallot, 172 So. 3d 788, 2013 Miss. App. LEXIS 245 (Miss. Ct. App. 2013).

Trial court's dismissal of complaint for failure to state a claim for which relief can be granted afforded plaintiffs an automatic right to amend within thirty days, but their failure to exercise this right rendered their assignment of error meritless. Sligh v. First Nat'l Bank, 704 So. 2d 1020, 1997 Miss. LEXIS 505 (Miss. 1997).

**Fraud.**

Petitioner's motion for leave to amend should have been allowed, where motion alleged fraud perpetrated upon court by administratrix of estate; if an allegation of fraud is sufficiently pled it should be heard, and thirty days leave to amend is to be granted when court sustains a motion to dismiss. Smith v. Estate of King, 501 So. 2d 1120, 1987 Miss. LEXIS 2287 (Miss. 1987).

**Implied consent.**

While a contractor did not assume that a homeowner's negligence claims had been pleaded in the homeowner's initial motion for summary judgment, they were taken as a given by the parties through most of the litigation. The contractor's acquiescence was so complete that the claims were tried by consent. Clausell v. Bourque, 158 So. 3d 384, 2015 Miss. App. LEXIS 100 (Miss. Ct. App. 2015).

Trial court erred in concluding that the landowners' complaint did not contain a description of the lands claimed to have been adversely possessed and that their claim failed because the trial court could have ordered a survey to describe boundaries of the tracts of land by metes and bounds; even if the landowners had not alleged adverse possession at all, the receipt of the kind of evidence offered and accepted without objection on the question of possession would constitute a trial by consent, and no amendment would be needed, Miss. R. Civ. P. 15(b). Benefield v. Swords, 857 So. 2d 782, 2003 Miss. App. LEXIS 963 (Miss. Ct. App. 2003).

Two fleeting references to the possibility of joint custody – during a trial in which both parents fought hard for sole custody – were insufficient to amend a parent's pleadings under a theory of implied consent to include a petition for joint custody. Mabus v. Mabus, 890 So. 2d 806, 2003 Miss. LEXIS 62 (Miss. 2003).

Because it was reasonable that claimant did not recognize the significance of the evidence introduced at trial that was not present in the pleadings, and thus failed to object, he did not give implied consent to the trial of the unpleaded issues. Cox v. S.B. Thomas Trust, 755 So. 2d 52, 1999 Miss. App. LEXIS 699 (Miss. Ct. App. 1999).

Plaintiff was not barred from asserting negligence issue, where she implicitly amended her complaint under subdivision (b) of this rule by introducing negligence issue in her motion opposing summary judgment, and the rule allows issues tried by implied consent to be litigated. Presswood v. Cook, 658 So. 2d 859, 1995 Miss. LEXIS 367 (Miss. 1995).

Chancellor erred in amending divorce decree to award husband the parties' oldest child as a tax exemption; issue of tax exemptions was not raised by the pleadings, and wife did not impliedly consent to trial of issue where chancellor's few, brief questions of husband concerning tax exemptions would not have alerted wife that a new, unpled issue was being raised and tried. Shipley v. Ferguson, 638 So. 2d 1295, 1994 Miss. LEXIS 337 (Miss. 1994).

A finding that an issue was tried by implied consent depends upon whether parties recognized that a new issue was being litigated at trial; where questions asked or evidence presented at trial are relevant to issues actually raised in the pleadings, trial by implied consent will not be found. Setser v. Piazza, 644 So. 2d 1211, 1994 Miss. LEXIS 526 (Miss. 1994).

Wife's action for separate maintenance was properly converted to, and tried as, a claim for alimony, where husband put on evidence as to fault and alimony, failed to properly object, and failed to raise any due process considerations at trial or on appeal, and therefore issue of alimony was tried by parties' consent. Weiss v. Weiss, 579 So. 2d 539, 1991 Miss. LEXIS 238 (Miss. 1991).

Where plaintiffs originally sued on agency theory but added joint venture claim at trial, the matter was tried by implied consent where defendant noted the new theory but did not object. Carmichael v. Agur Realty Co., 574 So. 2d 603, 1990 Miss. LEXIS 780 (Miss. 1990).

Undue influence issue was tried by implied consent of parties, where plaintiff at trial sought to establish existence of confidential relationship and defendant's exercise of undue influence, and no objection was offered on grounds that such evidence was beyond scope of pleadings. Norris v. Norris, 498 So. 2d 809, 1986 Miss. LEXIS 2839 (Miss. 1986).

**Interest of justice.**

Chancellor abused her discretion by allowing a wife to put forward evidence of her need for temporary rehabilitative alimony, in order "to be fair to both parties and to do equity," where there had been no mention of alimony in the pre-trial statement. Singley v. Singley, 2003 Miss. LEXIS 283 (Miss. June 12, 2003).

Chancery court should have allowed taxpayers' post-judgment motion to amend complaint to assert claim under 42 U.S.C. § 1983 and Equal Protection Clause, since case was of great public interest, federal judiciary had declared that it had no subject matter jurisdiction, and justice demanded that the claim be heard and decided on its merits and the only available alternative was allowing amendment in the present action. Burrell v. Mississippi State Tax Com., 536 So. 2d 848, 1988 Miss. LEXIS 367 (Miss. 1988), overruled in part, Commonwealth Brands v. Morgan, 110 So. 3d 752, 2013 Miss. LEXIS 141 (Miss. 2013).

Trial court did not err in denying the motion to amend filed by the deceased patient's heir after the statute of limitations expired because the heir failed to meet both the identity of transaction test and the notice requirement, thereby rendering the relation back doctrine of Miss. R. Civ. P. 15(c) inapplicable and her amended complaint barred by the two-year statute of limitations provided in Miss. Code Ann. § 15-1-36(2) for wrongful death actions. The facts on which the heir founded her claims of negligence gave rise to separate and distinct actions, which failed to inform the doctor of litigation concerning a particular occurrence because the original complaint alleged that the doctor negligently prescribed ACE inhibitors for the patient's hypertension, and the amended complaint alleged he negligently prescribed allopurinol for the patient's gout. Bracey v. Sullivan, 899 So. 2d 210, 2005 Miss. App. LEXIS 69 (Miss. Ct. App. 2005).

**Prejudice.**

Although the court did not find any evidence that appellant sought leave of court to amend his complaint to add a claim that appellee usurped a corporate opportunity, any error was harmless because the record was clear that the chancellor did not award appellant any damages based on that claim. Griffith v. Griffith, 997 So. 2d 218, 2008 Miss. App. LEXIS 715 (Miss. Ct. App. 2008).

Under Miss. R. Civ. P. 15, appellant should have been allowed to amend his pleadings where, when appellee appealed from the justice court to the circuit court, the circuit court granted original jurisdiction, not appellate jurisdiction, and therefore had to follow the Mississippi Rules of Civil Procedure; appellee would not suffer prejudice if appellant were to amend his pleadings, especially since it was appellee who chose to appeal to the circuit court and invoke the original jurisdiction of the circuit court. Statham v. Miller, 988 So. 2d 407, 2008 Miss. App. LEXIS 401 (Miss. Ct. App. 2008).

Had the trial court granted the couple leave to amend, the rights of all the defendants would be prejudicially affected, in particular, the driver's insurer, who had been dismissed as a result of the settlement agreement, would have been most prejudicially affected, and to grant the couple permission to amend their complaint at such a late date would prejudice the restaurant; accordingly, the trial court did not abuse its discretion in denying the couple's motion to amend. Whitaker v. T & M Foods, Ltd., 7 So. 3d 946, 2007 Miss. App. LEXIS 634 (Miss. Ct. App. 2007), rev'd, 2008 Miss. LEXIS 486 (Miss. Oct. 2, 2008), rev'd, 7 So. 3d 893, 2009 Miss. LEXIS 166 (Miss. 2009).

County court did not abuse its discretion in granting a plaintiff, more than one year after the complaint was filed, leave to amend her ad damnum clause from $75,000 to $750,000, as the amendment did not prejudice defendant, which could have sought removal to federal court but chose not to. Wal-Mart Super Ctr. v. Long, 852 So. 2d 568, 2003 Miss. LEXIS 312 (Miss. 2003).

Where employee filed her motion to amend her pleadings just 14 days after the employer filed his answer and 9 days after the employer filed his motion for summary judgment, this filing by the employee was well within the normal period for discovery and prior to the case being anywhere near ready for trial, and there was no actual prejudice to the employer, thus, the trial court abused its discretion in denying the employee's motion to amend her pleadings. Coleman v. Smith, 841 So. 2d 192, 2003 Miss. App. LEXIS 257 (Miss. Ct. App. 2003).

Amendment of defendant's answer and counterclaim should have been allowed, where amendment would have merely formally pled those issues of which plaintiff already had full knowledge. TXG Intrastate Pipeline Co. v. Grossnickle, 716 So. 2d 991, 1997 Miss. LEXIS 512 (Miss. 1997).

In practice, an amendment should be denied only if the amendment would cause actual prejudice to the opposite party. TXG Intrastate Pipeline Co. v. Grossnickle, 716 So. 2d 991, 1997 Miss. LEXIS 512 (Miss. 1997).

Trial court did not abuse its discretion in granting leave to file amended complaint, where opposing party did not assert nor did record contain a hint of prejudice. Rector v. Mississippi State Highway Comm'n, 623 So. 2d 975, 1993 Miss. LEXIS 311 (Miss. 1993).

Allowing entire theory of liability to change at conclusion of a three-day trial seriously prejudiced defendant, and circuit judge therefore erred in submitting new issue to jury, and was correct in reversing his ruling upon defendant's motion for judgment notwithstanding the verdict. Hester v. Bandy, 627 So. 2d 833, 1993 Miss. LEXIS 534 (Miss. 1993).

**Relation back.**

Plaintiff's claims were time-barred where his original complaint did not identify a cause of action against a fictitious party, the amended allegations were the first against the fictitious parties and directly contradicted the case's original theory, and thus, the amended complaint did not relate back under Miss. R. Civ. P. 9(h) and 15(c)(2). Hammons v. Navarre, 252 So. 3d 9, 2018 Miss. LEXIS 252 (Miss. 2018).

Fact that Miss. R. Civ. P. 21 requires a court order to add an additional party to the suit lends credence to the interpretation that an amended complaint adding a party under Miss. R. Civ. P. 15 does not relate back to the time of filing. Rule 15's relation-back doctrine is not intended to apply where a new defendant is brought into the suit in an attempt to perfect venue. Forrest Gen. Hosp. v. Upton, 240 So. 3d 410, 2018 Miss. LEXIS 174 (Miss. 2018).

Plain-language interpretation of the ordinary meaning of the Mississippi Rules of Civil Procedure supports the conclusion that the addition of a party to a suit does not relate back under Miss. R. Civ. P. 15 for the purposes of determining venue. Forrest Gen. Hosp. v. Upton, 240 So. 3d 410, 2018 Miss. LEXIS 174 (Miss. 2018).

Does an amended complaint, which names a new party to the suit, relate back to the time of filing of the original complaint for the purposes of determining venue? The Supreme Court of Mississippi finds that it does not. Forrest Gen. Hosp.

v. Upton, 240 So. 3d 410, 2018 Miss. LEXIS 174 (Miss. 2018).

Wrongful-death beneficiary's suit against a nursing home was time-barred because (1) the relation-back privilege for a Miss. R. Civ. P. 9(h) amendment did not apply as the nursing home was known to the beneficiary when filing the original complaint naming a fictitious defendant, and, (2) if the nursing home were unknown to the beneficiary when filing the original complaint or before the statute of limitations ran, it was not timely named due to the beneficiary's failure to exercise due diligence to attempt to learn the proper party, as the beneficiary knew the nursing home existed, and medical records available at the start of the case showed the nursing home's potential liability. Hopkins v. CLC of Biloxi, LLC, 229 So. 3d 742, 2017 Miss. App. LEXIS 620 (Miss. Ct. App. 2017).

Summary judgment was properly granted to the owner of man buggy that was involved in an accident, because the applicable statute of limitations had run, and the owner was not properly substituted for a fictitious party into the accident victim's complaint, as the victim possessed enough information to determine the legal entity that owned the buggy, given that the owner's label was on the buggy. The amendment by the victim to add the owner as a party did not relate back to the filing of the complaint because the victim failed to establish that the victim utilized reasonable diligence to timely identify the owner as a fictitious party. Davenport v. Hertz Equip. Rental Corp., 187 So. 3d 194, 2016 Miss. App. LEXIS 112 (Miss. Ct. App. 2016).

Dismissal of a suit seeking to enforce a construction lien was proper as: (1) the original complaint (OC) did not name the real party in interest under Miss. R. Civ. P. 17(a), the current owner (CO) of the building; (2) the prior owner had conveyed the property before the OC was filed; (3) the amended complaint (AC) was time-barred as it was not served on the CO until after the Miss. Code Ann. § 85-7-141 limitations period expired; (4) due to the lack of timely service under Miss. R. Civ. P. 4(h), the AC did not relate back to the OC's filing under Miss. R. Civ. P. 15(c); and (5) the contractor did not show good cause for the delayed service of the CO. Welch Roofing & Constr., Inc. v. Farina, 99 So. 3d 274, 2012 Miss. App. LEXIS 639 (Miss. Ct. App. 2012).

Circuit court did not err in granting summary judgment in favor of the manufacturers because they were not properly substituted pursuant to Miss. R. Civ. P. 9(h) and Miss. R. Civ. P. 15(c)'s relation-back provision did not apply, which meant that a wife's wrongful death claims against the manufacturers were untimely. Miller v. Engelhard Corp., 95 So. 3d 740, 2012 Miss. App. LEXIS 492 (Miss. Ct. App. 2012).

Circuit court did not err in granting summary judgment in favor of the manufacturers because they were not properly substituted pursuant to Miss. R. Civ. P. 9(h) and Miss. R. Civ. P. 15(c)'s relation-back provision did not apply, which meant that a wife's wrongful death claims against the manufacturers were untimely. Miller v. Engelhard Corp., 95 So. 3d 740, 2012 Miss. App. LEXIS 492 (Miss. Ct. App. 2012).

In a medical negligence case in which a mother raised her constitutional challenges to the Mississippi Tort Claims Act (MTCA) for the first time on appeal, although, in her motion to amend the complaint, the mother stated that she wished to raise the constitutionality of the MTCA, there was no valid complaint to amend. The mother had not complied with the notice requirement under Miss. R. Civ. P. 24(d), and she had not complied with the 90-day notice period in Miss. Code Ann. § 11-46-11(1). Jones v. Laurel Family Clinic, P.A., 37 So. 3d 665, 2010 Miss. App. LEXIS 14 (Miss. Ct. App. 2010).

Trial court's dismissal of the personal injury action as untimely was reversed and remanded for further proceedings because it had long been recognized that the doctrine of misnomer allowed parties to correct party-name errors if doing so would not result in prejudice. Allowing the dismissal to stand would have denied the patient an opportunity for a trial on the merits because of a misnomer in the complaint, and the patient should not have been penalized for the misnomer, because no such penalty existed under the facts of the case, in which the correction was simple and prejudiced no one. Scaggs v. GPCH-GP, Inc., 23 So. 3d 1080, 2009 Miss. LEXIS 474 (Miss. 2009).

Applying Miss. R. Civ. P. 15(c), the patient's proposed amended complaint did arise out of the same transaction, but there was no evidence that the medical company received any notice of the institution of the present medical negligence action until after the time period for service of process had expired. Thus, the patient failed to meet the requirements of Rule 15(c) and seeing as the company was not a defendant in the case, it was not error for the circuit court to refuse to allow the patient to serve the company with process, and Miss. R. Civ. P. 4(h) was inapplicable. Johnson v. Lee, 17 So. 3d 1140, 2009 Miss. App. LEXIS 589 (Miss. Ct. App. 2009).

Summary judgment was granted to an electric company in a property damage case because the statute of limitations was not tolled under Miss. Code Ann. § 15-1-57 since, from the date of an alleged incident until the expiration of the three-year statute of limitations, other parties were free to file their own claim or to join in the claim erroneously filed on behalf of a dissolved corporation. Miss. R. Civ. P. 15(c) did not allow for a reprieve from the limitations period because no amended complaint was filed; instead, an entirely new action with new parties was initiated. Funderburg v. Pontotoc Elec. Power Ass'n, 6 So. 3d 439, 2009 Miss. App. LEXIS 159 (Miss. Ct. App. 2009).

Negligence case was properly dismissed as barred by the statute of limitations where the elements of Miss. R. Civ. P. 15(c) were not met; even though an amended complaint arose from the same conduct, transaction, or occurrence as an original complaint, there was no mistake concerning a driver's identity where he was identified in an accident report and referred to in the allegations of the original complaint. An owner's original suit against the driver's grandmother was dismissed because the grandmother was not the driver's guardian. Campbell v. Davis, 8 So. 3d 909, 2009 Miss. App. LEXIS 116 (Miss. Ct. App. 2009).

Civil rights litigant's motion to amend his pro se complaint in tort to add a federal claim under 42 U.S.C.S. § 1983 for violation of his right to free speech on the ground that the tort claims were barred by the Mississippi Tort Claims Act was properly denied because the federal claim was barred under the applicable residual three-year statute of limitation period in Miss. Code Ann. § 15-1-49 and because the amended claim did not relate back to the time of the filing of the original pleading, pursuant to Miss. R. Civ. P. 15(c); the proposed amendment did not pass the identity of transaction test because the tort claims asserted in the original complaint did not bear a relation to the free speech claim and the defendant was not on notice regarding the free speech claim. Giles v. Stokes, 988 So. 2d 926, 2008 Miss. App. LEXIS 419 (Miss. Ct. App. 2008).

In a products liability suit, pursuant to Miss. R. Civ. P. 9(h) and 15(c)(2), a patient's second amended complaint, which substituted a medical device manufacturer for an unknown defendant, related back to the date of the original complaint naming a fictitious defendant because the patient made a reasonably diligent inquiry into the identity of the manufacturer where the suit was filed one day before the three-year limitations period in Miss. Code Ann. § 15-1-49 expired; less than three months elapsed between when the hospital that used the device on the patient supplied an erroneous manufacturer's name and when the patient sought to substitute that manufacturer's name for the fictitious party designation; and the patient sought to substitute the correct manufacturer for the first manufacturer within three weeks after learning that the manufacturer had actually made the device. Scoggins v. Boston Sci. Corp., 2008 U.S. Dist. LEXIS 35507 (N.D. Miss. Apr. 22, 2008).

Landman and lessees entered stipulated evidence on the amount in dispute and the date that it was due, and the landman made no other objections to this stipulation; the landman did not object that the evidence of prejudgment interest was outside the pleadings, and since he failed to make such objection, the evidence of liquidated damages and the date from which they were allegedly due was entered prior to judgment by the expenses or, at the very least, implied consent of the parties. Gill v. Gipson, 982 So. 2d 415, 2007 Miss. App. LEXIS 520 (Miss. Ct. App. 2007), cert. denied, 981 So. 2d 298, 2008 Miss. LEXIS 238 (Miss. 2008).

Substitution of a son as the party in a wrongful death case was improper because a patient's brother lacked standing to bring the action originally; by the time the son filed an amended complaint, the limitations period in Miss. Code Ann. § 11-7-13 had expired, and the complaint did not relate back to a nullity, and therefore dismissal was warranted. Tolliver ex rel. Wrongful Death Beneficiaries of Green v. Mladineo, 987 So. 2d 989, 2007 Miss. App. LEXIS 467 (Miss. Ct. App. 2007).

In a wrongful death case, an amendment of a complaint under Miss. R. Civ. P. 15(c) was properly denied because the causes of action did not arise out of the same nucleus of common facts; one dealt with the design and manufacturing of a vehicle, while the other dealt with the failure to inspect and repair the vehicle before resale, and therefore, the statute of limitations had run on the proposed claim since relation back did not apply. Russell v. Ford Motor Co., 960 So. 2d 495, 2006 Miss. App. LEXIS 758 (Miss. Ct. App. 2006), cert. denied, 959 So. 2d 1051, 2007 Miss. LEXIS 387 (Miss. 2007).

Patient's amended complaint did not relate back to the original complaint as the patient was not diligent by waiting almost two years after filing the original complaint to identify a clinic and a doctor who had been named as fictitious parties. Joiner v. Phillips, 953 So. 2d 1123, 2006 Miss. App. LEXIS 649 (Miss. Ct. App. 2006).

Summary judgment was properly awarded to a doctor in a patient's medical malpractice action where the patient's amended complaint, in which she added the doctor as a defendant, was not a proper Miss. R. Civ. P. 9(h) substitution, because the amended complaint had not replaced a John Doe defendant with the doctor, and the amended complaint did not relate back to the date of the original pleading under Rules 9(h) and 15(c)(2). Santangelo v. Green, 920 So. 2d 521, 2006 Miss. App. LEXIS 75 (Miss. Ct. App. 2006).

In a medical malpractice action, on remand from a first appeal denying an amended complaint, the trial court granted summary judgment for defendants based on the two-year limitations period. However, upon a petition for rehearing, the appellate court held that based on the unique facts of the case, the amended complaint should have been treated as an original complaint as to the added parties; since the amended complaint was filed prior to the expiration of the statute of limitations (exactly two years after the alleged negligence), and a summons, along with the amended complaint, was served upon the added parties within the time period required by Miss. R. Civ. P. 4(h), the trial judge erred in granting summary judgment for defendants. Wilner v. White, 929 So. 2d 343, 2005 Miss. App. LEXIS 1033 (Miss. Ct. App. 2005), rev'd, 929 So. 2d 315, 2006 Miss. LEXIS 267 (Miss. 2006).

Amendment that changes the parties against whom the claim is asserted will relate back if within the statute of limitations period and the additional 120 days for service of process, the new party receives such notice of the action as will prevent prejudice, and the new party knows or should have known that but for a mistake concerning the identity of the proper party, the action would be brought against the party. If the complaint uses fictitious names because the plaintiff is ignorant of the name of an opposing party and so alleges in his pleading, then an amendment to add the newly discovered actual party relates back to the date of the original pleading pursuant to Miss. R. Civ. P. 9(h) and Miss. R. Civ. P. 15(c)(2). Wilner v. White, 929 So. 2d 343, 2005 Miss. App. LEXIS 1033 (Miss. Ct. App. 2005), rev'd, 929 So. 2d 315, 2006 Miss. LEXIS 267 (Miss. 2006).

Circuit court had priority jurisdiction over a chancery court regarding the specific performance of a lease agreement between a partnership and a corporation because the partnership filed a complaint alleging breach of a management contract against the corporation in the circuit court before the corporation filed its action in the chancery court, the partnership's complaint was amended after the corporation filed its action in the chancery court to include a declaratory action that the lease was void as a result of the corporation's breach of the management agreement, and the complaint amendment related back to the date of the partnership's original filing under Miss. R. Civ. P. 15(c). Copiah Med. Assocs. v. Miss. Baptist Health Sys., 898 So. 2d 656, 2005 Miss. LEXIS 259 (Miss. 2005).

Trial court did not err in denying the motion to amend filed by the deceased patient's heir after the statute of limitations expired because the heir failed to meet both the identity of transaction test and the notice requirement, thereby rendering the relation back doctrine of Miss. R. Civ. P. 15(c) inapplicable and her amended complaint barred by the statute of limitations. The facts on which the heir founded her claims of negligence gave rise to separate and distinct actions, which failed to inform the doctor of litigation concerning a particular occurrence because the original complaint alleged that the doctor negligently prescribed ACE inhibitors for the patient's hypertension, and the amended complaint alleged he negligently prescribed allopurinol for the patient's gout. Bracey v. Sullivan, 899 So. 2d 210, 2005 Miss. App. LEXIS 69 (Miss. Ct. App. 2005).

Notwithstanding Miss. Code Ann. § 93-25-9(b), the chancellor could have exercised jurisdiction over the child support question if the father, a resident of California, had voluntarily entered a general appearance, or filed a responsive pleading that effectively waived the issue of jurisdiction. However, while it was correct that the father filed a written answer, with leave of court, he filed an amended answer, which contested jurisdiction; same related back to the filing date of the original answer, and despite his written entry of appearance, and a motion for guardian ad litem, the facts did not suffice for a general appearance or for personal jurisdiction over the father for the purpose of modifying child support. Scaife v. Scaife, 880 So. 2d 1089, 2004 Miss. App. LEXIS 851 (Miss. Ct. App. 2004).

Patient's motion for leave to amend had been filed prior to the end of the limitation and service of process period, however, the matter was not brought on for hearing until after the limitation and the process service window closed. An amendment to add a party at so late a date would relate back only if notice had been timely received, and "a mistake concerning the identity of the proper party" had existed or substitution of a newly identified party for a fictitious one was being made; even had the patient's complaint been amended immediately after the hearing on the motion to amend, it would not have related back since the patient was aware of the new defendants who were the subject of the proposed amendment and there was not reasonable diligence. Wilner v. White, 2004 Miss. App. LEXIS 654 (Miss. Ct. App. July 13, 2004), op. withdrawn, sub. op., 929 So. 2d 343, 2005 Miss. App. LEXIS 1033 (Miss. Ct. App. 2005).

By a request to amend its complaint against a debtor to seek foreclosure, a lienholder properly initiated foreclosure, even though the request was not granted until months later because, pursuant to Miss. R. Civ. P. 15, the granting of a motion to amend related back to the original pleadings; thus, the lienholder initiated foreclosure proceedings prior to the expiration of the one-year extension of a condominium lien pursuant to Miss. Code Ann. § 89-9-21. Tally Arms Condo. Ass'n v. Breland, 854 So. 2d 28, 2003 Miss. App. LEXIS 789 (Miss. Ct. App. 2003).

Where newly added defendants were not served with the original complaint or with the motion to amend and the proposed amended complaint within 120 days after the statute of limitations elapsed, as the amended complaint was filed after the statute of limitations had run against the new defendants and did not relate back to the filing of the original complaint under Miss. R. Civ. P. 15(a), (c), the trial court properly dismissed the new defendants. Curry v. Turner, 832 So. 2d 508, 2002 Miss. LEXIS 391 (Miss. 2002), limited, overruled in part, Pioneer Cmty. Hosp. of Newton v. Roberts, 214 So. 3d 259, 2017 Miss. LEXIS 107 (Miss. 2017).

In order for an amendment to a complaint to "relate back" under subsection (c) of this rule, the original complaint must be valid. Pickens v. Donaldson, 748 So. 2d 684, 1999 Miss. LEXIS 292 (Miss. 1999).

Relation back privilege provided for fictitious parties under subdivision (c)(2) of this rule requires plaintiff to actually exercise a reasonably diligent inquiry into identity of the fictitious party. Doe v. Mississippi Blood Servs., 704 So. 2d 1016, 1997 Miss. LEXIS 460 (Miss. 1997), cert. denied, 523 U.S. 1078, 118 S. Ct. 1525, 140 L. Ed. 2d 676, 1998 U.S. LEXIS 2613 (U.S. 1998).

Plaintiff's attempt to join new party after running of statute of limitations was denied; plaintiff improperly substituted one party for another, not for a fictitiously named defendant, and therefore could not avail herself of relation back provisions of rules. Doe v. Mississippi Blood Servs., 704 So. 2d 1016, 1997 Miss. LEXIS 460 (Miss. 1997), cert. denied, 523 U.S. 1078, 118 S. Ct. 1525, 140 L. Ed. 2d 676, 1998 U.S. LEXIS 2613 (U.S. 1998).

Amended complaint correcting name of corporate defendant was not time-barred and related back to date of originally filed complaint, where company's insurance adjuster investigated claim soon after occurrence and the same attorneys represented both corporate entities. Brown v. Winn-Dixie Montgomery, 669 So. 2d 92, 1996 Miss. LEXIS 55 (Miss. 1996).

In determining the propriety of amending a pleading which would otherwise be time barred because the limitations period had run, the claim stated in amendment must arise from the same transaction or occurrence as did the claim in original complaint, and the opposing party must have been put on notice regarding the claim or defense raised by the amended pleading. Hudson v. Parvin, 582 So. 2d 403, 1991 Miss. LEXIS 363 (Miss. 1991).

Where plaintiff filed an amended complaint within ten days after her original complaint was dismissed under M.R.C.P. 12(b)(6), she was not required to petition court for 30 days leave, and her amended complaint related back to the date of her original complaint. O'Cain v. Harvey Freeman & Sons, Inc., 603 So. 2d 824, 1991 Miss. LEXIS 975 (Miss. 1991).

Filing date of amended bill could not be used to meet residency period necessary for divorce, since amended bill related back to filing date of original bill. O'Neill v. O'Neill, 515 So. 2d 1208, 1987 Miss. LEXIS 2922 (Miss. 1987).

**Statute of limitations.**

Because father's claim on a promissory note against a son would still be futile if a trial court allowed him to amend it under Miss. R. Civ. P. 15 due to the running of the statute of limitations, trial court did not err in denying the father's motion to amend and granting the son's motion to dismiss under Miss. R. Civ. P. 12(b)(6). Merideth v. Merideth, 987 So. 2d 477, 2008 Miss. App. LEXIS 393 (Miss. Ct. App. 2008).

Circuit court erred in dismissing the doctor as a defendant from the beneficiaries' wrongful death claim where the time allowed by the medical malpractice statute of limitations had not yet expired when the doctor was served with the amended complaint. Long v. Mem'l Hosp. at Gulfport, 969 So. 2d 35, 2007 Miss. LEXIS 570 (Miss. 2007).

Patient's amended complaint, adding a doctor and clinic as defendants, could not be treated for purposes of the added parties as an original complaint; because only the motion to amend the complaint pursuant to Miss. R. Civ. P. 15(c) was considered filed before the expiration of the two-year statute of limitations under Miss. Code Ann. § 15-1-36, when the trial court denied the motion to amend, the practical effect was that no amended complaint had ever been filed. Wilner v. White, 929 So. 2d 315, 2006 Miss. LEXIS 267 (Miss. 2006).

Patient's motion for leave to amend was filed prior to the end of the limitation and service of process periods, however, the matter was not brought on for hearing until after the limitation and the process service window closed. An amendment to add a party at so late a date would relate back only if notice had been timely received, and "a mistake concerning the identity of the proper party" had existed or substitution of a newly identified party for a fictitious one was being made; even had the patient's complaint been amended immediately after the hearing on the motion to amend, it would not have related back since the patient was aware of the new defendants who were the subject of the proposed amendment and there was not reasonable diligence; therefore, the limitations period was not tolled. Wilner v. White, 2004 Miss. App. LEXIS 654 (Miss. Ct. App. July 13, 2004), op. withdrawn, sub. op., 929 So. 2d 343, 2005 Miss. App. LEXIS 1033 (Miss. Ct. App. 2005).

In a patient's negligence action, in granting the motion to amend the complaint four years after the initial suit to add the health care provider as a new party, it appeared obvious that the new "fraudulent concealment" argument was advanced as a "savings" option, because without it the statute of limitation on negligence actions would have barred any action; because the trial court erred in granting the motion to amend the complaint, the issue of whether or not the amended complaint would relate back became moot. Medicomp, Inc. v. Marshall, 878 So. 2d 193, 2004 Miss. App. LEXIS 129 (Miss. Ct. App.), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 917 (Miss. 2004), cert. denied, 543 U.S. 1028, 125 S. Ct. 671, 160 L. Ed. 2d 508, 2004 U.S. LEXIS 8083 (U.S. 2004).

In a contempt proceeding against the husband for not paying child support, the pleading of the Mississippi Department of Human Services (DHS) was not styled as an amendment to the wife's original complaint for child support arrearages and was not pled as such, new process was served on the husband, and the DHS failed to obtain permission from the chancellor to amend the petition; thus, the chancellor was correct in finding the DHS's petition stood alone, did not revive the wife's prior petition, and was barred by the statute of limitations. Miss. Dep't of Human Servs. v. Guidry, 830 So. 2d 628, 2002 Miss. LEXIS 320 (Miss. 2002).

In an action arising from a motor vehicle accident, the plaintiff should have been granted leave to amend her complaint to assert that the defendant's minor son was driving the defendant's vehicle at the time of the accident, notwithstanding the expiration of the statute of limitations, since (1) the defendant, as well as his minor son, had notice of the plaintiff's claim within the applicable statute of limitations by virtue of the plaintiff's negotiations with the defendant's insurer and ultimately, the action against the defendant, and (2) the defendant and his son knew or should have known that but for some error in identity, the son was the proper party and could not be said to have been prejudiced as the defendant retained counsel at the time the suit was instituted. Estes v. Starnes, 732 So. 2d 251, 1999 Miss. LEXIS 74 (Miss. 1999).

**Sua sponte.**

The trial court did not err in bifurcating trial in a proceeding to contest probate of a will and to allow amendment of the pleadings, notwithstanding that the parties did not make a motion for amendment and did not argue for an amendment. Smith v. Averill (In re Will of Smith), 722 So. 2d 606, 1998 Miss. LEXIS 533 (Miss. 1998).

**Timeliness.**

Trial court erred in dismissing a plaintiff's personal injury case without prejudice for insufficiency of process because the defendants waived the defense of insufficiency of process by failing to assert it in their answer, their motions to amend their answers to include the defense were filed outside the 30 days allowed for amendment as a matter of course, and, while the motions to amend the answers were not moot, it could not be said that the trial court could have exercised its discretion to grant the motion for leave to amend. Cox v. SMG, 226 So. 3d 1246, 2017 Miss. App. LEXIS 524 (Miss. Ct. App. 2017).

After a responsive pleading was filed, the claimant could not amend without leave of the court or written permission from the adverse party. Dorman v. Power, 203 So. 3d 33, 2016 Miss. App. LEXIS 662 (Miss. Ct. App. 2016).

Car owner's request to amend her complaint was untimely and failed to conform to Miss. R. Civ. P. 15, in that the request to amend was made outside of the discovery window and the owner obtained neither leave of court nor the repair facility's written consent to amend. Beene v. Ferguson Auto., Inc., 37 So. 3d 695, 2010 Miss. App. LEXIS 290 (Miss. Ct. App. 2010).

Patron's personal injury suit against a store was remanded to the state court in which it was originally filed because the store removed the suit after the expiration of the one-year period in 28 U.S.C. § 1446(b); the equitable exception to the one-year period did not apply because although the patron waited until just before trial to amend her complaint to seek more than $75,000, such was warranted by new medical findings concerning the patron's injuries and was allowable under Miss. R. Civ. P. 54(c) and Miss. R. Civ. P. 15. Smith v. Wal-Mart Stores, Inc., 489 F. Supp. 2d 600, 2007 U.S. Dist. LEXIS 43431 (N.D. Miss. 2007).

Where leave to amend a complaint was sought at a hearing for summary judgment, but a motion for such was not filed until after summary judgment was granted, the motion was properly denied as untimely. Harmon v. Regions Bank, 961 So. 2d 693, 2007 Miss. LEXIS 326 (Miss. 2007).

Trial court erred in sua sponte entering a default judgment against a city under Miss. R. Civ. P. 55 in a suit brought under the Mississippi Tort Claims Act, specifically Miss. Code Ann. § 11-46-9(1)(c); although the city did not timely answer plaintiff's amended complaint pursuant to Miss. R. Civ. P. 15(a), the parties continued to engage in discovery for over four years and plaintiff had no intention of seeking of a default judgment. City of Jackson v. Presley, 942 So. 2d 777, 2006 Miss. LEXIS 649 (Miss. 2006).

Though former Miss. R. Civ. P.15(a) entitled plaintiffs to an automatic 30 days' leave to amend their complaint after the trial court granted defendants' motion for judgment on the pleadings, their failure to timely file an amended complaint justified the trial court's denial of their subsequent motion to amend the complaint. Lane v. R. J. Reynolds Tobacco Co., 853 So. 2d 1144, 2003 Miss. LEXIS 211 (Miss. 2003), overruled in part, R. J. Reynolds Tobacco Co. v. King, 921 So. 2d 268, 2005 Miss. LEXIS 423 (Miss. 2005).

Trial court abused its discretion by allowing a party in a land dispute to amend her pleadings after commencement of trial to include a counterclaim for adverse possession, an affirmative defense. Brown v. Akin, 790 So. 2d 893, 2001 Miss. App. LEXIS 269 (Miss. Ct. App. 2001).

## Rule 16. Pre-trial procedure.

In any action the court may, on its own motion or on the motion of any party, and shall on the motion of all parties, direct the attorneys for the parties to appear before it at least twenty days before the case is set for trial for a conference to consider and determine:

(a) The possibility of settlement of the action;

(b) the simplification of the issues;

(c) the necessity or desirability of amendments to the pleadings;

(d) itemizations of expenses and special damages;

(e) the limitation of the number of expert witnesses;

(f) the exchange of reports of expert witnesses expected to be called by each party;

(g) the exchange of medical reports and hospital records, but only to the extent that such exchange does not abridge the physician-patient privilege;

(h) the advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(i) the imposition of sanctions as authorized by Rule 37;

(j) the possibility of obtaining admissions of fact and of documents and other exhibits which will avoid unnecessary proof;

(k) in jury cases, proposed instructions, and in non-jury cases, proposed findings of fact and conclusions of law, all of which may be subsequently amended or supplemented as justice may require;

(*l*) such other matters as may aid in the disposition of the action.

The court may enter an order reciting the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any other matters considered, and limiting issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered shall control the subsequent course of the action, unless modified at the trial to prevent manifest injustice.

**HISTORY: Amended effective March 1, 1989; April 13, 2000; Comments repealed effective July 1, 2014.**

### ADVISORY COMMITTEE HISTORICAL NOTE

Effective April 13, 2000, Rule 16 was amended to allow the conference to be held pursuant to the court's motion. 753-754 So. 2d. XVII (West Miss. Cas. 2000.)

Effective March 1, 1989, Rule 16 was amended to abrogate provisions for a pre-trial calendar. 536-538 So. 2d XXI (West Miss. Cas. 1989).

### JUDICIAL DECISIONS

#### ANALYSIS

Construction.
Issues.
Motion for recusal denied.

**Construction.**

Nothing in this rule or elsewhere allows a local court to unilaterally adopt a special rule which is inconsistent with a uniform rule regarding the reporting of settlement to the court. Watts v. Pennington, 598 So. 2d 1308, 1992 Miss. LEXIS 200 (Miss. 1992).

**Issues.**

Chancellor abused her discretion by allowing a wife to put forward evidence of her need for temporary rehabilitative alimony, in order "to be fair to both parties and to do equity," where there had been no mention of alimony in the pre-trial statement. Singley v. Singley, 2003 Miss. LEXIS 283 (Miss. June 12, 2003).

Chancellor abused her discretion in awarding a wife alimony since alimony had not been mentioned in the pretrial statement and the chancellor could not modify the pretrial statement: the parties had not agreed to modification, and the chancellor did not find manifest injustice. Singley v. Singley, 846 So. 2d 1004, 2002 Miss. LEXIS 309 (Miss. 2002).

The chancellor abused her discretion in determining that the issue of alimony was a matter properly before it, notwithstanding that the wife's counterclaim contained language requesting periodic and lump sum alimony, since the pre-trial statement produced by a joint effort of the parties, approved by the chancellor, and entered by order of the chancellor was unambiguous and clear and did not indicate that alimony was an issue to be tried. Singley v. Singley, 2000 Miss. App. LEXIS 456 (Miss. Ct. App. Sept. 26, 2000), aff'd in part and rev'd in part, 846 So. 2d 1004, 2002 Miss. LEXIS 309 (Miss. 2002), aff'd in part and rev'd in part, 2003 Miss. LEXIS 283 (Miss. June 12, 2003).

**Motion for recusal denied.**

Trial court did not abuse its discretion in denying plaintiff's motion for recusal where plaintiff failed to produce any evidence regarding either allegation of impropriety; plaintiff produced no evidence that the court administrator had any material input into the court's judicial decisions. Hill v. Mills, 26 So. 3d 322, 2010 Miss. LEXIS 42 (Miss. 2010).

### Rule 16A. Motions for recusal of judges.

Motions seeking the recusal of judges shall be timely filed with the trial judge and shall be governed by procedures set forth in the Uniform Rules of Circuit and County Court Practice and the Uniform Rules of Chancery Court Practice.

**HISTORY: Adopted, April 4, 2002; Comments repealed effective July 1, 2014.**

### ADVISORY COMMITTEE HISTORICAL NOTE

Effective April 4, 2002, Rule 16A and the Comment were adopted. 813-815 So. 2d LXXXI (West Miss. Cases 2002).

## CHAPTER IV. PARTIES

### Rule 17. Parties plaintiff and defendant; capacity.

(a) *Real party in interest.* — Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his representative capacity without joining with him the party for whose benefit the action is brought. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) *Subrogation cases.* — In subrogation cases, regardless of whether subrogation has occurred by operation of law, assignment, loan receipt, or otherwise, if the subrogor no longer has a pecuniary interest in the claim the action shall be brought in the name of the subrogee. If the subrogor still has a pecuniary interest in the claim, the action shall be brought in the names of the subrogor and the subrogee.

(c) *Infants or persons under legal disability.* — Whenever a party to an action is an infant or is under legal disability and has a representative duly appointed under the laws of the State of Mississippi or the laws of a foreign state or country, the representative may sue or defend on behalf of such party. A party defendant who is an infant or is under legal disability and is not so represented may be represented by a guardian ad litem appointed by the court when the court considers such appointment necessary for the protection of the interest of such defendant. The guardian ad litem shall be a resident of the State of Mississippi, shall file his consent and oath with the clerk, and shall give such bond as the court may require. The court may make any other orders it deems proper for the protection of the defendant. When the interest of an unborn or unconceived person is before the court, the court may appoint a guardian ad litem for such interest. If an infant or incompetent person does not have a duly appointed representative, he may sue by his next friend.

(d) *Guardian ad litem; how chosen.* — Whenever a guardian ad litem shall be necessary, the court in which the action is pending shall appoint an attorney to serve in that capacity. In all cases in which a guardian ad litem is required, the court must ascertain a reasonable fee or compensation to be allowed and paid to such guardian ad litem for his service rendered in such cause, to be taxed as a part of the cost in such action.

(e) *Public officers.* — When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added.

**HISTORY: Comments repealed effective July 1, 2014.**

## JUDICIAL DECISIONS

### ANALYSIS

Capacity.
Deceased persons.
Guardians ad litem.
Notice.
Real party in interest.
Res judicata effect.
Subrogation.
Survival action.
Wrongful death actions.

**Capacity.**

Issue of whether a limited liability company (LLC) had standing had been waived, expressly or impliedly, by the parties because the question was not an issue of standing but of capacity, and the LLC's lack of capacity had been cured; the LLC reregistered as a foreign limited liability company in good standing with the Mississippi Secretary of State, and all parties accommodated re-registration pending appeal and consented to supplement the record regarding the LLC's continued existence. Jourdan River Estates, LLC v. Favre, 278 So. 3d 1135, 2019 Miss. LEXIS 345 (Miss. 2019).

**Deceased persons.**

Miss. R. Civ. P. 17(a) did not allow the widow of a decedent to be substituted as a party because the original complaint, which was filed in the name of the decedent, was a nullity. Though the amended complaint was instituted by a proper party, it was filed outside the statute of limitations, and the amended complaint could not relate back to the original complaint as that complaint was a nullity and failed to toll the running of the statute of limitations. Garlock Sealing Techs., LLC v. Pittman, 2010 Miss. LEXIS 539 (Miss. Oct. 14, 2010).

**Guardians ad litem.**

Appellate court found no error in a chancellor's equal assessment of the guardian ad litem (GAL) fee to the paternal grandparent and the maternal great-grandparents when the chancellor awarded joint physical custody of a child to the parties. Although the paternal grandparent asserted that the apportionment of the GAL costs worked a manifest injustice upon the grandparent, the grandparent provided no evidence to support this allegation. Darby v. Combs, 229 So. 3d 136, 2016 Miss. App. LEXIS 681 (Miss. Ct. App. 2016), aff'd, 229 So. 3d 108, 2017 Miss. LEXIS 433 (Miss. 2017).

Chancery court did not abuse its discretion in apportioning the costs of a guardian ad litem equally among the parties in a child custody dispute, without considering a mother's financial circumstances; there is no evidence in the record to indicate that the apportionment of the cost for the guardian ad litem was an undue burden to either party. McCraw v. Buchanan, 10 So. 3d 979, 2009 Miss. App. LEXIS 242 (Miss. Ct. App. 2009).

Fee paid to the guardian ad litem was proper where the youth court recognized the complexity of the case and awarded the guardian a higher amount than what it considered reasonable for the usual case, Miss. Code Ann. § 43-21-121(6); further, the guardian failed to point to anything that indicated that the youth court's decision was unreasonable or that the court had abused its discretion as to the amount of compensation, Miss. R. Civ. P. 17(d). In the Interest of L.D.M., 872 So. 2d 655, 2004 Miss. LEXIS 321 (Miss. 2004).

The Department of Human Services was properly required to pay a portion of the guardian ad litem fees incurred after it was made a passive litigant in a proceeding for modification of visitation where the husband alleged physical and sexual abuse of the child at issue, the department supported this allegation, and the court found that no such abuse occurred. Mississippi Dep't of Human Servs. v. Murr, 797 So. 2d 818, 2000 Miss. LEXIS 184 (Miss. 2000).

In a proceeding for modification of visitation in which the Department of Human Services joined the action and supported the father, the department was properly required to pay guardian ad litem fees including those incurred after the date that the department was made a passive litigant in the case; notwithstanding the department's passive role, it previously became a litigant when it adopted the position of the father and alleged child abuse, and taking a passive role in the litigation did not change its status as a party to the case. Mississippi Dep't of Human Servs. v. Murr, 797 So. 2d 818, 2000 Miss. LEXIS 184 (Miss. 2000).

County board of supervisors was not required to pay guardian ad litem's fee under subdivision (d) of this rule, where case in which the guardian's services were rendered had been appealed, and it could not be ascertained against whom the costs would finally be assessed. Lowrey v. Forrest County Bd. of Supervisors, 559 So. 2d 1029, 1990 Miss. LEXIS 187 (Miss. 1990).

Guardian ad litem fee under subdivision (d) of this rule was not a "cost of preparation of the record on appeal" under M.R.A.P. Rule 11(b)(1), and therefore prepayment of fee was not required for processing of appeal to supreme court. In re Newsom, 536 So. 2d 1, 1988 Miss. LEXIS 393 (Miss. 1988).

Appointment of guardian ad litem was needed to insure and protect best interests of child who filed paternity suit against her presumed natural father, since, in context of divorce action, interest of child's mother might not be coextensive with the interest of the child. Baker v. Williams, 503 So. 2d 249, 1987 Miss. LEXIS 2349 (Miss. 1987).

**Notice.**

Estate was properly noticed of the hearing on the motion for summary judgment where the estate, not the heir who filed the motion for summary judgment, elected not to notice each beneficiary of the will. The beneficiaries were named in the probated will and the executor was acting on behalf of all the beneficiaries to set aside the deeds in order to bring the real property back into the estate. Smith v. Smith (In re Will of Smith), 910 So. 2d 562, 2005 Miss. LEXIS 145 (Miss. 2005).

**Real party in interest.**

Law firm was the real party in interest in its action to recover its 40 percent assignment of all monies its deceased client's estate received by virtue of the client's biological relationship to his late father because the law firm was the beneficiary of the funds received pursuant to a contingency fee contract. Estate of Johnson v. Kitchens Law Firm, P.A., 294 So. 3d 621, 2019 Miss. App. LEXIS 412 (Miss. Ct. App. 2019), cert. denied, 291 So. 3d 1110, 2020 Miss. LEXIS 120 (Miss. 2020).

Because a student was incapacitated during the time she filed a claim against a school district she should have been allowed to substitute her mother; the student's parents did not file suit on her behalf, and thus, the mother could be substituted as an interested party and file a complaint on the student's behalf until she was twenty-one, or the student could individually file after turning twenty-one within the one-year statute of limitation prescribed under the Mississippi Tort Claims Act. Doe v. Holmes Cty. Sch. Dist., 246 So. 3d 920, 2018 Miss. App. LEXIS 225 (Miss. Ct. App. 2018).

Circuit court erred in granting summary judgment in favor of a subcontractor and a contractor because, while the former owner did not own the property when the structural damage to a building was discovered, it had standing as a "real party in interest" where it entered into valid, enforceable contracts with the contractor and the subcontractor for site work and experienced an adverse effect from their conduct, and they provided no legal challenges or defenses to the former owner's claims. Gray Props., LLC v. Util. Constructors, Inc., 168 So. 3d 1164, 2014 Miss. App. LEXIS 323 (Miss. Ct. App.), cert. denied, 152 So. 3d 1176, 2014 Miss. LEXIS 590 (Miss. 2014).

Trial court erred in dismissing a breach of contract claim in an original complaint against the prior owner of a building due to the untimely service of the current owner under Miss. R. Civ. P. 4(h) of an amended complaint as the prior owner was the real party in interest under Miss. R. Civ. P. 17(a), and the prior owner was timely served; the original complaint gave the prior owner sufficient notice of the claims and grounds upon which relief which was sought under the liberal notice pleading requirements of Miss. R. Civ. P.

8(a). Welch Roofing & Constr., Inc. v. Farina, 99 So. 3d 274, 2012 Miss. App. LEXIS 639 (Miss. Ct. App. 2012).

Dismissal of a suit seeking to enforce a construction lien was proper as: (1) the original complaint (OC) did not name the real party in interest under Miss. R. Civ. P. 17(a), the current owner (CO) of the building; (2) the prior owner had conveyed the property before the OC was filed; (3) the amended complaint (AC) was time-barred as it was not served on the CO until after the Miss. Code Ann. § 85-7-141 limitations period expired; (4) due to the lack of timely service under Miss. R. Civ. P. 4(h), the AC did not relate back to the OC's filing under Miss. R. Civ. P. 15(c); and (5) the contractor did not show good cause for the delayed service. Welch Roofing & Constr., Inc. v. Farina, 99 So. 3d 274, 2012 Miss. App. LEXIS 639 (Miss. Ct. App. 2012).

In a property damage case, because there was no authority cited for the proposition that an action filed on behalf of a dissolved corporation should have been treated as being filed against a partnership, appellate review of the issue was precluded. In addressing the merits of the issue, it was determined that a dissolved corporation could not have been a real party in interest because it had been dissolved more than eight years before the alleged incident took place, and there was an opportunity given to substitute the real party in interest. Funderburg v. Pontotoc Elec. Power Ass'n, 6 So. 3d 439, 2009 Miss. App. LEXIS 159 (Miss. Ct. App. 2009).

Dismissal of an action alleging waste due to the cutting of timber was improperly dismissed on the basis that an estate lacked standing to bring the action since it had no interest therein and no power to bring such an action; the trial court should have allowed a substitution of the heirs as parties to the action. Tolbert v. Southgate Timber Co., 943 So. 2d 90, 2006 Miss. App. LEXIS 868 (Miss. Ct. App. 2006).

Although Miss. R. Civ. P. 25(c) transfers were generally permissive, the execution sale and purchase of lawsuits, as choses in action, left only one party, a bank, with any interest in the litigation; because Miss. R. Civ. P. 17 allowed only the real party in interest to prosecute its claims, the trial court abused its discretion by refusing to substitute the bank as plaintiff in the actions. Citizens Nat'l Bank v. Dixieland Forest Prods., LLC, 935 So. 2d 1004, 2006 Miss. LEXIS 409 (Miss. 2006).

Trial court did not err by granting the corporations summary judgment on the issue of standing in the law firm's antitrust lawsuit, as the law firm's clients only had standing to object to any fees associated with retrieval of their medical records under Miss. Code Ann. § 41-9-65, and the law firm was not a real party in interest under Miss. R. Civ. P. 17(a). Owen & Galloway, L.L.C. v. Smart Corp., 913 So. 2d 174, 2005 Miss. LEXIS 836 (Miss. 2005).

**Res judicata effect.**

Where a father entered into a stipulation to dismiss a driver from a negligence case with prejudice, his minor son was unable to assert the same cause of action against the driver when he reached the age of majority, pursuant to the doctrine of res judicata. Taylor v. Taylor, 835 So. 2d 60, 2003 Miss. LEXIS 26 (Miss. 2003).

**Subrogation.**

Plaintiff was a real party in interest, as opposed to a nominal party, in an unsuccessful property damage suit brought by subrogated insurance carrier, and plaintiff was therefore barred from pursuing a subsequent action under doctrines of res judicata and collateral estoppel. Alexander v. Elzie, 621 So. 2d 909, 1992 Miss. LEXIS 826 (Miss. 1992).

Where subrogated insurer assigned to plaintiff whatever rights it might have by virtue of subrogation, and chose instead to rely upon its contractual right against plaintiff in the event of recovery, the insurer was no longer a real party in interest as contemplated by subdivision (a) of this rule. Turner v. Haynes, 489 So. 2d 494, 1986 Miss. LEXIS 2469 (Miss. 1986).

**Survival action.**

Where summary judgment was granted in a daughter wrongful death complaint, and upon remand the complaint was amended to allege a survival action under Miss. Code Ann. § 91-7-233 with the estate added as a party, the real party in interest joined the suit within a reasonable time after objection pursuant to Miss. R. Civ. P. 17. Methodist Hosp. of Hattiesburg, Inc. v. Richardson, 909 So. 2d 1066, 2005 Miss. LEXIS 74 (Miss. 2005).

**Wrongful death actions.**

Even if the sandblasting company had timely objected that the widow was not a real party in interest, the widow would have been entitled to a reasonable time after objection to open an estate and add the estate as a plaintiff. Therefore, even if the issue had been preserved, the appellate court would not have reversed but would have remanded to give the widow a reasonable time to comply with this rule. Miss. Valley Silica Co. v. Barnett, 227 So. 3d 1102, 2016 Miss. App. LEXIS 548 (Miss. Ct. App. 2016), cert. dismissed, 2017 Miss. LEXIS 401 (Miss. Sept. 28, 2017).

Sandblasting company waived any objection that the widow was not the real party in interest in a wrongful death action by failing to raise the issue until after judgment had been entered on the jury's verdict. Miss. Valley Silica Co. v. Barnett, 227 So. 3d 1102, 2016 Miss. App. LEXIS 548 (Miss. Ct. App. 2016), cert. dismissed, 2017 Miss. LEXIS 401 (Miss. Sept. 28, 2017).

Dismissal of a wrongful death suit was proper because the great-nephew lacked standing to institute a wrongful death suit under Miss. Code Ann. § 11-7-13, which conferred standing only to a decedent's spouse, parent, child, or sibling and not to distant relatives; the great-nephew also lacked standing because he was not the administrator of the decedent's estate when the wrongful death suit was commenced, and standing was to be determined as of the commencement of the action. Delta Health Group, Inc. v. Estate of Pope, 995 So. 2d 123, 2008 Miss. LEXIS 485 (Miss. 2008).

## Rule 18. Joinder of claims and remedies.

(a) *Joinder of claims.* — A party asserting a claim to relief as an original claim, counter-claim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims as he has against an opposing party.

(b) *Joinder of remedies.* — Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties.

**HISTORY: Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

### ADVISORY COMMITTEE NOTES

Rule 18(a) eliminates any restrictions on claims that may be joined in actions in the courts of Mississippi. Rule 18(a) permits legal and equitable claims or any combination of them to be joined in one action; a party may also assert alternative claims for relief, consistency among the claims not being necessary; consequently, an election of remedies or theories will not be required at the pleading stage of litigation.

Since Rule 18(a) deals only with the scope of joinder at the pleading stage and not with questions of trial convenience, jurisdiction, or venue, a party should be permitted to join all claims against an opponent as a matter of right. The rule proceeds on the theory that no inconvenience can result from the joinder of any two or more matters in the pleadings, but only from trying two or more matters together, if at all.

## JUDICIAL DECISIONS

### ANALYSIS

Joinder of claims.
Joinder of remedies.

**Joinder of claims.**

All claims for the wrongful death of a person must be litigated in the same suit and in the same court. Long v. McKinney, 897 So. 2d 160, 2004 Miss. LEXIS 1404 (Miss. 2004).

In a wrongful death action, a court erred by failing to consolidate beneficiaries' separate suit filed one day after the decedent's daughter's suit because the daughter filed suit as the representative of all statutory beneficiaries, and all such beneficiaries should have received notice of the litigation. Because there was no apparent conflict of interest between appellee and the estate, and since the estate, through appellee as administratrix, employed a law firm to represent the estate, that firm should represent the estate, provided the pleadings were amended to assert a claim on behalf of the estate. Long v. McKinney, 897 So. 2d 160, 2004 Miss. LEXIS 1404 (Miss. 2004).

Actions sounding in both contract and tort may be joined in the same complaint. Trammell v. State, 622 So. 2d 1257, 1993 Miss. LEXIS 328 (Miss. 1993).

Although the different claims required different burdens of proof, they could still be joined in one action. Towner v. Moore, 604 So. 2d 1093, 1992 Miss. LEXIS 424 (Miss. 1992).

**Joinder of remedies.**

Party may combine a suit to determine heirship with a suit to contest a will, and will contestant's allegation that she was decedent's sole heir at law was sufficient as a request for determination of heirship. Dees v. Estate of Moore, 562 So. 2d 109, 1990 Miss. LEXIS 257 (Miss. 1990).

## Rule 19. Joinder of persons needed for just adjudication.

(a) *Persons to be joined if feasible.* — A person who is subject to the jurisdiction of the court shall be joined as a party in the action if:

(1) in his absence complete relief cannot be accorded among those already parties, or

(2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant or, in a proper case, an involuntary plaintiff.

(b) *Determination by court whenever joinder not feasible.* — If a person as described in subdivision (a) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: First, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) *Pleading reasons for nonjoinder.* — A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1) through (2) who are not joined, and the reasons why they are not joined.

**HISTORY: Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

## ADVISORY COMMITTEE NOTE

Compulsory joinder is an exception to the general practice of giving the plaintiff the right to decide who shall be parties to a law suit; although a court must take cognizance of this traditional prerogative in exercising its discretion under Rule 19, plaintiff's choice will have to be compromised when significant countervailing considerations make the joinder of particular absentees desirable.

There are at least four main questions to be considered under Rule 19: first, the plaintiff's interest in having a forum; second, the defendant's wish to avoid multiple litigation, inconsistent relief, or sole responsibility for a liability shared with another; third, the interest of an outsider whom it would have been desirable to join; fourth, the interest of the courts and the public in complete, consistent, and efficient settlement of controversies. This list is by no means exhaustive or exclusive; pragmatism controls.

There is no precise formula for determining whether a particular nonparty must be joined under Rule 19(b). The decision has to be made in terms of the general policies of avoiding multiple litigation, providing the parties with complete and effective relief in a single action, and protecting the absent persons from the possible prejudicial effect of deciding the case without them. Account also must be taken of whether other alternatives are available to the litigants. By its very nature Rule 19(b) calls for determinations that are heavily influenced by the facts and circumstances of individual cases.

## JUDICIAL DECISIONS

### ANALYSIS

Adoption proceedings.
Dismissal.
Indispensable parties.
Interest in litigation.
Parties; necessary.
Parties; unnecessary.
Preservation for review.
Subrogation in workers' compensation cases.
Timeliness.

**Adoption proceedings.**

The maternal grandparents should have been joined as parties in an adoption proceeding where they had filed a suit for custody of the child at issue. S.R. v. P.L.H. (In re D.T.H.), 748 So. 2d 853, 1999 Miss. App. LEXIS 543 (Miss. Ct. App. 1999).

**Dismissal.**

Trial court did not err in dismissing claim for sub-surface trespass and conversion, due to plaintiff's failure to join all affected mineral interest holders. Ladner v. Quality Exploration Co., 505 So. 2d 288, 1987 Miss. LEXIS 2440 (Miss. 1987).

**Indispensable parties.**

In an action alleging waste, a trial court should have allowed an amendment to join two owners of property that gave permission to cut timber since they might have been indispensable parties under Miss. R. Civ. P. 19. Tolbert v. Southgate Timber Co., 943 So. 2d 90, 2006 Miss. App. LEXIS 868 (Miss. Ct. App. 2006).

United States was not an indispensable party to litigation involving a rural electric power association's ability to engage in the business of selling propane, even though the Rural Electrification Administration had a security interest in the association's property. Tallahatchie Valley Elec. Power Ass'n v. Miss. Propane Gas

Ass'n, 812 So. 2d 912, 2002 Miss. LEXIS 5 (Miss. 2002).

Transferee, as owner of certain percentages property interests at issue in the litigation, had interests in both the property and in the litigation. As such, it was a necessary and indispensable party which should have been joined upon defendant's motion. TXG Intrastate Pipeline Co. v. Grossnickle, 716 So. 2d 991, 1997 Miss. LEXIS 512 (Miss. 1997).

County board of supervisors was an indispensable party to action involving effect of zoning ordinance on railroad, and the board was to be made a party on remand. Columbus & G. R. Co. v. Scales, 578 So. 2d 275, 1991 Miss. LEXIS 224 (Miss. 1991).

No proper and complete adjudication of dispute involving real estate lien could be made in absence of persons owning interests in the property affected; procedural due process required that they be given notice and an opportunity to be heard. Aldridge v. Aldridge, 527 So. 2d 96, 1988 Miss. LEXIS 263 (Miss. 1988).

**Interest in litigation.**

If a landowner's spouse and adult child claimed an interest in a property which a utility sought to acquire in a quick-take condemnation action, their claim was against the landowner only because a warranty deed purporting to convey an interest in the subject property was misfiled in the wrong judicial district. Harrison County Util. Auth. v. Walker, 143 So. 3d 608, 2014 Miss. App. LEXIS 19 (Miss. Ct. App.), cert. denied, 141 So. 3d 947, 2014 Miss. LEXIS 386 (Miss. 2014).

**Parties; necessary.**

Chancery court erred in entering a paternity judgment because the mother's ex-husband, who previously had been named as the child's legal father, should have been joined as a necessary party to the action between the child's mother and the child's biological father before an adjudication of paternity was made. Pope v. Fountain, 287 So. 3d 988, 2019 Miss. App. LEXIS 608 (Miss. Ct. App. 2019).

Trial court erred by failing to join a company as a party in an action filed by a school district and a city challenging a county board of supervisors' approval of tax assessments on the company's leasehold interest in property it leased from the county because the company had claimed an interest in the subject matter, and the failure to join it as a party would leave both the district and tax assessor at a substantial risk of facing double litigation. Pascagoula- Gautier Sch. Dist. v. Bd. of Supervisors, 212 So. 3d 742, 2016 Miss. LEXIS 437 (Miss. 2016).

Daughter had to be joined as a necessary party pursuant to Miss. R. Civ. P. 19(a)(2) because her mother gave her a warranty deed to some of the property at issue, and since the daughter's title to the property she was deeded was likely to prove to be only as good as the mother's title, the daughter had an undeniable interest in the litigation that was distinct from the mother's interest; before rendering a judgment the trial court had to, at the minimum, notify the daughter and allow her a "meaningful" opportunity to be heard. Powell v. Evans, 113 So. 3d 1270, 2013 Miss. App. LEXIS 264 (Miss. Ct. App. 2013).

Circuit court could not fully and completely determine priority of garnishors without first retrying that the creditor join the prior garnishors under Miss. R. Civ. P. 19(a). The prior garnishors had a significant pecuniary interest in the disposition of the creditor's motion to determine priority and the circuit court's subsequent fulfillment of that request. Y-D Lumber Co. v. Humphreys County, 2 So. 3d 793, 2009 Miss. App. LEXIS 68 (Miss. Ct. App. 2009).

Administratrix's negligence claims against the healthcare providers and doctors was wrongful death case, and as such was a Miss. R. Civ. P. 19 compulsory joinder case and governed by Miss. Code Ann. § 11-7-13; thus, the trial court erred by transferring venue as to each doctor to separate counties, and venue for the wrongful death claim was proper in Bolivar County. Rose v. Bologna, 942 So. 2d 1287, 2006 Miss. LEXIS 550 (Miss. 2006).

Neighbor's claim that all necessary parties were not joined in the suit was without merit where the neighbor did not identify a specific party that was necessary to the action; based on the evidence, the appellate court found that all necessary parties were joined. Fike v. Shelton, 860 So. 2d 1227, 2003 Miss. App. LEXIS 907 (Miss. Ct. App. 2003).

Because the State was the ultimate fee-holder of 16th Section lands, it was therefore a necessary party to any action that might forever divest it of title in those lands; when the board of education filed a complaint to quiet and confirm title, and the landowners counterclaimed for clear title on their behalf, the suit became one that endangered the State's interest in protecting its asserted title and the failure to join the State as an interested party in a real estate dispute justified reversal and remand as the failure was a violation of fundamental due process. Bd. of Educ. v. Warner, 853 So. 2d 1159, 2003 Miss. LEXIS 311 (Miss. 2003).

Trial court did not err in noticing the absence of a necessary party and ordering a joinder, and when the need for the joinder disappeared, the chancellor, recognizing the change in circumstances, did not err in entering a final judgment. Flowers v. McCraw, 792 So. 2d 339, 2001 Miss. App. LEXIS 325 (Miss. Ct. App. 2001).

Any court sitting as an appellate court has inherent authority to allow additional parties to participate in appeal upon timely application or upon the court's invitation; indeed, there may be occasions when the court should decline to act until all necessary parties have been joined. Cummings v. Benderman, 681 So. 2d 97, 1996 Miss. LEXIS 501 (Miss. 1996).

Wife of defendant should have been made a party to action involving boundary dispute, where she owned a half interest in land, it was her homestead, and her husband could not make any binding agreement concerning land without her participation. Mabry v. Howington, 569 So. 2d 1165, 1990 Miss. LEXIS 560 (Miss. 1990).

**Parties; unnecessary.**

Landowner's spouse and adult child were not necessary parties in a quick-take condemnation action brought by a utility because a warranty deed purporting to convey an ownership interest in the subject property to them was filed in the wrong judicial district. Harrison County Util. Auth. v. Walker, 143 So. 3d 608, 2014 Miss. App. LEXIS 19 (Miss. Ct. App.), cert. denied, 141 So. 3d 947, 2014 Miss. LEXIS 386 (Miss. 2014).

Chancellor did not err in approving the final accounting and discharging the conservator because under Miss. R. Civ. P. 19 joinder was not feasible because no person had been appointed to represent the estate, the estate suffered no prejudice, and neither Miss. Code Ann. § 93-13-67 nor caselaw indicated that the failure of the conservator to file accountings was fatal to the approval of a final accounting. Vinson v. Benson, 972 So. 2d 694, 2007 Miss. App. LEXIS 349 (Miss. Ct. App. 2007), cert. denied, 973 So. 2d 244, 2008 Miss. LEXIS 8 (Miss. 2008).

Condemning authority in eminent domain action was not required to join neighboring landowner, a portion of whose land was held by condemnee by adverse possession. Coats v. Yazoo City, 562 So. 2d 64, 1990 Miss. LEXIS 225 (Miss. 1990).

Owners of property containing access road to subdivision in violation of county ordinance were not indispensable parties to county's action to bring subdivision into compliance. Johnson v. Hinds County, 524 So. 2d 947, 1988 Miss. LEXIS 194 (Miss. 1988).

**Preservation for review.**

Even if a buyer from a tax sale was a necessary and indispensable party under Miss. R. Civ. P. 19 to a proceeding where the redemption period in Miss. Code Ann. § 27-45-3 was extended for 60 days, the buyer's successor in interest was procedurally barred from bringing its Miss. R. Civ. P. 19 objection on appeal since the issue was not raised. The issue was not heard sua sponte in accordance with Shaw v. Shaw, 603 So. 2d 287 (Miss. 1992), because the buyer was notified by letter of the foreclosure sale and the possibility that the tax redemption period could be extended, this knowledge was imputed to the successor in interest, and neither the buyer nor the successor in interest chose to challenge the joinder issue until after the conclusion of the trial court proceedings. Marathon Asset Mgmt., LLC v. Otto, 977 So. 2d 1241, 2008 Miss. App. LEXIS 178 (Miss. Ct. App. 2008).

**Subrogation in workers' compensation cases.**

With respect to an employer's or workers' compensation insurer's right to subrogation, Miss. Code Ann. § 71-3-71 allows them to either join or intervene in a third party action filed by an injured worker, and either will suffice to protect the insurer's or employer's right to reimbursement. Liberty Mut. Ins. Co. v. Shoemake, 111 So. 3d 1207, 2013 Miss. LEXIS 190 (Miss. 2013).

Workers' compensation insurer could not file a separate subrogation action under Miss. Code Ann. § 71-3-71 against an injured worker after he settled a third-party action in Alabama and reimbursed the insurer only the amount it was entitled to under Alabama law, as the insurer had notice of the action but did not join or intervene in that suit. Liberty Mut. Ins. Co. v. Shoemake, 111 So. 3d 1207, 2013 Miss. LEXIS 190 (Miss. 2013).

**Timeliness.**

Former husband was not untimely added as a permissible party because although the husband filed a motion to amend the judgment eleven days after the former wife obtained a settlement order, the final day in the applicable period fell on a Sunday. Cooper v. Estate of Gatwood, 119 So. 3d 1031, 2013 Miss. LEXIS 412 (Miss. 2013).

Circuit court had authority to add a former husband to the garnishment proceeding between his former wife and his employer because the husband possessed a sufficient interest to be joined; the husband's personal property was under the employer's control, and he asserted that the wife obtained title and possession to that property through fraudulent misrepresentation. Cooper v. Estate of Gatwood, 119 So. 3d 1031, 2013 Miss. LEXIS 412 (Miss. 2013).

City was not a necessary party in a landowner's action for ejectment against a developer because the city had no interest, actual or mistaken, with the disputed strip of land, and its absence in the matter did not prevent the chancery court from granting complete relief between the developer and the landowner; when the action began, either the developer or the landowner owned the disputed property, and a conveyance to the developer involved the unplatted portion of a subdivision, with no dedication provision for the city contained therein. Delta Hous. Dev. Corp. v. Johnson, 48 So. 3d 573, 2010 Miss. App. LEXIS 177 (Miss. Ct. App.), cert. denied, 49 So. 3d 1139, 2010 Miss. LEXIS 628 (Miss. 2010).

In a wrongful death action, a court erred by failing to consolidate beneficiaries' separate suit filed one day after the decedent's daughter's suit because the daughter filed suit as the representative of all statutory beneficiaries, and all such beneficiaries should have received notice of the litigation. Because there was no apparent conflict of interest between appellee and the estate, and since the estate, through appellee as administratrix, employed a law firm to represent the estate, that firm should represent the estate, provided the pleadings were amended to assert a claim on behalf of the estate. Long v. McKinney, 897 So. 2d 160, 2004 Miss. LEXIS 1404 (Miss. 2004).

All claims for the wrongful death of a person must be litigated in the same suit and in the same court. Long v. McKinney, 897 So. 2d 160, 2004 Miss. LEXIS 1404 (Miss. 2004).

Fact that parties had pending applications before Environmental Quality Permit Board did not give them an interest in the litigation, where the litigation did not challenge the issuance of specific permits by the board, but challenged the governor's authority to adopt a rule without public input. Fordice v. Thomas, 649 So. 2d 835, 1995 Miss. LEXIS 34 (Miss. 1995), but see USPCI of Mississippi v. State ex rel. McGowan, 688 So. 2d 783, 1997 Miss. LEXIS 42 (Miss. 1997).

## Rule 20. Permissive joinder of parties.

(a) *Permissive joinder.* — All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) *Separate trials.* — The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom the party asserts no claim and who asserts no claim against the party, and may order separate trials or make other orders to prevent delay or prejudice.

**HISTORY: Amended February 20, 2004 to make rule gender neutral; Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

## ADVISORY COMMITTEE NOTE

Rule 20(a) permits joinder in a single action of all persons asserting or defending against a joint, several or alternative right to relief that arises out of the same transaction or occurrence or series of transactions or occurrences and presents a common question of law or fact. The phrase "transaction or occurrence" requires that there be a distinct litigable event linking the parties. Rule 20(a) simply establishes a procedure under which several parties' demands arising out of the same litigable event may be tried together, thereby avoiding the unnecessary loss of time and money to the court and the parties that the duplicate presentation of the evidence relating to facts common to more than one demand for relief would entail.

Joinder of parties under Rule 20(a) is not unlimited as is joinder of claims under Rule 18(a). Rule 20(a) imposes two specific requisites to the joinder of parties: (1) a right to relief must be asserted by or against each plaintiff or defendant relating to or arising out of the same transaction, occurrence, or the same series of transactions or occurrences; and (2) some question of law or fact common to all the parties will arise in the action. Both of these requirements must be satisfied in order to sustain party joinder under Rule 20(a). *See American Bankers, Inc. of Florida v. Alexander,* 818 So. 2d 1073, 1078 (Miss. 2001). However, even if the transaction requirement cannot be satisfied, there always is a possibility that, under the proper circumstances, separate actions can be instituted and then consolidated for trial under Rule 42(a) if there is a question of law or fact common to all the parties. *See Stoner v. Colvin,* 236 Miss. 736, 748, 110 So. 2d 920, 924 (1959) (courts of general jurisdiction have inherent power to consolidate actions when called for by the circumstances). If the criteria of Rule 20 are otherwise met, the court should consider whether different injuries, different damages, different defensive postures and other individualized factors will be so dissimilar as to make management of cases consolidated under Rule 20 impractical. *See Demboski v. CSX Transp., Inc.,* 157 F.R.D. 28 (S.D. Miss. 1994) cited with approval in *Illinois Cen. R.R. Co. v. Travis,* 808 So. 2d 928, 934 (Miss. 2002).

In order to allow the court to make a prompt determination of whether joinder is proper, the factual basis for joinder should be fully disclosed as early as practicable, and motions questioning joinder should be filed, where possible, sufficiently early to avoid delays in the proceedings.

## JUDICIAL DECISIONS

### ANALYSIS

Construction.
Adding parties.
Fraudulent misjoinder.
Interpretation.
Joinder improper.
Joinder proper.
Review.
Severance.
Venue.

**Construction.**

As to permissive joinder and the application of Miss. R. Civ. P. 20(a), the Mississippi Supreme Court recently added, in addition to other factors enunciated in past decisions, that a plaintiff must indicate the specific injury sustained. The Supreme Court now adds to the list that a plaintiff must specify the "distinct litigable event" common to all plaintiffs; this information by no means guarantees that plaintiffs may be joined in one suit, but it should supply a trial court with the information necessary to make such a determination. Ill. Cent. R.R. Co. v. Gregory, 912 So. 2d 829, 2005 Miss. LEXIS 297 (Miss. 2005).

**Adding parties.**

Chancellor erred in denying plaintiffs' motion for leave to amend complaint, where party sought to be added as plaintiff alleged causes of action which arose out of a series of transactions including those which created issues between existing parties. McDonald v. Holmes, 595 So. 2d 434, 1992 Miss. LEXIS 93 (Miss. 1992), overruled in part, Capital City Ins. Co. v. G.B. "Boots" Smith Corp., 889 So. 2d 505, 2004 Miss. LEXIS 1329 (Miss. 2004).

**Fraudulent misjoinder.**

Plaintiffs' claims against medical defendants were fraudulently misjoined with those against employer defendants, Miss. R. Civ. P. 20: while a work-related accident might have had some relevance to damages in the claims against the medical defendants, it was not a "linking" event joining the two sets of defendants (the medical defendants were sued for medical malpractice and product liability in connection with a surgery which was related to an accident at work, while the employer defendants were sued for wrongful discharge, slander, intentional infliction of emotional distress, and negligence in connection with the administration of a drug test); further, the plaintiffs failed to identify, nor could the court find, any question of law or fact common to the two sets of defendants. Palermo v. Letourneau Techs., Inc., 542 F. Supp. 2d 499, 2008 U.S. Dist. LEXIS 31181 (S.D. Miss. 2008).

After a negligence suit was removed from state to federal court, then remanded due to lack of complete diversity jurisdiction, defendant insurer's motion for reconsideration of the federal district court's order awarding fees related to the removal and remand to plaintiff insured under 28 USCS § 1447(c) was rejected; the court held that joinder of the insurer was proper under Miss. R. Civ. P. 20 for the purpose of obtaining a declaration of coverage under Fed. R. Civ. P. 57, and thus the court did not err in holding that the insurer lacked an objectively reasonable basis to remove the case on the grounds that it had been fraudulently misjoined with an in-state defendant. Hines v. Plane Paint, Inc., 430 F. Supp. 2d 598, 2006 U.S. Dist. LEXIS 32591 (S.D. Miss. 2006).

Assuming arguendo that the Fifth Circuit would explicitly adopt the Tapscott rationale in an appropriate case, the court would only be able to accept jurisdiction based on the misjoinder of a party if such misjoinder were egregious; as the Mississippi Supreme Court had found the joinder of literally thousands of consumer plaintiffs from several different states to be proper under Miss. R. Civ. P. 20, the court could not conclude that the joinders were improper, much less egregiously so, under the liberal version of Miss. R. Civ. P. Rule 20 which applied at the time the amended complaint was filed. Walton v. Tower Loan, 338 F. Supp. 2d 691, 2004 U.S. Dist. LEXIS 27165 (N.D. Miss. 2004).

Motion for remand was granted because the court did not find fraudulent misjoinder with regard to defendants under Miss. R. Civ. P. 20 and the fact that 5 out of 45 plaintiffs had filed for bankruptcy was not sufficient to establish federal jurisdiction under 28 U.S.C.S. § 1334 when state law claims completely predominated in the action. Jackson v. Truly, 307 F. Supp. 2d 818, 2004 U.S. Dist. LEXIS 10471 (N.D. Miss. 2004).

**Interpretation.**

Language requiring that joined plaintiffs demonstrate the existence of a "distinct litigable event" semantically distinguishes Miss. R. Civ. P. 20(a) from the requirement under Fed. R. Civ. P. 20(a) that the claims between the different plaintiffs be "logically related." MS Life Ins. Co. v. Baker, 905 So. 2d 1179, 2005 Miss. LEXIS 19 (Miss. 2005).

**Joinder improper.**

Trial court's dismissal of the nonresidents' asbestos injury suit without prejudice was correct where, under the applicable case law, plaintiffs could not be joined under Miss. R. Civ. P. 20 unless their claims were connected by a distinct, litigable event and the causes of action had accrued outside the state. Alexander v. AC And S, Inc., 947 So. 2d 891, 2007 Miss. LEXIS 17 (Miss. 2007).

Amount of evidence that would have to be introduced to prove all of the claims by the agents against the insurers in one trial would certainly overwhelm a jury; no agent had claims against every defendant, and the agents failed to provide sufficient facts to prove that their claims of fraud and conspiracy could withstand severance. Miss. Farm Bureau Fed'n v. Roberts, 927 So. 2d 739, 2006 Miss. LEXIS 98 (Miss. 2006).

Trial court abused its discretion in allowing plaintiffs to conduct discovery as the plaintiffs were not properly joined under Miss. R. Civ. P. 20, and the complaint did not put the railroad on notice as to the specific wrong done to each plaintiff by the railroad. Thus, the matter was remanded for plaintiffs to amend the complaint. Ill. Cent. R.R. v. Adams, 922 So. 2d 787, 2006 Miss. LEXIS 99 (Miss. 2006).

Medical malpractice and pharmaceutical product liability case was remanded for severance where the trial court abused its discretion in joining the four patients' cases because each patient was affiliated with only one physician and one pharmacist, and it was improper to join diverse plaintiffs with diverse defendants in the same law suit. Warner-Lambert Co. v. Potts, 909 So. 2d 1092, 2005 Miss. LEXIS 75 (Miss. 2005).

Where plaintiffs, numerous former and present employees, sued defendant, a railroad company, for occupational lung disease (all but one plaintiff residing outside of Tunica County, Mississippi, where the suit was filed, and some plaintiffs residing in Tennessee), primarily due to alleged exposure to asbestos, the railroad company successfully argued that joinder was improper because their employment consisted of work in different crafts at different work sites during different periods of time, and there was no transaction or occurrence or "distinct litigable event" common to all plaintiffs. Moreover, all claims against out-of-state defendants based on causes of action that accrued out of state were dismissed based on forum non conveniens, and all other plaintiffs' claims had to be severed from those of the Tunica County resident, including claims of plaintiffs who alleged exposure in Tunica County; all cases that could not be brought individually in Tunica County were to be transferred to a venue in which each plaintiff could have originally brought his or her claim, as required by Miss. R. Civ. P. 82(d). Ill. Cent. R.R. Co. v. Gregory, 912 So. 2d 829, 2005 Miss. LEXIS 297 (Miss. 2005).

Court erred in denying defendants' motion to sever and transfer plaintiffs' personal injury claims based on improper joinder because there was no single transaction or occurrence connecting plaintiffs to asbestos exposure at a shipyard to justify joinder under Miss. R. Civ. P. 20(a). Although each plaintiff worked at a common workplace, the shipyard, their employment was at different dates and times. Crossfield Prods. Corp. v. Irby, 910 So. 2d 498, 2005 Miss. LEXIS 77 (Miss. 2005).

Where a department store was sued for racial profiling customers across the country in store security measures, the joinder of claims of out-of-state customers into a single mass action in Mississippi exceeded the scope of permissible joinder under Miss. R. Civ. P. 20(a). Cases without an independent basis for venue in Hinds County, Mississippi, were severed. Dillard's, Inc. v. Scott, 908 So. 2d 93, 2005 Miss. LEXIS 286 (Miss. 2005).

Same transaction or occurrence requirement of Miss. R. Civ. P. 20(a) was satisfied as any potential claims the driver had against either the employee or insurer arose out of one distinct event, the accident of March 14, 2001; however, the driver improperly joined the insurer as a defendant where the driver could not rely on Miss. R. Civ. P. 57 as the basis for bringing suit against the insurer where Rule 57 only allowed the driver to seek a declaratory judgment against an insurer when coverage was in doubt, and coverage was not in doubt; there would therefore be no common question of law or fact litigated between all parties, making joinder of the insurer and employee as defendants improper. Mercer v. Moody, 918 So. 2d 664, 2005 Miss. LEXIS 365 (Miss. 2005).

Trial court improperly permitted an asbestos mass tort case with 76 plaintiffs and 136 defendants to proceed without severance when only 6 plaintiffs had ties to Mississippi, only 2 of those were exposed in the trial court's county, and plaintiffs were exposed at 250 different work locations in 20 different states. Amchem Prods. v. Rogers, 912 So. 2d 853, 2005 Miss. LEXIS 179 (Miss. 2005).

Suits of six asbestos claims plaintiffs and seven defendants were improperly joined as the plaintiff's actions did not arise out of the same transaction or occurrence. Although the plaintiffs all alleged exposure to asbestos, the plaintiffs worked in different occupations, for different employers, at different times; furthermore, some of the plaintiffs used respiratory protection equipment while others did not; also evident of improper joinder was the identical amounts of damages awarded to each plaintiff, in that each plaintiff had unique medical histories, work histories, differing exposures and differing diagnoses which were presented to the jury. 3M Co. v. Johnson, 895 So. 2d 151, 2005 Miss. LEXIS 43 (Miss. 2005).

Medical malpractice and pharmaceutical product liability case was remanded for severance where the trial court abused its discretion in joining the four patients' cases because each patient was affiliated with only one physician and one pharmacist, and it was improper to join diverse plaintiffs with diverse defendants in the same law suit. Warner-Lambert Co. v. Potts, 909 So. 2d 1092, 2005 Miss. LEXIS 75 (Miss. 2005).

Joinder was improper under Miss. R. Civ. P. 20(a) in borrowers' suit against lenders based on alleged "insurance packing," "loan flipping," and other deceptive business practices because there was no common question of misrepresentation and the borrowers failed to meet the Rule 20(a) same transaction and occurrence test as the loans were taken out on different days from different branch offices using different loan officers and containing different interest rates. CitiFinancial, Inc. v. Moody, 910 So. 2d 553, 2005 Miss. LEXIS 149 (Miss. 2005).

Court erred in denying defendants' motion to sever and transfer plaintiffs' personal injury claims based on improper joinder because there was no single transaction or occurrence connecting plaintiffs to asbestos exposure at a shipyard to justify joinder under Miss. R. Civ. P. 20(a). Although each plaintiff worked at a common workplace, the shipyard, their employment was at different dates and times. Crossfield Prods. Corp. v. Irby, 910 So. 2d 498, 2005 Miss. LEXIS 77 (Miss. 2005).

Because the owners' claims against the insurer and agents did not arise from the same transaction or occurrence or series of transactions or occurrences, joinder was not proper under Miss. R. Civ. P. 20(a); the owners were located in seven different Mississippi counties and three other states, dealt with different agents or employees, had different customer bases, and the damages allegedly incurred by each owner necessarily arose in a different time period. State Farm Mut. Auto. Ins. Co. v. Murriel, 904 So. 2d 112, 2004 Miss. LEXIS 1341 (Miss. 2004).

Where three plaintiffs residing in different counties alleged they were harmed by a defective drug that had been prescribed to them, they could not be permissively joined in the same suit because their merely taking the same prescription drug did not constitute the "same transaction or occurrence" required by the permissive joinder rule, Miss. R. Civ. P. 20. Purdue Pharma, L.P. v. Estate of Heffner, 904 So. 2d 100, 2004 Miss. LEXIS 1225 (Miss. 2004).

Federal district court's determination that a doctor had not been fraudulently joined to defeat diversity jurisdiction was not a determination that he was properly joined under Miss. R. Civ. P. 20. Purdue Pharma, L.P. v. Estate of Heffner, 904 So. 2d 100, 2004 Miss. LEXIS 1225 (Miss. 2004).

Just because plaintiffs may all be joined in an action does not necessarily mean that all named defendants are appropriately joined; where users of a prescription drug filed a state court tort action against the drug's makers and an in-state doctor, as to those users who were not treated by the doctor, the action was properly removed to the court because the doctor was egregiously misjoined. Jones v. Nastech Pharm., 319 F. Supp. 2d 720, 2004 U.S. Dist. LEXIS 9780 (S.D. Miss. 2004).

In a products liability case arising from use of a prescription drug, a court improperly joined the suits of ten plaintiffs where their actions did not arise out of the same transaction or occurrence as plaintiffs were prescribed the drug by different physicians, in different amounts, for different ailments, they presented 10 unique medical histories, and along with the histories and injuries, plaintiffs also claimed significantly different medical expenses. Although there were significant differences in medical expenses, the jury took only two hours after a four-week trial to award each plaintiff $ 10 million. Janssen Pharmaceutica, Inc. v. Bailey, 878 So. 2d 31, 2004 Miss. LEXIS 494 (Miss. 2004), modified, 2004 Miss. LEXIS 1002 (Miss. Aug. 5, 2004).

**Joinder proper.**

Miss. R. Civ. P. 20 is clearly considered to apply to asbestos claims. Amchem Prods. v. Rogers, 912 So. 2d 853, 2005 Miss. LEXIS 179 (Miss. 2005).

Where there was at least one viable state-law claim with a possibility of recovery against the resident retail sellers with respect to the strict liability claim under Miss. Code Ann. § 11-1-63, joinder of the diabetics' claims was proper under Miss. R. Civ. P. 20; therefore, the the case was erroneously removed pursuant to 28 U.S.C.S. § 1332 and had to be remanded to the state court. Polk v. Lifescan, Inc., 2003 U.S. Dist. LEXIS 25762 (N.D. Miss. Sept. 19, 2003).

Where users of a prescription drug filed a state court tort action against the drug's makers and an in-state doctor, as to the only user who was treated by the doctor, the action was remanded because the court held that the physician was egregiously misjoined because the remaining plaintiffs did not allege a claim against both the physician and the pharmaceutical companies arising out of the same transaction or occurrence. Jones v. Nastech Pharm., 319 F. Supp. 2d 720, 2004 U.S. Dist. LEXIS 9780 (S.D. Miss. 2004).

In a mass-joined asbestos action brought by plaintiff consumers against defendants, manufacturers and retailers, seeking recovery for injuries resulting from exposure to asbestos-containing products, the consumers were entitled to have the action remanded to state court because no egregious procedural misjoinder existed in the action, including the joinder of so-called "friction defendants" (manufacturers and sellers of car parts sold to consumers) and "non-friction defendants" (manufacturers and sellers of industrial insulation products). Thus, defendants failed to show that the local retailers were fraudulently joined for the purpose of defeating removal jurisdiction. Duffin v. Honeywell Int'l, Inc., 312 F. Supp. 2d 869, 2004 U.S. Dist. LEXIS 12857 (N.D. Miss. 2004).

Pursuant to 28 U.S.C.S. §§ 1332(a) and 1441(a), the individuals' motion to remand their action against the automobile manufacturers and sellers seeking to recover for personal injuries and property damages arising out of automobile accidents was granted where, under the liberal joinder provisions of Miss. R. Civ. P. 20 and the case law interpreting it, the individuals' allegations that their injuries arose out of the installation of defective engine systems in their automobiles were sufficiently related to withstand the manufacturers' and sellers' fraudulent misjoinder arguments. Burrell v. Ford Motor Co., 304 F. Supp. 2d 883, 2004 U.S. Dist. LEXIS 2436 (S.D. Miss. 2004).

Insurance agents' motion to remand their several tort claims against an insurance company and a supervisor was granted where the agents had stated at least one claim against the non-diverse supervisor, tortious interference with contract, by sufficiently alleging (1) the existence of an agency contract with the company, (2) that the supervisor had unjustifiably interfered with that contract, and (3) that the agents had not fraudulently misjoined their claims under Miss. R. Civ. P. 20, since each agent was under a separate agency contract with the company, so that the facts and law supporting the agents' claims had numerous common factors, and the evidence required to prove them was not so voluminous that jury confusion would result. Ross v. Life Investors Ins. Co. of Am., 309 F. Supp. 2d 842, 2004 U.S. Dist. LEXIS 3928 (S.D. Miss. 2004).

Where painters and sanders sued diverse manufacturers and non-diverse sellers regarding lead paint exposure and defendants removed the case to federal court, Miss. R. Civ. P. 20, rather than Fed. R. Civ. P. 20, applied to the fraudulent misjoinder analysis because application of Fed. R. Civ. P. 20 in a fraudulent misjoinder analysis violates the Fed. R. Civ. P. 82 prohibition on utilizing the Federal Rules of Civil Procedure to expand the jurisdiction of a federal court; the court found that neither the plaintiffs nor the plaintiffs' claims were fraudulently misjoined. Sweeney v. Sherwin Williams Co., 304 F. Supp. 2d 868, 2004 U.S. Dist. LEXIS 1088 (S.D. Miss. 2004).

In analgesic users' suit against manufacturers, pharmacies, and a doctor arising out of the use of the analgesic Oxycontin, remand to state court was appropriate because the doctor was not fraudulently misjoined. Jamison v. Purdue Pharma Co., 251 F. Supp. 2d 1315, 2003 U.S. Dist. LEXIS 4439 (S.D. Miss. 2003).

Almost 1,400 plaintiffs were properly joined in five consolidated actions alleging that they were force placed into collateral protection insurance policies at unfavorable rates since (1) all of the plaintiffs' claims arose out of the same pattern of conduct, the same type of insurance, and involved interpretation of the same master policy, (2) the plaintiffs asserted that the cases contained at least 22 common issues of fact and law that applied to each and every plaintiff, and (3) the defendants asserted the same defense to all of the claims. Am. Bankers Ins. Co. v. Alexander, 818 So. 2d 1073, 2001 Miss. LEXIS 19 (Miss. 2001), cert. denied, 534 U.S. 944, 122 S. Ct. 324, 151 L. Ed. 2d 242, 2001 U.S. LEXIS 7358 (U.S. 2001), overruled in part, Capital City Ins. Co. v. G.B. "Boots" Smith Corp., 889 So. 2d 505, 2004 Miss. LEXIS 1329 (Miss. 2004).

**Review.**

Circuit court erred in stating that Miss. R. Civ. P. 20 required only that cause of actions had to arise out of similar transactions or occurrences, that could be satisfied by common questions of law or fact. Rule 20(a) imposes two specific requisites to the joinder of parties: (1) a right to relief must be asserted by or against each plaintiff or defendant relating to or arising out of the same transaction or occurrence; and, (2) some question of law or fact common to all the parties will arise in the action; both of these requirements must be satisfied. Ill. Cent. R.R. Co. v. Gregory, 912 So. 2d 829, 2005 Miss. LEXIS 297 (Miss. 2005).

Where forty-five plaintiffs made general allegations claiming that an insurance company illegally required credit insurance and fraudulently inflated the cost of premiums, the plaintiffs failed to meet the prerequisite for joinder that the claims be based upon the same transaction or occurrence. The trial court abused its discretion in ruling on the insurance company's motion to sever with scant proof offered for, or in opposition to, joinder. MS Life Ins. Co. v. Baker, 905 So. 2d 1179, 2005 Miss. LEXIS 19 (Miss. 2005).

Although allowing joinder would have been the better choice, trial court's denial of joinder was not an abuse of discretion, considering uncertain state of the law. Bobby Kitchens, Inc. v. Mississippi Ins. Guaranty Ass'n, 560 So. 2d 129, 1989 Miss. LEXIS 447 (Miss. 1989).

Defendants' motion for reconsideration of the district court's refusal to grant their motion to remand on the basis of fraudulent joinder to prevent removal was denied where the amendments of Miss. R. Civ. P. 20 did not apply retroactively to require reconsideration of defendants' contention that plaintiffs were misjoined. Duffin v. Honeywell Int'l, Inc., 2004 U.S. Dist. LEXIS 12856 (N.D. Miss. Apr. 26, 2004).

**Severance.**

Following an automobile accident in which both drivers had the same liability insurer, appellee driver filed a claim for property damage and medical payments under her policy with the insurer and a third-party claim for bodily injury and medical expenses under appellant's liability policy, and appellant driver filed breach of contract and bad faith claims against the insurer; circuit court abused its discretion in denying the motion to sever, because neither prong of Miss. R. Civ. P. 20(a) was met for permissive joinder. Hegwood v. Williamson, 949 So. 2d 728, 2007 Miss. LEXIS 4 (Miss. 2007).

In patient's action over prescription drugs manufactured and sold by drug company to treat obesity, the trial of the seven patient's claims against the four doctors and the drug company would have inevitably resulted in the same confusing presentation of evidence which the Mississippi Supreme Court sought to avoid in reversing the trial court in Janssen Pharmaceutica, Inc. v. Armond, 866 So. 2d 1092 (Miss. 2004). The supreme court therefore reversed the trial court's denial of the drug company's motion to sever or transfer venue, and remand with instructions that the trial court sever and transfer the cases to the appropriate venue. Wyeth-Ayerst Labs. v. Caldwell, 905 So. 2d 1205, 2005 Miss. LEXIS 60 (Miss. 2005).

Severance was ordered as to each of the residents where they failed in their obligation to assert sufficient information to justify joinder; the trial court was directed to dismiss the complaint of each resident who failed, within 45 days of the order, to provide the manufacturers and trial court with sufficient information, including the name of the manufacturer or manufacturers against whom each resident made a claim, and the time period and location of exposure. Harold's Auto Parts, Inc. v. Mangialardi, 889 So. 2d 493, 2004 Miss. LEXIS 1501 (Miss. 2004).

In patient's action over prescription drugs manufactured and sold by drug company to treat obesity, the trial of the seven patient's claims against the four doctors and the drug company would have inevitably resulted in the same confusing presentation of evidence which the Mississippi Supreme Court sought to avoid in reversing the trial court in Janssen Pharmaceutica, Inc. v. Armond, 866 So. 2d 1092 (Miss. 2004). The supreme court therefore reversed the trial court's denial of the drug company's motion to sever or transfer venue, and remand with instructions that the trial court sever and transfer the cases to the appropriate venue. Wyeth-Ayerst Labs. v. Caldwell, 905 So. 2d 1205, 2005 Miss. LEXIS 60 (Miss. 2005).

Issues raised in the pharmaceutical companies' appeal dealt with the same issues raised and discussed in an earlier case, where the appellate court determined that joinder was improper and that the trial court abused its discretion in denying the motion to sever and transfer; because the patients in the case did not share a single, distinct litigable event, they could not be joined, and the pharmaceutical companies' motion should have been granted and the improperly joined patients should have been severed for separate trials. Janssen Pharmaceutica, Inc. v. Jackson, 883 So. 2d 91, 2004 Miss. LEXIS 1201 (Miss. 2004).

Pharmaceutical companies argued that the plaintiffs took the prescription drug at different times, under different labels and warnings and had different pre-existing conditions. Because of those differences, the companies sought to have plaintiffs' joinder in Jefferson County severed, alleging that the inquiries into alleged defective design, failure to warn, breach of warranty and misrepresentation would be wholly distinct in each plaintiff's case; the Mississippi Supreme Court concluded a jury could well be overwhelmed by the 30 separate fact patterns that were offered to prove medical malpractice, affirmed the trial court's decision to sever plaintiffs' claims, and affirmed the trial court's decision allowing for transfer of the claims of those plaintiffs without jurisdiction in Jefferson County to the court or courts of plaintiffs' counsel's choosing. Culbert v. Johnson & Johnson, 883 So. 2d 550, 2004 Miss. LEXIS 1197 (Miss. 2004).

Court erred in denying pharmaceutical company's motion to sever plaintiffs' claims against physicians and pharmacists in an action for injuries sustained after the use of a drug; jury might have been overwhelmed with 37 fact patterns offered to prove malpractice. Janssen Pharmaceutica, Inc. v. Keys, 879 So. 2d 446, 2004 Miss. LEXIS 966 (Miss. 2004).

For the purposes of Miss. R. Civ. P. 20, six medical malpractice plaintiffs were misjoined with the remaining 19 plaintiffs where, inter alia, each of the medical malpractice plaintiffs would have different facts and witnesses to support their claims of medical malpractice at trial, and would also have different medical histories with no relationship to those of the other plaintiffs. Thus, where each doctor-patient pair presented a different set of factual issues requiring consideration, the court found that the claims of the medical malpractice plaintiffs should be severed from the claims of the other plaintiffs and should be remanded to the state court from which they had been removed. Pittman v. Purdue Pharma Co., 2004 U.S. Dist. LEXIS 9840 (S.D. Miss. Mar. 12, 2004).

Motion to remand was granted with regard to four plaintiffs because these plaintiffs' claims were fraudulently misjoined under both Fed. R. Civ. P. 20 and Miss. R. Civ. P. 20 with the claims of their co-plaintiffs as their claims did not arise from the same transaction or occurrence as to the purchase of insurance policies from defendants. Therefore, the court did not allow the four plaintiffs to deprive the diverse defendants of their right of removal based on diversity jurisdiction. Reed v. Am. Med. Sec. Group, Inc., 324 F. Supp. 2d 798, 2004 U.S. Dist. LEXIS 11347 (S.D. Miss. 2004).

Joinder of consumers' complaints against defendants was improper under Miss. R. Civ. P. 20 and Smith County was improper venue; the case was remanded for severance and for a transfer of the severed cases to those jurisdictions in which each consumer could have brought his or her claims without reliance on another of the improperly joined plaintiffs. Janssen Pharmaceutica, Inc. v. Grant, 873 So. 2d 100, 2004 Miss. LEXIS 493 (Miss. 2004).

Court erred in denying pharmaceutical companies' and doctors' motion to sever and transfer venue for separate trials in an action by 56 plaintiffs for injuries caused by a prescription medication; plaintiffs had different medical histories, alleged different injuries at different times, ingested different amounts of the medication over different periods of time, received advice from different doctors, who, in turn, received different information about the risks associated with the medication via six different warning labels utilized during the time covered by the lawsuit, and who each had his or her own reasons to prescribe the medication. Mass joinder of the claims would make it impossible for the jury to limit the evidence to the appropriate plaintiff and doctor relationship. Janssen Pharmaceutica, Inc. v. Armond, 866 So. 2d 1092, 2004 Miss. LEXIS 204 (Miss. 2004).

The court properly severed a claim against a teacher arising from the paddling of a child as punishment from a claim against the school superintendent for falsely reporting that the child was abused by her father, since the claims were based on different events and involving different individuals. Burnham v. Stevens, 734 So. 2d 256, 1999 Miss. App. LEXIS 33 (Miss. Ct. App. 1999).

**Venue.**

Where two medical defendants fall within the same category, Miss. Code Ann. § 11-11-3(3) does not contain any language preventing permissive joinder under Miss. R. Civ. P. 20. Further, the plain language does not prevent the application of Miss. R. Civ. P. 82(c). Miss. Baptist Health Sys. v. Harkins, 245 So. 3d 370, 2018 Miss. LEXIS 69 (Miss. 2018).

In a suit where an administratrix sued a railroad for her husband's death, alleging injuries and death due to exposure to asbestos, although the decedent resided and worked for the railroad in Tennessee, a suit with others against it in Mississippi was proper because the administratrix was properly joined under Miss. R. Civ. P. 20, and thus, under Miss. R. Civ. P. 82(c), venue was proper for all plaintiffs where it was proper for one. Ill. Cent. R.R. Co. v. Travis, 808 So. 2d 928, 2002 Miss. LEXIS 101 (Miss. 2002), overruled in part, Capital City Ins. Co. v. G.B. "Boots" Smith Corp., 889 So. 2d 505, 2004 Miss. LEXIS 1329 (Miss. 2004), overruled, Ill. Cent. R.R. Co. v. Gregory, 912 So. 2d 829, 2005 Miss. LEXIS 297 (Miss. 2005).

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## Rule 21. Misjoinder and nonjoinder of parties.

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

**HISTORY: Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

## ADVISORY COMMITTEE NOTE

Rule 21 applies, for example, when: (1) the joined parties do not meet the requisites of Rule 20; (2) no relief has been demanded from one or more of the parties joined as defendants; (3) no claim for relief is stated against one or more of the defendants; (4) one of several plaintiffs does not seek any relief against the defendant and is without any real interest in the controversy.

Rules 17 and 19 should be used as reference points for what is meant by nonjoinder in Rule 21. Thus, Rule 21 simply describes the procedural consequences of failing to join a party as required in Rules 17 and 19.

## JUDICIAL DECISIONS

### ANALYSIS

Additional parties.
Severance.
Severance; forum after.

**Additional parties.**

It was not an abuse of discretion to deny a daughter's motion to amend the daughter's petition in a probate proceeding because (1) the daughter did not state how the daughter proposed to amend the petition, (2) fraud claims alluded to were not stated with required specificity, and (3) the daughter sought to add attorneys as parties without required leave of court. Flowers v. Flowers (In re Estate of Flowers), 269 So. 3d 120, 2018 Miss. App. LEXIS 2 (Miss. Ct. App. 2018).

Addition of two parties in a revised petition for incorporation did not render the petition jurisdictionally fatal, pursuant to Miss. Code Ann. § 21-1-15, because Miss. R. Civ. P. 21 applied to petitions of incorporation where the parties had received timely service of process and neither party objected to the proposed incorporation. City of Jackson v. Byram Incorporators, 16 So. 3d 662, 2009 Miss. LEXIS 145 (Miss. 2009).

**Severance.**

Chancellor did not abuse its discretion by denying a motion for leave to amend a complaint because the movant failed to inform the chancellor of what facts or acts constituted alleged fraud or negligence per se by the attorneys who represented the interests of the decedent's estate, a testamentary trust, and a guardianship. Moreover, the chancellor dismissed the attorneys from the litigation because the movant failed to obtain the court's leave to join them, and the movant filed no appeal of the attorneys' dismissal. Flowers v. Estate of Flowers (In re Estate of Flowers), 269 So. 3d 198, 2018 Miss. App. LEXIS 56 (Miss. Ct. App. 2018), aff'd in part and rev'd in part, 264 So. 3d 775, 2019 Miss. LEXIS 95 (Miss. 2019).

Trial court's order dismissing defendants whose names had been added in plaintiff's amended complaint without the court's leave was proper because the new names were not substituted for fictitious parties, but rather were those of new defendants whose addition required court approval under Miss. R. Civ. P. 21. Veal v. J. P. Morgan Trust Co., N.A., 955 So. 2d 843, 2007 Miss. LEXIS 368 (Miss. 2007).

Where the plaintiffs are misjoined and severance is required, the rule is for the trial court to: (1) allow a plaintiff whose case is properly before the court (if any), and all properly joined plaintiffs, to proceed in the filed action; (2) allow misjoined plaintiffs who are properly before the trial court to proceed with separate actions in the forum court; and (3) sever and dismiss all misjoined plaintiffs who lack proper venue in the forum court, allowing each severed plaintiff to file a new complaint in an appropriate venue selected by that plaintiff. Canadian National/Illinois Cent. R.R. v. Smith, 926 So. 2d 839, 2006 Miss. LEXIS 95 (Miss. 2006).

Trial court in medical malpractice action abused its discretion in severing plaintiff's claims against a second physician, where those claims involved the same nucleus of common facts and arose from the same transaction or occurrence. Kiddy v. Lipscomb, 628 So. 2d 1355, 1993 Miss. LEXIS 445 (Miss. 1993).

**Severance; forum after.**

Decision to grant summary judgment to companies in a product liability action was reversed on appeal because the case should have never been transferred to a second county in Mississippi due to misjoinder; since nothing connected the claims to Mississippi, they should have been dismissed instead of transferred. Creel v. Bridgestone/Firestone N. Am. Tire, LLC, 950 So. 2d 1024, 2007 Miss. LEXIS 128 (Miss. 2007).

Where the plaintiffs are misjoined and severance is required, the rule is for the trial court to: (1) allow a plaintiff whose case is properly before the court (if any), and all properly joined plaintiffs, to proceed in the filed action; (2) allow misjoined plaintiffs who are properly before the trial court to proceed with separate actions in the forum court; and (3) sever and dismiss all misjoined plaintiffs who lack proper venue in the forum court, allowing each severed plaintiff to file a new complaint in an appropriate venue selected by that plaintiff. Canadian National/Illinois Cent. R.R. v. Smith, 926 So. 2d 839, 2006 Miss. LEXIS 95 (Miss. 2006).

## Rule 22. Interpleader.

(a) *Plaintiff or defendant.* — Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counter-claim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

(b) *Release from liability; deposit or delivery.* — Any party seeking interpleader, as provided in subdivision (a) of this rule, may deposit with the court the amount claimed, or deliver to the court or as otherwise directed by the court, the property claimed, and the court may thereupon order such party discharged from liability as to such claims and the action shall continue as between the claimants of such money or property.

**HISTORY: Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

## ADVISORY COMMITTEE NOTE

The protection afforded by interpleader takes several forms. Most significantly, it prevents a stakeholder from being obligated to determine at his peril which claimant has the better claim and, when the stakeholder himself has no interest in the fund, forces the claimants to contest what essentially is a controversy between them without embroiling the stakeholder in the litigation over the merits of the respective claims. Even if the stakeholder denies liability, either in whole or in part to one or more of the claimants, interpleader still protects him from the vexation of multiple suits and the possibility of multiple liability that could result from adverse determinations in different courts. Thus, interpleader can be employed to reach an early and effective determination of disputed questions with a consequent saving of trouble and expense for the parties. As is true of the other liberal joinder provisions in these rules, interpleader also benefits the judicial system by condensing numerous potential individual actions into a single comprehensive unit, with a resulting savings in court time and energy.

Interpleader also can be used to protect the claimants by bringing them together in one action and reaching an equitable division of a limited fund. This situation frequently arises when the insurer of an alleged tortfeasor is faced with claims aggregating more than its liability under the policy. Were an insurance company required to await reduction of claims to judgment, the first claimant to obtain such judgment or to negotiate a settlement might appropriate all or a disproportionate share of the fund before his fellow claimants were able to establish their claim. The difficulties such a race to judgment poses for the insurer, and the unfairness which may result to some claimants, are among the principal evils the interpleader device is intended to remedy.

An additional advantage of interpleader to the claimant is that it normally involves a deposit of the disputed funds or property in court, thereby eliminating much of the delay and expense that often attends the enforcement of a money judgment.

The primary test for determining the propriety of interpleading the adverse claimants and discharging the stakeholder is whether the stakeholder legitimately fears multiple vexations directed against a single fund.

Ordinarily, interpleader is conducted in two "stages." In the first, the court hears evidence to determine whether the plaintiff is entitled to interplead the defendants. In the second stage, a determination is made on the merits of the adverse claims and, if appropriate, on the rights of an interested stakeholder.

After the stakeholder has paid the disputed funds into court, or given bond therefor, and the claimants have had notice and an opportunity to be heard, the court determines whether the stakeholder is entitled to interpleader relief. If so, the court will enter an order requiring the claimants to interplead and, if the stakeholder is disinterested, discharging the stakeholder from the proceeding and from further liability with regard to the interpleader fund. The court may also permanently enjoin the claimants from further harassing the stakeholder with the claims or judicial proceedings.

There is, however, no inflexible rule that the proceeding must be divided into two stages. The entire action may be disposed of at one time in cases where, for example, the stakeholder has not moved to be discharged or has remained in the action by reason of an interest therein. There may even be a third stage, in the event that the second stage determination leaves unresolved some further dispute, either between the stakeholder and the prevailing claimant or among the prevailing claimants.

Trial during stages later than the first is also appropriate for counterclaims raised by the claimants, such as those alleging an independent liability, and for cross-claims between claimants which are held appropriate for resolution in the course of the interpleader proceedings.

## JUDICIAL DECISIONS

### ANALYSIS

In general.
Applicability.

**In general.**

Chancery court erred in dismissing as moot the counterclaims filed by an insured's father because the father permissibly filed counterclaims in the insurer's interpleader action; the father's counterclaims were separate and independent tort claims against the insurer. Pulliam v. Alfa Ins. Co., 238 So. 3d 620, 2018 Miss. App. LEXIS 40 (Miss. Ct. App. 2018).

Chancery court properly determined that an insurer was entitled to interplead all potential claimants under a life insurance policy because the insured legitimately feared multiple liability based on competing claims to the same life insurance proceeds; because interpleader was appropriate, and the insurer deposited the full amount of the life insurance proceeds with the court, the chancery court appropriately released and discharged it from liability under the policy and the interpled funds. Pulliam v. Alfa Ins. Co., 238 So. 3d 620, 2018 Miss. App. LEXIS 40 (Miss. Ct. App. 2018).

Because Mississippi law defined the release the interpleader received by the scope of the stake, the interpleader action did not shield the surety (a non-party) from liability that arose from its bond obligation. JSI Communs. v. Travelers Cas. & Sur. Co. of Am., 807 F.3d 725, 2015 U.S. App. LEXIS 21080 (5th Cir. Miss. 2015).

A Rule 22 interpleader action provides only the procedural vehicle to assert claims to the specific funds; however, the rule by itself cannot be the basis for a pro-rata distribution. Chic Creations of Bonita Lakes Mall v. Doleac Elec. Co., 791 So. 2d 254, 2000 Miss. App. LEXIS 553 (Miss. Ct. App. 2000).

**Applicability.**

Where a plumber had been named as an interpleader defendant, the plumber was not required to have sought statutory remedies for the outstanding balance on its contract before it could recover funds that had been interpled. Noble House, Inc. v. W & W Plumbing & Heating, Inc., 881 So. 2d 377, 2004 Miss. App. LEXIS 880 (Miss. Ct. App. 2004).

Interpleader action was available to law firm to facilitate payment of funds in its possession into the registry of the court when several attorneys made claims to the funds as attorney fees arising from litigation. Scruggs, Millette, Bozeman &

Dent, P.A. v. Merkel & Cocke, P.A., 804 So. 2d 1000, 2001 Miss. LEXIS 317 (Miss. 2001).

Interpleader was appropriate where a contract between a shopping center owner and a retail store in the shopping center provided that the owner would pay a certain sum to the store for the construction of the interior of the store and the owner knew that subcontractors were not paid by the general contractor for their work on the store; the owner had a reasonable concern that it could be subjected to multiple litigation and the validity of the various potential claims was not for the owner to determine. Chic Creations of Bonita Lakes Mall v. Doleac Elec. Co., 791 So. 2d 254, 2000 Miss. App. LEXIS 553 (Miss. Ct. App. 2000).

### Rule 23. Class actions. [Omitted].

### Rule 23.1. Derivative actions by shareholders. [Omitted].

### Rule 23.2. Actions relating to unincorporated associations. [Omitted].

### Rule 24. Intervention.

(a) *Intervention of right.* — Upon timely application, anyone shall be permitted to intervene in an action:

(1) when a statute confers an unconditional right to intervene; or

(2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) *Permissive intervention.* — Upon timely application anyone may be permitted to intervene in an action:

(1) when a statute confers a conditional right to intervene; or

(2) when an applicant's claim or defense and the main action have a question of law or fact in common.

When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency, or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) *Procedure.* — A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene.

(d) *Intervention by the state.* — In any action (1) to restrain or enjoin the enforcement, operation, or execution of any statute of the State of Mississippi by restraining or enjoining the action of any officer of the State or any political subdivision thereof, or the action of any agency, board, or commission acting under state law, in which a claim is asserted that the statute under which the action sought to be restrained or enjoined is to be taken is unconstitutional, or

(2) for declaratory relief brought pursuant to Rule 57 in which a declaration or adjudication of the unconstitutionality of any statute of the State of Mississippi is among the relief requested, the party asserting the unconstitutionality of the statute shall notify the Attorney General of the State of Mississippi within such time as to afford him an opportunity to intervene and argue the question of constitutionality.

**HISTORY: Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

## ADVISORY COMMITTEE NOTE

Rule 24 requires the court to balance the interests of the would-be intervenor against the burdens such intervention might pose on those already parties or on the judicial system's economic and efficient disposition of the case. If one of the criteria for intervention as a matter of right is met and the would-be intervenor files a timely application for intervention, intervention shall be allowed. *See Dare v. Stoke,* 62 So. 3d 958, 959 (Miss. 2011). A trial court has discretion when ruling on a timely motion to permissively intervene and "may permissively grant or deny a motion to intervene, provided there is a common question of law or fact and the motion was timely filed." *See Madison HMA, Inc. v. St. Dominic-Jackson Mem'l Hosp.,* 35 So. 3d 1209, 1215 (Miss. 2010).

Applications to intervene as of right pursuant to Rule 24(a) or to permissively intervene pursuant to Rule 24(b) must be timely. The rule does not set out any specific time limits. Instead, trial courts are to weigh the following four factors when determining timeliness: "(1) the length of time during which the would-be intervenor actually knew or should have known of his interest in the case before he petitioned for leave to intervene; (2) the extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case; (3) the extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied; and (4) the existence of unusual circumstances mitigating either for or against a determination that the application is timely." *See Hood ex rel. State Tobacco Litigation,* 958 So. 2d 790, 806 (Miss. 2007). The determination of whether an application to intervene is timely is committed to the discretion of the trial court and will not be overturned on appeal absent an abuse of discretion.

## JUDICIAL DECISIONS

### ANALYSIS

Construction.
Divorce proceedings.
Effect of failure to intervene.
Intervention as of right.
Intervention; by state.
Intervention; improper.
Intervention; permissive.
Motion wrongly denied.
Procedure.
Time for appeal.
Timeliness of motion.

**Construction.**

Workers' compensation insurance carrier could pursue an appeal even though it did not file a formal intervention notice pursuant to Miss. R. Civ. P. 24 because the trial court and all other parties had acted as if the carrier had intervened and the equities of hearing the appeal favored the insurance carrier. Federated Mut. Ins. Co. v. McNeal, 943 So. 2d 658, 2006 Miss. LEXIS 678 (Miss. 2006).

In a paternity action, the mother argued that she had a fundamental right, as a mother, to retain the birth name given to her child, and that the paternal presumption in Miss. Code Ann. § 93-9-9(1) constituted both a due process and equal protection violation, but she had waited three years (until the final hearing on custody, support, and visitation), to act on her prior motion to amend the earlier judgment of the chancellor, which had given the child the father's surname. The Mississippi Supreme Court held: (1) although other jurisdictions had established that a parent had a fundamental constitutional right in his/her child's name, the supreme court had yet to recognize that same was fundamental; (2) the mother had made no challenge to the constitutionality of § 93-9-9(1) in her motion to alter or amend, and the father and the trial court were first apprised of her constitutional challenge when she appealed to the instant court; (3) the Mississippi Attorney General had received no notice of her constitutional challenge until he received her appellate brief; and (4) consequently, the issue was procedurally barred pursuant to Miss. R. Civ. P. 24(d), and because she had failed to raise the constitutional issue in the trial court. Powers v. Tiebauer, 939 So. 2d 749, 2005 Miss. LEXIS 533 (Miss. 2005).

Whether putative intervenor is likely to prevail on merits is not part of calculus in which trial court should engage in considering an application to intervene. Guaranty Nat'l Ins. Co. v. Pittman, 501 So. 2d 377, 1987 Miss. LEXIS 2268 (Miss. 1987).

**Divorce proceedings.**

A man's second wife was entitled to intervene in a proceeding in which the man's first wife sought to set aside their divorce judgment in order to protect her property and marital rights. Cohen v. Cohen, 748 So. 2d 91, 1999 Miss. LEXIS 285 (Miss. 1999).

**Effect of failure to intervene.**

Workers' compensation insurer could not file a separate subrogation action under Miss. Code Ann. § 71-3-71 against an injured worker after he settled a third-party action in Alabama and reimbursed the insurer only the amount it was entitled to under Alabama law, as the insurer had notice of the action but did not join or intervene in that suit. Liberty Mut. Ins. Co. v. Shoemake, 111 So. 3d 1207, 2013 Miss. LEXIS 190 (Miss. 2013).

**Intervention as of right.**

Law firm should have been allowed to intervene as a matter of right because it had an interest in the discovery of information related to any causes of action a family could have, and it had an interest in the information that was purposefully developed in order to craft a lawsuit against it; because there were no parties to the bill of discovery except for the family members, it was not only that the law firm's interest was not adequately protected, it had no one protecting its interest at all. Butler Snow LLP v. Estate of Mayfield, 281 So. 3d 1214, 2019 Miss. App. LEXIS 265 (Miss. Ct. App. 2019).

Mississippi Gaming and Hospitality Association had no right to intervene in actions involving applications for gaming site approval as Miss. Code Ann. § 75-76-121(4) provided only permissive intervention. Miss. Gaming & Hosp. Ass'n v. Diamondhead Real Estate, LLC, 265 So. 3d 135, 2019 Miss. LEXIS 26 (Miss. 2019).

Statewide association of planning and development districts (association) was properly allowed to intervene in a citizen's suit to declare a planning and development district (district) to be a public agency because (1) the association established the association's status as a representative for all districts, (2) a disposition in favor of the citizen would impair the association's ability to protect other districts, and (3) each district was unique, so the district sued did not adequately represent the interests of all districts or the association. Kinney v. S. Miss. Planning & Dev. Dist., 202 So. 3d 187, 2016 Miss. LEXIS 349 (Miss. 2016).

Standard of review for intervention of right under Miss. R. Civ. P. 24(a)(2) is de novo, while the standard of review for permissive intervention under Rule 24(b)(2) is abuse of discretion; the chancery court erred in denying a buyer's motion for intervention of right under Rule 24(a)(2) in a hospital's action to enforce a contract for the acquisition of a surgery center's membership interests, assets, and certificate of need because the four requirements necessary to establish intervention of right, including timeliness, an adequate interest in the action, impaired ability to protect that interest, and inadequate representation of that interest, were met. Madison HMA, Inc. v. St. Dominic-Jackson Mem. Hosp., 35 So. 3d 1209, 2010 Miss. LEXIS 276 (Miss. 2010).

With respect to an employer's or workers' compensation insurer's right to subrogation, Miss. Code Ann. § 71-3-71 allows them to either join or intervene in a third party action filed by an injured worker, and either will suffice to protect the insurer's or employer's right to reimbursement. Liberty Mut. Ins. Co. v. Shoemake, 111 So. 3d 1207, 2013 Miss. LEXIS 190 (Miss. 2013).

Although the railroad company had a substantial financial interest in the adoption by the grandfather, that interest was purely economic since the grandfather's adopted children would be able to join his natural children to maintain and continue the grandfather's asbestos suit against the railroad company because they were his dependants and beneficiaries, and the three adopted children were receiving approximately $ 1,932 per month from the grandfather's retirement with the railroad company, a benefit they could not have received had they not been adopted. Therefore, because the railroad company's claim for intervention was based solely on its property and monetary concerns, intervention under Miss. R. Civ. P. 24(a)(2) was precluded. D.C.S. v. J.F., 44 So. 3d 1006, 2009 Miss. App. LEXIS 714 (Miss. Ct. App. 2009), cert. dismissed, 2010 Miss. LEXIS 515 (Miss. Sept. 30, 2010).

Trial court abused its discretion in denying the grandmother's motion to intervene as the grandmother's interests in the safety and well-being of her grandchildren were not being represented by the existing parties; they deprived the children, and particularly the granddaughter, of the court's protection and it was never appropriate to deprive children of due process safeguards by punishing one of the litigants in a custody battle and refusing to consider allegations of abuse of the children. S.G. v. D.C., 13 So. 3d 269, 2009 Miss. LEXIS 270 (Miss. 2009).

Motion to intervene filed by the Governor of Mississippi, the Mississippi Division of Medicaid, and the Mississippi Health Care Trust Fund was timely filed and they had the right to intervene under Miss. R. Civ. P. 24 (a) because: (1) the application for intervention was timely due to the current, ongoing, and future expenditures and income from tobacco settlement monies; (2) the original parties to the tobacco litigation will not suffer prejudice by their intervention; (3) denying the intervention would deny the Governor and the Trust Fund their arguable and purported right to input regarding expenditures or budgeting of the settlement funds; and (4) there were unusual circumstances militating for a determination that the application was timely. Hood ex rel. State Tobacco Litigation v. State, 958 So. 2d 790, 2007 Miss. LEXIS 344 (Miss. 2007).

Appellate court affirmed the trial court's denial of the foster parent's motion to intervene under Miss. R. Civ. P. 24(a) in adoption proceedings brought by the individual as it was in the best interests of the minor child for the matter to proceed without intervention. Neshoba County Dep't of Human Servs. v. Hodge, 919 So. 2d 1157, 2006 Miss. App. LEXIS 2 (Miss. Ct. App. 2006).

Trial court erred in denying an employer's and insurers' request to intervene in an employee's negligence action against a doctor and a medical corporation. The employer and the insurers were entitled to intervene because the employee's paraplegia, which occurred after back surgery, was proximately caused by her on-the-job injury. Miss. Ins. Guar. Ass'n v. Brewer, 922 So. 2d 807, 2005 Miss. App. LEXIS 484 (Miss. Ct. App. 2005), cert. denied, 927 So. 2d 750, 2006 Miss. LEXIS 126 (Miss. 2006).

Department of human services had a duty to intervene in paternity action, and its intervention in action was one of right. Mississippi State Dep't of Human Servs. v. Barnett, 633 So. 2d 430, 1993 Miss. LEXIS 602 (Miss. 1993).

Workers' compensation carrier was entitled to participate in proceeds of settlement reached during trial between injured employee and driver of other automobile involved in collision. Sneed v. Verdun, 611 So. 2d 947, 1992 Miss. LEXIS 834 (Miss. 1992).

Liability insurer should have been allowed to intervene in personal injury action stemming from accident between automobile and truck, where defendant truck driver had defaulted and intervenor was insurance carrier for truck driver's putative employer. Guaranty Nat'l Ins. Co. v. Pittman, 501 So. 2d 377, 1987 Miss. LEXIS 2268 (Miss. 1987).

This rule does not address the manner or degree of participation of all parties, after an intervenor exercises right of intervention; manner or degree of participation must be left to broad discretion of trial judge, whose responsibility it is to see that each party is afforded opportunity to assert and protect his own interest in an orderly, fair proceeding. Reikes v. Martin, 471 So. 2d 385, 1985 Miss. LEXIS 2101 (Miss. 1985).

**Intervention; by state.**

Mother did not notice the attorney general of a constitutional challenge in a timely manner because although the mother noticed the attorney general in the notice of appeal, that was untimely and not within such time as to afford the attorney general an opportunity to intervene and argue the question of constitutionality. Harbour v. Tupelo Pub. Sch. Dist. ex rel. State, 275 So. 3d 70, 2019 Miss. LEXIS 232 (Miss. 2019).

Father and his children failed to provide the Attorney General with notice of their constitutional challenge at the trial level because they first notified the Attorney General of their challenge to the constitutionality of Miss. Code Ann. § 91-1-15 in their notice of appeal; thus, the father and children did not comply with the requirements of the rule, and their challenge to the constitutionality of the wrongful death statute's incorporation of § 91-1-15(3) was procedurally barred. Perkins v. Nelson (In re Estate of Nelson), 266 So. 3d 1008, 2018 Miss. App. LEXIS 350 (Miss. Ct. App. 2018).

Homeowners' challenge to the constitutionality of a statute was barred because the homeowners did not generally raise the issue before the trial court, and they did not notify the Attorney General or serve a copy of their appellate brief on the Attorney General or appropriate governmental body. Brown v. Waldron, 186 So. 3d 955, 2016 Miss. App. LEXIS 115 (Miss. Ct. App. 2016).

In a medical negligence case in which a mother raised her constitutional challenges to the Mississippi Tort Claims Act (MTCA) for the first time on appeal, although, in her motion to amend the complaint, the mother stated that she wished to raise the constitutionality of the MTCA, there was no valid complaint to amend. The mother had not complied with the notice requirement under Miss. R. Civ. P. 24(d), and she had not complied with the 90-day notice period in Miss. Code Ann. § 11-46-11(1). Jones v. Laurel Family Clinic, P.A., 37 So. 3d 665, 2010 Miss. App. LEXIS 14 (Miss. Ct. App. 2010).

Supposed "notice" to a special assistant attorney general is not sufficient under Miss. R. Civ. P. 24(d) or Miss. R. App. P. 44; therefore, a hospital was procedurally barred from bringing constitutional challenges to Miss. Code Ann. § 41-7-191(16) under Miss. Const. art. 4, § 87, Miss. Const. art. 3, § 14, and the Fourteenth Amendment where there was no notice to the Mississippi Attorney General. Oktibbeha County Hosp. v. Miss. State Dep't of Health, 956 So. 2d 207, 2007 Miss. LEXIS 277 (Miss. 2007).

Appellant's failure to challenge the constitutionality of Miss. Code Ann. § 11-46-13(1) in the trial court or to give notice to the Attorney General precluded the Supreme Court from considering the issue on appeal. Donaldson v. Covington County, 846 So. 2d 219, 2003 Miss. LEXIS 133 (Miss. 2003).

In an abuse and neglect proceeding, the parents were procedurally barred from challenging the constitutionality of the proceeding because they failed to send notice of their challenge to the Attorney General. In the Interest of D. O., 798 So. 2d 417, 2001 Miss. LEXIS 64 (Miss. 2001).

Chancellor erred in declaring portion of state statute unconstitutional without giving proper notice to Attorney General to appear and defend constitutionality of the statute. State v. Watkins, 676 So. 2d 247, 1996 Miss. LEXIS 327 (Miss. 1996).

**Intervention; improper.**

Denial of the doctor's intervention in the modification of a property settlement agreement (PSA) entered into by the husband and wife was appropriate because the doctor did not have a legally protected interest in the divorce; he was not named in the PSA, and it provided for no legal obligations or duties owed expressly to him. Additionally, given the doctor's attempt to intermeddle in the divorce proceedings, after having meddled with the marital relationship of the husband and wife, justice hardly demanded intervention by him. Dare v. Stokes, 62 So. 3d 958, 2011 Miss. LEXIS 267 (Miss. 2011).

Denial of the intervenors' motion to intervene was improper pursuant to Miss. R. Civ. P. 24(a), where the motion was timely, in part, because the court could find no prejudice to the existing parties since the suit under the Open Meetings Act, § 25-41-1 et seq., had been stayed in 1998 for a number of years and the quiet title suit was not initiated until late 2002. Hayes v. Leflore County Bd. of Supervisors, 935 So. 2d 1026, 2005 Miss. App. LEXIS 534 (Miss. Ct. App. 2005), rev'd, 2006 Miss. LEXIS 210 (Miss. Apr. 27, 2006).

County which owned pulp mill and land on which it was located was not entitled to intervene as a defendant in action against mill operator for its discharge of toxic substances into river, where county failed to establish that its interest was not already adequately represented by existing party defendants. Perry County v. Ferguson, 618 So. 2d 1270, 1993 Miss. LEXIS 201 (Miss. 1993).

Intervention of resident security holders was improper in utility rate increase proceedings, where they were already a party to the proceedings through officers of power company, and their interest was adequately represented by the company. State ex rel. Pittman v. Mississippi Public Service Com., 506 So. 2d 978, 1987 Miss. LEXIS 2367 (Miss. 1987), rev'd, 487 U.S. 354, 108 S. Ct. 2428, 101 L. Ed. 2d 322, 1988 U.S. LEXIS 2874 (U.S. 1988).

**Intervention; permissive.**

Since the Governor of Mississippi, the Mississippi Division of Medicaid, and the Mississippi Health Care Trust Fund were not seeking to intervene in a concluded matter which had already been litigated, the assertion by the partnership, a nonprofit organization created to reduce underage smoking, that they could not intervene because the matter was already litigated lacked merit; by allowing intervention, the payments made by the tobacco companies each year would not be altered, and therefore the settlement agreement between the state and the tobacco companies would not be jeopardized. Hood ex rel. State Tobacco Litigation v. State, 958 So. 2d 790, 2007 Miss. LEXIS 344 (Miss. 2007).

Motion to intervene filed by the Governor of Mississippi, the Mississippi Division of Medicaid, and the Mississippi Health Care Trust Fund could not be set aside for a perceived lack of statutory or legal authority because: (1) the Governor unquestionably had not only the statutory but also the constitutional authority to intervene since the Governor was under a solemn duty to act in order to assure faithful execution of Mississippi's laws; (2) the division had a compelling interest to see that the annual payments of $20 million were placed in the Mississippi Health Care Trust Fund because the suit was initially brought to recoup monies expended by the division; (3) the Mississippi Health Care Trust Fund was authorized to recoup funds paid to a partnership, a non-profit organization created to reduce under age smoking; and (4) the Mississippi Attorney General declined to take action. Hood ex rel. State Tobacco Litigation v. State, 958 So. 2d 790, 2007 Miss. LEXIS 344 (Miss. 2007).

The court improperly allowed a physician to intervene in an action to establish paternity brought prior to an anticipated wrongful death action by the father against the physician based upon alleged negligent medical treatment leading to the deaths of the mother and child; there was no suggestion that the physician's defense to the claim of negligence would be in any way impacted by the paternity action and his liability existed independent of the paternity action. In re Estate of Johnson, 779 So. 2d 164, 2000 Miss. App. LEXIS 574 (Miss. Ct. App. 2000).

State Democratic Committee should have been allowed to intervene permissively, if not by right, in election contest involving candidate it sponsored; Committee's interest in the subject matter was substantial, and only the Committee could provide relief. Cummings v. Benderman, 681 So. 2d 97, 1996 Miss. LEXIS 501 (Miss. 1996).

**Motion wrongly denied.**

Company's motion to intervene in an action concerning ownership of land leased by the company should have been granted. After obtaining partial relief sought in its proposed complaint attached to its motion to intervene pursuant to Miss. R. Civ. P. 24(c), the company was entitled to continued participation in the proceedings as a matter of law. Lamar Cos. v. Cocajo Trust, 54 So. 3d 222, 2011 Miss. LEXIS 117 (Miss. 2011).

**Procedure.**

Motion to dismiss an appeal because an unsuccessful bidder failed to refile a motion to set aside a protective order after the chancery court granted his motion to intervene was denied as the successful bidder was not complaining of a defect in service of process of the motion to set aside a protective order. Morgan v. XLK Int'l, LLC, 255 So. 3d 1271, 2018 Miss. LEXIS 429 (Miss. 2018).

Since the driver failed to raise her constitutional challenge that the Mississippi Tort Claims Act violated the due process clause of the state constitution before the trial court and also failed to notify the Mississippi Attorney General in accordance with Miss. R. Civ. P. 24(d), her issue was procedurally barred on appeal. Canadian National/Illinois Cent. R.R. v. Smith, 926 So. 2d 839, 2006 Miss. LEXIS 95 (Miss. 2006).

Unemployment compensation claimant's constitutional argument on appeal was procedurally barred because his argument was unsupported by citation to authority and he did not provide notice to the attorney general under Miss. R. Civ. P. 24(d) and Miss. R. App. P. 44(a) that the constitutionality of a statute was being challenged; therefore, he was procedurally barred from advancing his constitutional argument on appeal. Grehan v. Miss. Empl. Sec. Comm'n, 918 So. 2d 774, 2005 Miss. App. LEXIS 337 (Miss. Ct. App. 2005).

Plaintiff's failure to raise the issue of the constitutionality of a statute before the trial court and to notify the Mississippi Attorney General resulted in a procedural bar on that issue. Cockrell v. Pearl River Valley Water Supply Dist., 865 So. 2d 357, 2004 Miss. LEXIS 69 (Miss. 2004).

Estate administrator failed to comply with the rule and the constitutionality issue of the statute was barred, because it was not raised in the trial court and because the attorney general's office was not properly notified. Corey v. Skelton, 834 So. 2d 681, 2003 Miss. LEXIS 6 (Miss. 2003).

Party who is granted permission to intervene pursuant to M.R.C.P. Rule 24(b)(2) is not required to issue a summons and complaint pursuant to Rule 4; rather, service of motion to intervene accompanied by complaint, pursuant to Rule 5, is sufficient service. Breland v. Smith-Johnson, Inc., 501 So. 2d 389, 1987 Miss. LEXIS 2278 (Miss. 1987).

**Time for appeal.**

Grandmother's appeal was timely where an immediate appeal of a denial of an application for leave to intervene under Miss. R. Civ. P. 24 was not required and the father did not file a brief in the current appeal, Miss. R. App. P. 31(d). S.G. v. D.C., 13 So. 3d 269, 2009 Miss. LEXIS 270 (Miss. 2009).

**Timeliness of motion.**

In a church's action to confirm title to property, a title holder's father's Miss. R. Civ. P. 24(a) motion to intervene was found untimely as the father pretended to be title holder to the property and answered the action before admitting the father's identity and seeking to intervene as himself; the delay prejudiced the church. Vasser v. Bibleway M.B. Church, 50 So. 3d 381, 2010 Miss. App. LEXIS 674 (Miss. Ct. App. 2010).

Although Miss. R. Civ. P. 25(c) transfers were generally permissive, the execution sale and purchase of lawsuits, as choses in action, left only one party, a bank, with any interest in the litigation; because Miss. R. Civ. P. 17 allowed only the real party in interest to prosecute its claims, the trial court abused its discretion by refusing to substitute the bank as plaintiff in the actions. Hayes v. Leflore County Bd. of Supervisors, 935 So. 2d 1015, 2006 Miss. LEXIS 445 (Miss. 2006).

In an action arising out of an automobile accident in which five persons died and five others were injured, it was error for the court to permit the representatives of two of the deceased persons to intervene in an action filed against the defendant city where the motion for intervention was not filed until after the expiration of the notice of claim and statute of limitations provisions of § 11-46-11. City of Tupelo v. Martin, 747 So. 2d 822, 1999 Miss. LEXIS 278 (Miss. 1999).

### RESEARCH REFERENCES

**ALR.**

Right to Intervene in Court Review of Zoning Proceeding. 47 A.L.R.6th 439.

## Rule 25. Substitution of parties.

(a) *Death.* —

(1) If a party dies and the claim is not thereby extinguished, the court shall, upon motion, order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of summons. The action shall be dismissed without prejudice as to the deceased party if the motion for substitution is not made within ninety days after the death is suggested upon the record by service of a statement of the fact of the death as herein provided for the service of the motion.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiff or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) *Legal disability.* — If a party comes under a legal disability the court upon motion served as provided in subdivision (a) of this rule may allow the action to be continued by or against his representative.

(c) *Transfer of interest.* — In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

(d) *Public officers; death or separation from office.* — When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

**HISTORY: Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

## ADVISORY COMMITTEE NOTE

The suggestion of death does not have to identify the decedent's successors or representatives to be substituted as the real party in interest. *See Clark v. Knesal,* 113 So. 3d 531, 536 (Miss. 2013). Although the rule requires that service of the suggestion of death upon non-parties be accomplished in accordance with Rule 4, the rule does not indicate which non-parties must be served with the suggestion of death so as to trigger the ninety-day time period. Interested non-parties whose rights may be cut off by the ninety-day limits must be served. See *Hurst v. SW Miss. Legal Servs.,* 610 So. 2d 374, 386 (1992) (defendant's failure to serve the named executrix of the deceased plaintiff's estate with the suggestion of death rendered the suggestion of death ineffective even though the executrix may have had actual notice of the suggestion of death); *Knesal,* 113 So. 3d at 537 (defendant/counter-plaintiff who was properly served with the suggestion of death could not argue that the failure to serve the plaintiff/counter-defendant's non-party successors rendered the suggestion invalid because: (i) the failure to serve the plaintiff/counter-defendant's non-party successors did not affect the defendant/counter-plaintiff's opportunity to file a motion to substitute; and (ii) service upon the decedent's successor was impossible because there was no existing estate or personal representative upon whom the suggestion of death could have been served). The rule contains no restriction on who may file and serve the suggestion of death; the decedent's lawyer may file and serve it. *Id.* at 538.

The general provisions of Rule 6(b) apply to motions to substitute; accordingly, the court may extend the period for substitution if timely requested. Similarly, the court may allow substitution to be made after expiration of the ninety-day period on a showing that the failure to act earlier was the result of excusable neglect. *See Knesal,* 113 So. 3d at 539.

If the named plaintiff was deceased at the time the original complaint was filed, then the original complaint is null and void and the real party in interest cannot be substituted as the proper plaintiff because a valid action was never commenced.

## JUDICIAL DECISIONS

### ANALYSIS

Applicability.
Death.
Transfers of interest.

**Applicability.**

Although Miss. R. Civ. P. 25(c) transfers were generally permissive, the execution sale and purchase of lawsuits, as choses in action, left only one party, a bank, with any interest in the litigation; because Miss. R. Civ. P. 17 allowed only the real party in interest to prosecute its claims, the trial court abused its discretion by refusing to substitute the bank as plaintiff in the actions. Citizens Nat'l Bank v. Dixieland Forest Prods., LLC, 935 So. 2d 1004, 2006 Miss. LEXIS 409 (Miss. 2006).

The rule, by its terms, applies to judgments, and not to pre-trial discovery orders. TXG Intrastate Pipeline Co. v. Grossnickle, 716 So. 2d 991, 1997 Miss. LEXIS 512 (Miss. 1997).

**Death.**

Chancellor's award of attorney's fees and expenses was reversed, and the case was remanded to the chancellor with instructions to: (1) dismiss the action without prejudice as to a deceased neighbor and then (2) reassess the distribution of the award of attorneys' fees and expenses to the remaining party because no party was ever substituted upon the neighbor's death; it did not appear that the chancellor ever dismissed the action as to the neighbor. Sullivan v. Estate of Maddox, 283 So. 3d 222, 2019 Miss. App. LEXIS 364 (Miss. Ct. App. 2019).

There was no abuse of discretion in allowing substitution of a neighbor's estate as a party because the neighbor's son, who had been appointed as executor of the estate, timely petitioned for an extension to file a substitution of parties. Sullivan v. Estate of Maddox, 283 So. 3d 222, 2019 Miss. App. LEXIS 364 (Miss. Ct. App. 2019).

Although the decedent's widow timely filed the original complaint within the three-year statute of limitations in the Federal Employers Liability Act, because, after her death, her attorneys failed to file a motion for substitution of parties within 90 days as required, and because the attorneys did not attempt to show good cause for failing to substitute a party, the trial court did not err in finding that the doctrine of equitable tolling should not be applied and that the statute of limitations had expired by the time plaintiffs filed the second complaint, and the trial court did not err in dismissing plaintiffs' second complaint. Burch v. Ill. Cent. R.R., 136 So. 3d 1063, 2014 Miss. LEXIS 218 (Miss. 2014).

Trial court did not abuse its discretion in filing to find a homeowner's delay in responding to a suggestion of death resulted from excusable neglect because the homeonwer was able to plead his case for excusable neglect fully at the hearing on the motion for substitution and dismissal; a motion for substitution may be granted after the ninety-day period only upon a showing of excusable neglect. Clark v. Knesal, 113 So. 3d 531, 2013 Miss. LEXIS 291 (Miss. 2013).

Given that dismissal was not contingent upon the filing of a motion, the trial court acted in accordance with the rule when it dismissed a decedent; the rule does not require a motion to dismiss to be filed, nor does it limit who may file such a motion if one is filed. Clark v. Knesal, 113 So. 3d 531, 2013 Miss. LEXIS 291 (Miss. 2013).

Decedent's attorney could file the suggestion of death because the rule was silent as to who could file the suggestion of death; since the rule is silent as to who may file the suggestion of death, an attorney may file the suggestion for a deceased client. Clark v. Knesal, 113 So. 3d 531, 2013 Miss. LEXIS 291 (Miss. 2013).

Because a homeowner's rights regarding the motion for substitution were not affected by the failure to serve the decedent's successors, service was not mandatory, and the service executed upon the homeowner's attorney was sufficient to trigger the ninety-day time period; there existed no estate upon which or personal representative upon whom the suggestion of death could have been served. Clark v. Knesal, 113 So. 3d 531, 2013 Miss. LEXIS 291 (Miss. 2013).

Trial court properly determined that failure to identify the successors or representatives of a decedent's estate did not toll the ninety-day time period for substitution because no identification of the successors or representatives was required. Clark v. Knesal, 113 So. 3d 531, 2013 Miss. LEXIS 291 (Miss. 2013).

According to established precedent and Miss. Code Ann. § 91-7-237, an executrix's medical malpractice action against a doctor and a medical practice survived a decedent's death and did not have to be recommenced because the executrix complied with Miss. R. Civ. P. 25 as the doctor and medical practice made no suggestion of death upon the record to trigger the ninety-day time requirement set out by the rule; nowhere does Rule 25 state that the substitution of parties is a commencement of a new action, but instead, it is the continuation of a prior action. Harris v. Darby, 17 So. 3d 1076, 2009 Miss. LEXIS 447 (Miss. 2009).

Medical malpractice suit was properly dismissed for failure to state a claim because plaintiffs did comply with Miss. Code Ann. § 11-1-58 by filing with their complaint either an expert disclosure or a certificate of counsel stating that an expert disclosure had not yet been obtained because of the running of the statute of limitations under Miss. Code Ann. § 15-1-36; strict compliance with Miss. Code Ann. § 11-1-58 was mandatory, and defendants, a medical center and the estate of a deceased doctor, which had been substituted as a defendant under Miss. R. Civ. P. 25(a)(1) after the doctor's death and reasserted the defenses raised by the doctor, had both raised as an affirmative defense plaintiffs' failure to comply with the statute. Caldwell v. N. Miss. Med. Ctr., Inc., 956 So. 2d 888, 2007 Miss. LEXIS 280 (Miss. 2007), overruled in part, Wimley v. Reid, 991 So. 2d 135, 2008 Miss. LEXIS 456 (Miss. 2008).

The requirement of Miss. R. Civ. P. 25(a) to move the substitution of the estate of a deceased party within 90 days of service of a statement of the fact of the death did not begin running when counsel for the deceased party moved for a continuance based on the party's death. Estate of Baxter v. Shaw Assocs., 797 So. 2d 396, 2001 Miss. App. LEXIS 398 (Miss. Ct. App. 2001).

Defendant did not fulfill the rule's requirement concerning service on non-parties when it mailed a copy of the Suggestion of Death to plaintiffs' attorney rather than to estate of deceased party plaintiff; since estate was not properly served, the ninety-day limitations period never began to run, and therefore trial court did not err in denying defendant's motion to dismiss deceased as a party plaintiff, and in allowing plaintiffs to substitute estate more than ninety days after defendant filed its Suggestion of Death. Hurst v. Southwest Miss. Legal Servs. Corp., 610 So. 2d 374, 1992 Miss. LEXIS 751 (Miss. 1992), overruled, Rains v. Gardner, 731 So. 2d 1192, 1999 Miss. LEXIS 47 (Miss. 1999).

**Transfers of interest.**

Current owners of the properties at issue had standing to contest the tax sales at issue because they were properly substituted as parties to the lawsuit where the former owner completed a valid transfer of her interest in the property to them. High Sierra Tax Sale Props., LLC v. Daley, 188 So. 3d 1224, 2015 Miss. App. LEXIS 410 (Miss. Ct. App. 2015), cert. denied, 188 So. 3d 575, 2016 Miss. LEXIS 170 (Miss. 2016).

Chancellor properly joined a trust to a lawsuit, instead of substituting the trust for a decedent's estate, because while it appeared that the estate had transferred its interest to the trust, the validity of that transfer was in question. Borne v. Estate of T. L. Carraway, 118 So. 3d 571, 2013 Miss. LEXIS 373 (Miss. 2013).

In the underlying action, the telecommunications company maintained that it should not have been named as a defendant by the landowner as it was not the parent company of the Mississippi Power Company (also a named defendant in the underling action), and had no easements or fiber optic telecommunications lines in Mississippi. However, the distinction addressed by the trial court in granting the landowner's motion to dismiss his trespass and unjust enrichment action, was that the landowner's claims were dismissed with prejudice rather than without prejudice; the trial court was in the best position to consider the telecommunication company's ore tenus motion for attorney's fees and costs and did not abuse its discretion in denying same where it found the circumstances may have been unusual, but that they were not exceptional. Miss. Power Co. v. Hanson, 905 So. 2d 547, 2005 Miss. LEXIS 2 (Miss. 2005).

By its terms this rule applied to judgments, not pre-trial discovery orders, and therefore it was error for chancellor to impose same discovery sanctions on second defendant that it imposed on first, where second defendant had complied with all discovery requests. TXG Intrastate Pipeline Co. v. Grossnickle, 716 So. 2d 991, 1997 Miss. LEXIS 512 (Miss. 1997).

Transferee, as owner of certain percentages in working interests and interests in the litigation, was a necessary, indispensable party and should have been joined upon defendant's motion. TXG Intrastate Pipeline Co. v. Grossnickle, 716 So. 2d 991, 1997 Miss. LEXIS 512 (Miss. 1997).

# CHAPTER V. DEPOSITIONS AND DISCOVERY

## Rule 26. General provisions governing discovery.

(a) *Discovery methods.* — Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; and requests for admission. Unless the court orders otherwise under subdivisions (c) or (d) of this rule, the frequency of use of these methods is not limited.

(b) *Scope of discovery.* — Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In general.* — Parties may obtain discovery regarding any matter, not privileged, which is relevant to the issues raised by the claims or defenses of any party. The discovery may include the existence, description, nature, custody, condition and location of any books, documents, electronically stored information, or other tangible things; and the identity and location of persons (i) having knowledge of any discoverable matter or (ii) who may be called as witnesses at the trial. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Insurance agreements.* — A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) *Trial preparation: materials.* — Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including that party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of that party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. Rule 37(a)(4) applies to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is: (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) *Trial preparations: experts.* — Discovery of facts known and opinions held by experts, otherwise discoverable under subsection (b)(1) of this rule may be obtained only as follows:

(A)(i) A requesting party may, through interrogatories, require any other party to identify any witness whom the responding party expects to call as a witness at trial to present evidence under Mississippi Rule of Evidence 702, 703, or 705.

(ii) If such witness has been retained or specially employed to provide expert testimony, the requesting party may, through interrogatories, require the responding party to state the subject matter on which the expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify: a summary of the grounds for each opinion; the facts or data considered by the witness in forming the opinions, regardless of when and how the facts or data were made known to the witness: any exhibits that will be used to summarize or support the opinions; the witness's qualifications, including a list of all publications authored by the witness in the previous ten years: a list of cases in which, during the previous ten years, the witness testified as an expert at trial or by deposition; and, for retained experts, a statement of the compensation to be paid for the study and testimony in the case.

(iii) If such witness has not been retained or specially employed to provide expert testimony, the requesting party may, through interrogatories. require the responding party to state the subject matter on which the witness is expected to present evidence under Mississippi Rule of Evidence 702, 703, or 705; and a summary of the facts and opinions to which the witness is expected to testify.

(iv) A party may depose any person who has been identified as a witness who will present evidence at trial under Mississippi Rule of Evidence 702, 703, or 705. Such expert depositions shall not be taken until the party desiring to depose such expert has received interrogatory responses concerning such expert's expected testimony.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Rule 26(b)(3) protects drafts of any interrogatory responses required under Rule 26(b)(4)(A)(ii) or other expert disclosures regardless of the form in which the draft is recorded.

(D) Rule 26(b)(3) protects communications between the party's lawyer or representative of the lawyer and any expert witness who has been retained or specially employed to present evidence at trial under Mississippi Rules of Evidence 702, 703 or 705, regardless of the form of the communications, except to the extent that the communications: (i) relate to compensation for the expert's study or testimony; (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or (iii) identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed. For purposes of this rule, a "representative of the lawyer" is one employed by the lawyer to assist the lawyer in the rendition of professional legal services.

(E) Unless manifest injustice would result, the court shall require the party taking the deposition of an opposing party's expert who has been specially retained or employed to present expert testimony at trial to pay the expert a reasonable fee for time spent giving deposition testimony and a reasonable fee for up to two hours actually spent preparing for such deposition. With respect to discovery obtained under subsection (b)(4)(B) of this rule, the court shall require the party seeking discovery; (i) to pay the expert a reasonable fee for time spent in responding to such discovery: and (ii) to pay the party who retained or specially employed the expert a fair portion of the fees and expenses reasonably incurred by such party in obtaining the facts and opinions from the expert.

(5) *Specific limitations on discovery of electronically stored information.* — A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the concerns of Rule 26(d)(2). The court may specify conditions for the discovery. Such conditions may include: (i) limiting the frequency or extent of electronic discovery; (ii) requiring the discovery to be conducted in stages with progressive showings by the requesting party of a need for additional information; (iii) limiting the sources of electronically stored information to be accessed or searched; (iv) limiting the amount or type of electronically stored information to be produced; (v) modifying the form in which the electronically stored information is to be produced; (vii) requiring a sample production of some of the electronically stored information to determine whether additional production is warranted; and (vii) allocating to the requesting party some or all of the cost of producing electronically stored information that is not reasonably accessible because of undue burden or cost.

(6) *Claiming privilege or protecting trial-preparation materials.* —

(A) *Information withheld.* — When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must: (i) expressly make the claim; and (ii) describe the nature of the documents, communications, electronically stored information, or tangible things not produced or disclosed – and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) *Information produced.* — If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) *Discovery conference.* — At any time after the commencement of the action, the court may hold a conference on the subject of discovery, and shall do so if requested by any party. The request for discovery conference shall certify that counsel has conferred, or made reasonable effort to confer, with opposing counsel concerning the matters set forth in the request, and shall include:

1. a statement of the issues to be tried;
2. a plan and schedule of discovery;
3. limitations to be placed on discovery, if any; and
4. Any objections or additions to the items contained in the request shall be served and filed no later than ten days after service of the request.

Following the discovery conference, the court shall enter an order fixing the issues; establishing a plan and schedule of discovery; setting limitations upon discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the case.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16.

The court may impose sanctions for the failure of a party or counsel without good cause to have cooperated in the framing of an appropriate discovery plan by agreement. Upon a showing of good cause, any order entered pursuant to this subdivision may be altered or amended.other proposed orders with respect to discovery.

(d) *Protective orders.* —

(1) *In general.* — Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending, or in the case of a deposition the court that issued a subpoena therefor, may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including, but not limited to, one or more of the following:

(A) that the discovery not be had;

(B) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(C) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(D) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(E) that discovery be conducted with no one present except persons designated by the court;

(F) that a deposition after being sealed is to be opened only by order of the court;

(G) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(H) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court;

(I) that payment of some or all of the expenses attendant upon such deposition or other discovery device be made by the party seeking same.

(2) *Limiting discovery.* — In determining whether to enter an order limiting the frequency or extent of discovery, the court may consider, among other things, whether the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome or less expensive; whether the party seeking

discovery has had ample opportunity to obtain the information by discovery in the action; and whether the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving those issues.

(3) *Ordering discovery.* — If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery.

(4) *Awarding expenses.* — Rule 37(a)(4) applies to the award of expenses incurred in relation to the motion.

(e) *Sequence and timing of discovery.* — Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(f) *Supplementation of responses.* —

(1) *In general.* — A party who has made an expert disclosure or who has responded to an interrogatory, request for production, or request for admission must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) *Expert witness.* — With respect to any expert witness who has been retained or specially employed to present evidence at trial under Mississippi Rules of Evidence 702, 703, or 705, the party's duty to supplement in a timely manner extends to information included in any disclosure of that expert's expected testimony, including information given in response to an expert interrogatory, information provided in an expert disclosure, and information given during an expert's deposition.

(g) *Signing discovery requests, responses, and objections.* — A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(1) *Signature required: effect of signature.* — Every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name – or by the party personally, if unrepresented – and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry, with respect to a discovery request, response, or objection, it is:

(A) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(B) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(C) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) *Failure to sign.* — Other parties have no duty to act on an unsigned request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) *Sanction for improper certification.* — If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

**HISTORY: Amended effective March 1, 1989; March 13, 1991; April 13, 2000; Amended effective May 29, 2003 to add Rule 26(5) addressing discovery of electronic data; Comments repealed effective July 1, 2014; amended effective January 1, 2020.**

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 1, 2020, M.R.C.P. 26 was amended so as to include subparagraph (g).

Effective January 1, 2020, Rule 26(b) was amended. Rule 26(b)(4) was amended so as to provide for two-tiered discovery regarding witnesses who will offer expert testimony at trial. The amended rule authorizes more detailed interrogatories concerning expert witnesses who are retained or specially employed and more general interrogatories concerning other witnesses who will provide expert testimony. The amendment also authorizes depositions of any witness who will provide expert testimony at trial. Rule 26(b) was amended so that certain communications between a party and a party's expert who has been retained or specially employed to provide expert testimony at trial are deemed trial preparation material. Rule 26(b)(5) governing discovery of electronically stored information was amended so as to refer to "electronically stored information" rather than "data or information in electronic or magnetic form." The amendment also provides a nonexhaustive list of the types of conditions a judge may place on electronic discovery. Rule 26(b) was further amended so as to include subsection (6), which requires a responding party to generally describe information withheld from discovery based an allegation of privilege or trial preparation material and established a process to deal with inadvertent production of privileged or trial preparation material.

Effective May 29, 2003, Rule 26(b) was amended by adding subsection (5) governing discovery of data or information in electronic or magnetic form.

Effective April 13, 2000, Rule 26(c) was amended to allow the court on its own motion to convene a discovery conference, 753-754 So. 2d XVII (West Miss. Cas. 2000).

Effective March 13, 1991, Rule 26(b)(1)(ii) was amended to delete the oral testimony of witnesses from the listing of matter that might be discovered by a party. Rule 26(d) was amended to provide that in the case of depositions protective orders might be made by the court that issued a subpoena therefor. 574-576 So. 2d XXIII (West Miss. Cas. 1991).

Effective March 1, 1989, Rule 26(b)(1) and Rule 26(f)(1) were amended to provide for the identification of (and supplementation of the prior identification of) those, in addition to experts, who may be called as witnesses at the trial. 536-538 So. 2d XXIV (West Miss. Cas. 1989).

## ADVISORY COMMITTEE NOTE

Rule 26(b)(2) limits discovery to "any matter, not privileged, which is relevant to the issues raised by the claims or defenses of any party." Earlier precedent authorized discovery of any matter, not privileged, relevant to the "subject matter" of the case. The current rule limiting discovery to the issues raised by any claim or defense was intended to narrow the scope of discovery.

Rule 26(b)(4)(A) establishes a two-tiered procedure for discovery concerning witnesses who will provide expert testimony at trial. With respect to retained and specially employed expert witnesses who are expected to testify at trial, the rule authorizes more detailed interrogatories than those permitted concerning other expert witnesses expected to testify at trial because a party can expect retained and specially employed expert witnesses to fully cooperate during discovery and trial. Thus, the rule authorizes interrogatories requesting not only a statement of the opinions the expert is expected to offer and the basis and reasons therefore, but also a statement of the facts and data considered, not just those relied upon, by the expert as well as information concerning the witness's qualifications, publications and previous expert testimony. Although Rule 26(b)(4)(A)(ii) authorizes interrogatories concerning exhibits that will be used to support or illustrate a retained or specially employed expert witness's opinion expected to be offered at trial, a complete response to such an interrogatory may not be possible until closer to trial because some such exhibits may not be created until they are actually needed for trial. Thus, a response or supplemented response concerning such exhibits should not be deemed untimely if it was reasonably made in advance of trial. Rule 26(b)(26)(b)(4)(A)(iii) establishes a more limited scope for interrogatories concerning expert witnesses who were not retained or specially employed but who are expected to testify at trial. Treating physicians and public accident investigators will often offer expert testimony at trial even though they have not been retained or specially employed by a party. The more limited duty to respond to interrogatories concerning this category of experts is based upon the recognition that some such witnesses may not fully cooperate with the party who intends to call them at trial thereby making it difficult or impossible for the party intending to call such witness at trial to fully and adequately respond to interrogatories requesting the more detailed information that is discoverable with respect to retained or specially employed expert witnesses expected to testify at trial. A response under Rule 26(b)(26)(b)(4)(A)(iii) is sufficient if it gives reasonable notice of the expert's testimony, taking into account the limitations of the party's knowledge of the facts known by and the opinions held by the expert.

Rule 26(b)(4)(C) & (D) grant trial preparation material or "work product" protection to draft responses to expert interrogatories, drafts of expert disclosures, and certain communications between the lawyer and the expert (or between the representative of the lawyer and the expert) in an effort to avoid costly, and oftentimes inefficient, discovery and to encourage more open and robust communication between the attorney and expert so that the attorney and expert may come to a better mutual understanding of the case. The protection is not absolute. Discovery may be had in the three excepted areas. In addition, pursuant to Rule 26(b)(3), a party may overcome the trial preparation material protection by showing a substantial need for the material in preparation of the case and an inability to obtain the substantial equivalent without undue hardship. The protection is not meant to foreclose inquiry into whether the expert explored other theories in the case at hand; whether the expert has ever explored other theories that were not explored in the case at hand, and if so why such theories were not explored in the case at hand; whether the expert considered any facts which were not relied upon and, if so, why such facts were not relied upon; whether any tests were run or models developed other than those disclosed in interrogatory responses and the results of such tests and/or models; and whether anybody other than the party's attorney provided support or participation in framing the opinion.

Rule 26(b)(5) governs discovery of electronically stored information and provides that a party may initially refuse to produce electronically stored information from a source that is not reasonably accessible because of undue burden or cost. The rule further provides, however, that a court may grant a motion to compel discovery from such sources upon a showing of good cause after taking into account factors such as the burden. expense and likely benefit of such discovery. The rule explicitly authorizes a court to order the requesting party to pay for some or all of the costs associated with discovery of electronically stored information from a source that is not reasonably accessible.

Rule 26(b)(6) requires a party withholding information based on a claim of privilege or trial preparation material to generally describe such information so as to enable the requesting party to assess the claim. It also establishes a procedure to govern inadvertent disclosure of privileged or trial preparation material.

Rule 26(c) authorizes the court to hold a discovery conference and thereafter enter an order governing discovery. The rule grants the court discretion to limit discovery and to allocate some or all of the expense of discovery to the requesting party when appropriate.

Rule 26(d) grants a court discretion to enter a protective order, among other things, prohibiting or limiting discovery after considering factors such as burden, cost, and likely benefit of such discovery.

Rule 26(f) imposes a duty to supplement. The duty to supplement, while imposed on a party, applies whether the additional or corrective information is learned by the client or by the attorney. Supplementations need not be made as each new item of information is learned but should be made at appropriate intervals during the discovery period, and with special promptness as the trial date approaches. It may be useful for any scheduling order to specify the time or times when supplementations should be made. The obligation to supplement responses to formal discovery requests applies to interrogatories, requests for production, and requests for admissions, but not ordinarily to deposition testimony. However, with respect to retained or specially employed experts, changes in the opinions expressed by the expert, whether in response to an interrogatory, an expert disclosure, or a deposition, are subject to a duty of supplemental disclosure. The obligation to supplement applies whenever a party learns that its prior disclosures or responses are in some material respect incomplete or incorrect. There is, however, no obligation to provide supplemental or corrective information that has been otherwise made known to the parties in writing or during the discovery process, as when a witness not previously disclosed is identified during the taking of a deposition or when an expert during a deposition corrects information contained in an earlier report.

M.R.C.P. 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37. In addition Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions. The subdivision provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection. The term “response” includes answers to interrogatories and to requests to admit as well as responses to production requests.

If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse. Although the certification duty requires the lawyer to pause and consider the reasonableness of his request, response, or objection, it is not meant to discourage or restrict necessary and legitimate discovery. The rule simply requires that the attorney make a reasonable inquiry into the factual basis of his response, request, or objection.

The duty to make a “reasonable inquiry” is satisfied if the investigation undertaken by the attorney and the conclusions drawn therefrom are reasonable under the circumstances. It is an objective standard similar to the one imposed by Rule 11. In making the inquiry, the attorney may rely on assertions by the client and on communications with other counsel in the case as long as that reliance is appropriate under the circumstances. Ultimately, what is reasonable is a matter for the court to decide on the totality of the circumstances.

M.R.C.P. 26(g) does not require the signing attorney to certify the truthfulness of the client's factual responses to a discovery request. Rather, the signature certifies that the lawyer has made a reasonable effort to assure that the client has provided all the information and documents available to him that are responsive to the discovery demand. Thus, the lawyer's certification under M.R.C.P. 6(g) [sic] should be distinguished from the requirement that a responding party must sign interrogatory responses under oath pursuant to M.R.C.P. 33(b).

Nor does the rule require a party or an attorney to disclose privileged communications or work product in order to show that a discovery request, response, or objection is substantially justified. The signing requirement means that every discovery request, response, or objection should be grounded on a theory that is reasonable under the precedents or a good faith belief as to what should be the law. This standard is heavily dependent on the circumstances of each case. The certification speaks as of the time it is made. The duty to supplement discovery responses continues to be governed by M.R.C.P. 26(e).

The premise of Rule 26(g) is that imposing sanctions on attorneys who fail to meet the rule's standards will significantly reduce abuse by imposing disadvantages therefor. The rule mandates that sanctions be imposed on attorneys who fail to meet the standards established in the first portion of Rule 26(g). The nature of the sanction is a matter of judicial discretion to be exercised in light of the particular circumstances. The sanctioning process must comport with due process requirements. The kind of notice and hearing required will depend on the facts of the case and the severity of the sanction being considered. To prevent the proliferation of the sanction procedure and to avoid multiple hearings, discovery in any sanction proceeding normally should be permitted only when it is clearly required by the interests of justice. In most cases the court will be aware of the circumstances and only a brief hearing should be necessary.

## JUDICIAL DECISIONS

### ANALYSIS

Applicability.
Disclosure of witnesses.
Discoverable matters.
Discovery of statements.
Discovery violations.
Expert testimony.
Expert witnesses.
Filing with court.
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Matters exempt from discovery.
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**Applicability.**

In a proceeding for adverse possession, the failure of the party opposing the claim of adverse possession to answer the requests for admission conclusively established that the deceased had exclusive use of the property at the times at issue, that the deceased held himself out as the owner of the property, and that the deceased did not allow others to use the property except with his permission. Williams v. Estate of Williams, 952 So. 2d 950, 2006 Miss. App. LEXIS 641 (Miss. Ct. App. 2006), cert. denied, 951 So. 2d 563, 2007 Miss. LEXIS 522 (Miss. 2007).

Architect sought to appeal a decision from the Mississippi State Board of Architecture that found that the architect had unlawfully engaged in the practice of architecture in Mississippi; the chancery court improperly dismissed the appeal because the time for appeal expired on a Saturday, and when the notice and bond were filed the following Monday, the appeal was timely; Miss. R. Civ. P. 6 was identical to Miss. R. App. P. 26(a) in all respects. Broady v. Miss. State Bd. of

Architecture, 936 So. 2d 441, 2006 Miss. App. LEXIS 593 (Miss. Ct. App. 2006).

Although defendant argued that the trial court erred in dismissing his appeal because it was dismissed by means of a procedure for dismissal of state civil, not criminal cases, and the appellate court initially agreed that Miss. R. Civ. P. 5 and 41 applied to civil and not criminal cases; an appeal was not perfected until a written notice of appeal and a cost bond were filed within 30 days of the judgment appealed, such that both a cost and appearance bond were required in appeals from municipal courts, and no Mississippi case permitted the filing of the required bonds past the 30-day appeal time. Riley v. Town of Lambert, 856 So. 2d 721, 2003 Miss. App. LEXIS 910 (Miss. Ct. App. 2003).

Correct standard for awarding sanctions for a vexatiously overbroad subpoena is that under M.R.C.P. Rule 45, not Rules 26 or 37. SLM v. Clinton Pub. Sch. Dist., 677 So. 2d 737, 1996 Miss. LEXIS 284 (Miss. 1996).

Insofar as they may be applicable, procedures contemplated by this rule are available to either party in a bar disciplinary matter for the taking of depositions of parties or witnesses. Mississippi State Bar v. Attorney L., 511 So. 2d 119, 1987 Miss. LEXIS 2615 (Miss. 1987).

**Disclosure of witnesses.**

Landowner did not designate any experts during the discovery phase of the matter and did not indicate his desire to call an expert witness prior to trial, as he was required to do under Miss. R. Civ. P. 26(b)(4)(A)(i). Had the landowner wished to preserve that issue for appeal, he was required to make a proffer of the witness's proposed testimony pursuant to Miss. R. Evid. 103(a)(2), and because the landowner neglected to make a proffer of the proposed expert testimony, the issue was not properly preserved for the appellate court's review. Pittman v. Dykes Timber Co., 18 So. 3d 923, 2009 Miss. App. LEXIS 673 (Miss. Ct. App. 2009).

Where a driver sued a utility company for negligence after the driver drove into some utility poles located in a truck parked on the side of a highway, the trial court did not err by allowing the utility company to present a witness, although the witness was not revealed during discovery, since that witness was not discovered until after the trial began. Myles v. Entergy Miss., Inc., 828 So. 2d 861, 2002 Miss. App. LEXIS 547 (Miss. Ct. App. 2002).

The requirements of Miss. R. Civ. P. 26(b) to disclose the name and testimony of an expert witness did not apply to an attorney testifying on behalf of a party who was not qualified as an expert. Estate of Baxter v. Shaw Assocs., 797 So. 2d 396, 2001 Miss. App. LEXIS 398 (Miss. Ct. App. 2001).

Bar disciplinary tribunal erred in allowing testimony of witness who had not been previously disclosed pursuant to attorney's discovery requests. Emil v. The Mississippi Bar, 690 So. 2d 301, 1997 Miss. LEXIS 3 (Miss. 1997).

**Discoverable matters.**

Granting of a directed verdict in favor of a physician provider, a physician, and a medical center, in a claim for medical malpractice was appropriate pursuant to Miss. R. Civ. P. 26(f)(1) because, if the patient's counsel had disclosed the medical articles in question to defendants shortly after gathering them in May 2005, the supplementation might have been seasonable. However, disclosure only six days prior to trial provided insufficient time for defendants' counsel to have adequately prepared a rebuttal. Hartel v. Pruett, 998 So. 2d 979, 2008 Miss. LEXIS 578 (Miss. 2008).

Trial court in divorce case was ordered on remand to rule as to each of 29 categories of financial information, granting the wife access to those documents revealing financial information (including any corporate documents relating to distribution or salary) that would positively or negatively affect her agreed entitlement to the husband's various forms of income. West v. West, 891 So. 2d 203, 2004 Miss. LEXIS 1411 (Miss. 2004).

Court in action for fraud and negligence in connection with pre-sale residential termite inspection erred in failing to compel answer to interrogatory asking defendant to identify every person for whom it had performed a pre-sale termite inspection in the past five years, since evidence of similar occurrences was relevant and admissible to show absence of mistake or accident, and plan or intent. Dawkins v. Redd Pest Control Co., 607 So. 2d 1232, 1992 Miss. LEXIS 622 (Miss. 1992).

**Discovery of statements.**

Trial court did not err in requiring defendant to produce, at trial, the recorded statement of a non-party witness, where plaintiff had not sought statement by pretrial discovery or subpoena. Seaboard S. R., Inc. v. Cantrell, 520 So. 2d 479, 1987 Miss. LEXIS 2981 (Miss. 1987).

**Discovery violations.**

Finding against the company in the driver's action for damages was improper where, whether or not the driver's counsel actually intended to obtain unfair advantage over the company by designating an expert at such a late date, the untimely designation, belated submission of Miss. R. Civ. P. 26(b)(4) interrogatory responses, last-minute deposition, and the addition of a third theory of liability as to the company weeks after the initial designation, had the effect of working a severe prejudice on the company. Int'l Paper Co. v. Townsend, 2006 Miss. App. LEXIS 108 (Miss. Ct. App. Feb. 7, 2006), op. withdrawn, sub. op., 961 So. 2d 741, 2007 Miss. App. LEXIS 192 (Miss. Ct. App. 2007).

Order by a trial court that granted the individuals' motion to compel a doctor to respond to a set of interrogatories and request for admissions was reversed; the state supreme court held that the trial court abused its discretion in granting the order as the discovery violated Miss. R. Civ. P.26(d) becasue it was unduly burdensome, and oppressive as many were confusing, and therefore, ambiguous. Haley v. Harbin, 933 So. 2d 261, 2005 Miss. LEXIS 531 (Miss. 2005).

Chancellor abused his discretion in refusing to require disclosure of the underlying business documents with respect to the loan on the divorcing parties' property; simply ruling that the wife could get all the financial information she needed by way of deposition did not satisfy her discovery requests – in contentious proceedings involving complex finances of such great magnitude, it is not sufficient to simply tell one party to rely on the self-interested assertions of their opponent and his witnesses – doing so eviscerates the aggrieved party of the ability to make a substantive showing of its case. West v. West, 891 So. 2d 203, 2004 Miss. LEXIS 1411 (Miss. 2004).

Trial judge did not abuse his discretion in refusing to allow evidence that was not disclosed, pursuant to a discovery request, regarding a doctor who treated the accident victim. However, the victim was not prejudiced by the exclusion as the jury nonetheless got the information the victim wished to convey through the doctor's report, the jurors' viewing of the victim's scar and determining for themselves the extent of permanent disfigurement. Haggerty v. Foster, 838 So. 2d 948, 2002 Miss. LEXIS 398 (Miss. 2002).

Chancery court was within its authority in excluding testimony of defendant's expert witness, where defendant failed to disclose expert's name in response to interrogatories and failed to supplement its answers before trial. Simmons v. Bank of Mississippi, 593 So. 2d 40, 1992 Miss. LEXIS 13 (Miss. 1992).

**Expert testimony.**

Trial judge did not err by striking the opinion testimony of an accident victim's expert witness because the opinion of the expert witness was not timely disclosed as the victim did not set forth meaningful information about a theory of the witness, regarding the victim being critically injured while attempting to attach a metal conduit to an electrical pole, that would have put a public utility company on notice as to the theory and allowed the company to meet the theory at trial. Griffith v. Entergy Miss., Inc., 203 So. 3d 579, 2016 Miss. LEXIS 372 (Miss. 2016).

Without expert testimony to establish that the risk of the type of injury suffered by plaintiff was a material known risk and one for which a reasonably prudent patient would have withheld consent upon being adequately informed, plaintiff failed to provide sufficient evidence to withstand summary judgment. Defendant physician's interrogatory responses did not supply the missing expert testimony. Bowen v. Amory HMA, LLC, 209 So. 3d 440, 2016 Miss. App. LEXIS 436 (Miss. Ct. App. 2016), cert. denied, 209 So. 3d 430, 2017 Miss. LEXIS 60 (Miss. 2017).

Trial court did not abuse its discretion in denying the doctor's proposed testimony regarding his treatment of the patient, as it was expert opinion testimony acquired after the surgical procedure and the doctor failed to meaningfully disclose it prior to trial as required by this rule. Robinson v. Corr, 188 So. 3d 560, 2016 Miss. LEXIS 151 (Miss. 2016).

In a medical malpractice case, the trial court did not err in limiting the patient's family's expert's testimony to his prior disclosures and then, when he could not testify to the standard of care because such evidence was not in his disclosures under Miss. R. Civ. P. 26(b)(4), granting summary judgment sua sponte to the defending doctor. Monroe v. Blevens, 185 So. 3d 419, 2016 Miss. App. LEXIS 47 (Miss. Ct. App. 2016).

In a medical malpractice case, Miss. R. Civ. P. 26(b)(4)(A)(i) required that defendant state the substance of the facts and opinions to which its expert was expected to testify and a summary of the grounds for each opinion. The expert's testimony was in conflict with the disclosures, and it was error to allow the expert to testify that there was no national standard of care for patient positioning for the removal of a central line. Sumrall v. Singing River Health Sys., 189 So. 3d 661, 2015 Miss. App. LEXIS 583 (Miss. Ct. App. 2015).

Expert's testimony about appellant's alleged lost profits was properly excluded, as the trial court found that appellant's expert discovery disclosures for lost net profits under Miss. R. Civ. P. 26(b)(4)(A)(i) were not presented in a meaningful way since it appeared the expert was only calculating lost gross profits and not the required lost net profits. Coastal Hardware & Rental Co., LLC v. Certain Underwriters at Lloyds, London, 120 So. 3d 1017, 2013 Miss. App. LEXIS 136 (Miss. Ct. App. 2013).

Trial court erred in allowing a physician to testify about plaintiff's future medical treatment and expenses because defense counsel was not provided with the substance of the physican's facts and opinions on that subject prior to trial. Bailey Lumber & Supply Co. v. Robinson, 98 So. 3d 986, 2012 Miss. LEXIS 386 (Miss. 2012).

Where the patient designated a doctor as her expert witness in a medical malpractice case, the designation failed to state his opinion, the facts on which he based his opinion, or a summary of the grounds supporting his opinion; the patient's supplemental designation was filed three weeks after the deadline. The trial court did not err by striking the expert, because the designation did not comply with Miss. R. Civ. P. 26(b)(4)(A)(i). Moore v. Delta Reg'l Med. Ctr., 23 So. 3d 541, 2009 Miss. App. LEXIS 328 (Miss. Ct. App. 2009).

Where an employee sued the railroad for injuries sustained while mounting a moving locomotive, the trial court did not err by allowing an expert to testify regarding reasons why the major railroads were amending their safety rules and allowing the expert to refer to statistical information; the subject matter contained in the expert report included the subject matter he testified to at trial, and there was no discovery violation. Canadian Nat'l/Ill. Cent. R.R. v. Hall, 953 So. 2d 1084, 2007 Miss. LEXIS 208 (Miss. 2007).

Appellate court's reasoning in affirming summary judgment for the physician stemmed not from the fact that the patient failed to file his expert's designation one week late. The appellate court affirmed because the patient failed to respond to the physician's motion with an affidavit, submitted by an expert, that established the standard of acceptable professional practice, that the physician deviated from that standard, that such deviation was the proximate cause of the patient's injuries, and that the patient suffered damages as a result; the letter submitted by the patient's expert, even if had been in proper affidavit form, was merely a broad statement of general allegations and did not announce the applicable standard of care. Potter v. Hopper, 907 So. 2d 376, 2005 Miss. App. LEXIS 32 (Miss. Ct. App.), cert. dismissed, 910 So. 2d 574, 2005 Miss. LEXIS 455 (Miss. 2005).

Accident reconstructionist's testimony and calculations relied on distances and speeds that were reported to him and, at trial, when the reports of speed and distance changed, said expert recalculated his opinion using the same methods and formulas that were admitted into evidence. The subject matter or substance of the expert's testimony did not change and his testimony was not improperly admitted pursuant to Miss. R. Civ. P. 26 (b)(4)(A)(i). McKenzie v. Supervalu, Inc., 883 So. 2d 1188, 2004 Miss. App. LEXIS 955 (Miss. Ct. App. 2004).

Though plaintiff was tardy in supplementing its discovery responses to provide defendant with its expert's data compilations and measurements, since defendant's ability to deal with this data at trial was not impaired, the trial court's denial of defendant's motion for a continuance was not an abuse of discretion. Choctaw Maid Farms, Inc. v. Hailey, 2001 Miss. LEXIS 302 (Miss. Oct. 31, 2001), op. withdrawn, sub. op., 822 So. 2d 911, 2002 Miss. LEXIS 181 (Miss. 2002).

The plaintiff disclosed the name and expected testimony of an expert witness in her responses to the defendant's interrogatories and, therefore, the expert's testimony as to the permanency of the plaintiff's injuries was properly introduced. Ford v. Johnson, 750 So. 2d 546, 1999 Miss. App. LEXIS 583 (Miss. Ct. App. 1999).

In a false arrest action, the court improperly allowed a physician to give expert testimony, where he was not listed as an expert witness pursuant to the rule, but he stated that the arrest of the plaintiff exacerbated her pre-existing depression. Foster v. Noel, 715 So. 2d 174, 1998 Miss. LEXIS 270 (Miss. 1998).

Trial court did not err in excluding testimony of expert witness hired two weeks before trial, where it was not until the day before trial that the expert produced a preliminary report based on his research, and a final report was not delivered until three days after the trial had begun. Broadhead v. Bonita Lakes Mall, Ltd. Pshp., 702 So. 2d 92, 1997 Miss. LEXIS 531 (Miss. 1997).

Testimony of plaintiff's expert witness did not go beyond scope of her supplemental interrogatory answers; language in interrogatory and that used at trial were not vastly different, and if interrogatories were read as a whole, defendant had sufficient notice of what expert's testimony would entail. Southwest Miss. Regional Medical Ctr. v. Lawrence, 684 So. 2d 1257, 1996 Miss. LEXIS 642 (Miss. 1996).

Where trial court limited scope of expert witness depositions by prohibiting inquiry into bias, interest, or prejudice of any of the experts, this precluded plaintiffs from discovering potentially valuable information, but did not amount to reversible error. McCarty v. Kellum, 667 So. 2d 1277, 1995 Miss. LEXIS 483 (Miss. 1995).

Absent showing of exceptional circumstances, deposition of an expert retained by a party but not expected to testify is impermissible. General Motors Corp. v. Jackson, 636 So. 2d 310, 1992 Miss. LEXIS 735 (Miss. 1992), cert. denied, 513 U.S. 928, 115 S. Ct. 317, 130 L. Ed. 2d 279, 1994 U.S. LEXIS 7105 (U.S. 1994).

Testimony of attorney as to what his examination of local land records reflected was not the type of expert testimony subject to an interrogatory under subdivision (b)(4)(A)(i) of this rule. R & S Dev., Inc. v. Wilson, 534 So. 2d 1008, 1988 Miss. LEXIS 535 (Miss. 1988).

Trial court did not err in applying sanctions and disallowing testimony and appraisal of expert not disclosed until day prior to trial. Varner v. Patrick, 523 So. 2d 319 (Miss. 1988).

Trial court was not required to exclude testimony of defendants' expert, where plaintiff did not request an order compelling discovery when defendants gave what plaintiff deemed to be unsatisfactory responses to its expert witness interrogatory. State Highway Com. v. Havard, 508 So. 2d 1099, 1987 Miss. LEXIS 2582 (Miss. 1987).

Trial judge did not err in admitting testimony of defendants' expert; where he was identified in interrogatory responses as an expert "in the field of mechanical operation of locomotive engines and trains," his testimony on operation of train's emergency brakes was not error. Slay v. Illinois C. G. R. Co., 511 So. 2d 875, 1987 Miss. LEXIS 2495 (Miss. 1987).

Circuit court erred in allowing expert to testify for defendant in negligence action;

expert's name had not been disclosed in answers to plaintiff's interrogatories, and defendant's claim that expert was a "rebuttal witness" was rejected. Harris v. General Host Corp., 503 So. 2d 795, 1986 Miss. LEXIS 2762 (Miss. 1986).

**Expert witnesses.**

Chancellor did not abuse its discretion by excluding the testimony of a local attorney, as to the reasonableness of the attorney's fees sought by the wife in a divorce proceeding, because the wife failed to designate the attorney as an expert witness as required. Rodrigue v. Rodrigue, 270 So. 3d 933, 2018 Miss. App. LEXIS 462 (Miss. Ct. App. 2018).

Trial judge did not abuse the judge's discretion in excluding a doctor as an expert witness for a patient because the doctor's affidavit made no mention of the standard of care necessary to rebut the testimony of another doctor, and the designation of the doctor on the issue was unreasonably late. Palermo v. LifeLink Found., Inc., 152 So. 3d 1177, 2014 Miss. App. LEXIS 14 (Miss. Ct. App.), aff'd, 152 So. 3d 1099, 2014 Miss. LEXIS 578 (Miss. 2014).

Trial court properly granted summary judgment to defendant on the basis that plaintiff failed to give defendant advance notice of the opinion testimony of plaintiff's expert so as to allow defendant to meaningfully cross-examine the expert at his deposition given that plaintiff's failure to designate the expert as an expert witness clearly constituted a discovery violation, and plaintiff had not provided any reason why she was unable to formally designate the expert as an expert witness and comply with the scheduling order. Buckley v. Singing River Hosp., 146 So. 3d 365, 2013 Miss. App. LEXIS 691 (Miss. Ct. App. 2013).

Emergency physician and nurse practitioner did not give impermissible expert testimony, and the February 2007 supplemental response to "Interrogatory No. 5" was not a discovery violation in regard to Miss. R. Civ. P. 26; both witnesses were identified and the employer was given reasonable notice as to the nurse practitioner's treatment of the driver. APAC Miss., Inc. v. Johnson, 15 So. 3d 465, 2009 Miss. App. LEXIS 136 (Miss. Ct. App. 2009).

Summary judgment was properly granted in a medical malpractice suit, a patient's expert witness affidavit to support her claim was untimely filed nine days following the summary judgment hearing; discovery responses were to be supplemented seasonably pursuant to Miss. R. Civ. P. 26(f). Dotson v. Jackson, 8 So. 3d 230, 2008 Miss. App. LEXIS 656 (Miss. Ct. App. 2008), cert. denied, 12 So. 3d 531, 2009 Miss. LEXIS 212 (Miss. 2009).

Under Miss. R. Civ. P. 26(b)(4)(A)(i), the plaintiff could call experts only to rebut opinions from defendants' expert not disclosed in discovery, and not reasonably anticipated; if the plaintiff wished to counter expected testimony from defendants' experts, she had fair opportunity to obtain experts of her own and properly disclose her expert's opinions. Banks v. Hill, 978 So. 2d 663, 2008 Miss. LEXIS 168 (Miss. 2008).

In a personal injury case, defendant's expert witness disclosure was proper because the expert witness designation clearly indicated that defendant's expert would testify that "the sole cause of the accident was plaintiff's following too closely and failing to keep her vehicle under control by not braking and/or steering in such a manner to maintain control of her vehicle"; It followed reasonably from that summary of the expert's opinion that the expert might testify about the speeds, distances, and times involved in the accident. Walker v. Gann, 955 So. 2d 920, 2007 Miss. App. LEXIS 290 (Miss. Ct. App. 2007).

Miss. R. Civ. P. 26(b)(4) mandated certain disclosures concerning expert witnesses, and it was necessary that litigants understand that there was an obligation to timely comply with the orders of trial court; the daughter wholly failed in her duty to designate a medical expert, a crucial component of her cause of action, and summary judgment was appropriately entered. Brooks v. Roberts, 882 So. 2d 229, 2004 Miss. LEXIS 1170 (Miss. 2004).

Heirs failed to show excusable neglect for not filing their designation of experts in a timely manner; their motion for extension of time to designate expert witnesses was therefor denied. Bowie v. Montfort Jones Mem'l Hosp., 861 So. 2d 1037, 2003 Miss. LEXIS 877 (Miss. 2003).

Where a medical malpractice defendant's interrogatory response negligently identified an expert as a urologist rather than an expert in infectious diseases, but adequately described the proposed substance of the testimony, the trial court did not abuse its discretion in allowing the testimony, or in denying the patient's surviving relatives' motions for directed verdict, judgment notwithstanding the verdict, and a new trial. Buskirk v. Elliott, 856 So. 2d 255, 2003 Miss. LEXIS 354 (Miss. 2003).

Trial court did not abuse its discretion by not permitting a grief therapist to testify because the plaintiffs failed to adequately respond to the defendant's discovery requests concerning expert testimony. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564, 2003 Miss. App. LEXIS 752 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 2005 Miss. LEXIS 21 (Miss. Jan. 13, 2005), aff'd in part and rev'd in part, 904 So. 2d 1077, 2005 Miss. LEXIS 247 (Miss. 2005).

In a personal injury action, the defendant should not have been unfairly surprised when the plaintiff's expert witness stated a specific level of physical impairment of the plaintiff because (1) the plaintiff identified the witness as an expert witness who would testify as to the plaintiff's injuries, treatment, and causation, and (2) the expert was also expected to testify that the plaintiff had a total disability from his previous employment. Peterson v. Ladner, 785 So. 2d 290, 2000 Miss. App. LEXIS 531 (Miss. Ct. App. 2000).

This rule does not require that an expert be restricted to testify only to the literal words from his or her opinion and a summary of the related grounds; the very use of the words "substance" and "summary" show that the rule does not require an expert to state solely the words of his or her compiled reports, and such a view would place form over substance. Holladay v. Holladay, 776 So. 2d 662, 2000 Miss. LEXIS 194 (Miss. 2000).

In an action against a pharmaceutical company and a physician arising from a massive stroke suffered by the plaintiff after taking a medication manufactured by the pharmaceutical company, an expert witness was properly allowed to testify on behalf of the pharmaceutical company because the expert had been designated as an expert witness by the physician and a supplemental discovery response by the pharmaceutical company stated that it reserved the right to call in its case-in-chief any treating physician, any expert witness listed by the plaintiffs and any expert witness listed by any co-defendant, even if such co-defendant was not a party at the time of trial; although the supplemental response was evasive or incomplete, the plaintiff failed to meet her burden to seek relief from the court and, instead, waited until trial to object to the presentation of the expert witness. Warren v. Sandoz Pharms. Corp., 783 So. 2d 735, 2000 Miss. App. LEXIS 395 (Miss. Ct. App. 2000).

The trial judge did not abuse his discretion by allowing the defendant's counsel to elicit opinions from a physician since (1) the plaintiffs' counsel participated in deposing the physician prior to trial and, thus, the plaintiffs could hardly cry "ambush" when the trial judge allowed the physician to express his "expert opinions," and (2) the plaintiffs had indicated during discovery that they intended to call the physician as their "fact" witness. Burnham v. Stevens, 734 So. 2d 256, 1999 Miss. App. LEXIS 33 (Miss. Ct. App. 1999).

In finding the plaintiff's initial answer of "No decision has been made concerning any experts which may be relied upon. This response will be supplemented at the appropriate time," to be no answer at all, the trial judge abused his discretion; the plaintiff's initial answer was appropriate when given and was seasonably supplemented to allow the defendant enough time to prepare before trial. Robert v. Colson, 729 So. 2d 1243, 1999 Miss. LEXIS 27 (Miss. 1999).

**Filing with court.**

Letters between the mother's and the father's attorneys indicated the dates on which the subpoena and notice thereof were served, the subpoena on a Friday, and the notice to the mother's attorney on the following Monday. Those letters did show that the father's attorney had failed to serve notice of the subpoena immediately under Miss. R. Civ. P. 45, but the father's attorney's failure to follow correct procedure did not rise to the level of abuse of process; the trial court properly granted summary judgment in favor of the father and his attorney as to the abuse of process claim. Ayles v. Allen, 907 So. 2d 300, 2005 Miss. LEXIS 361 (Miss. 2005).

No evidence existed on when the student actually mailed the envelope, so it was possible that the envelope was deposited in a mailbox on the 29th, but not postmarked until the 30th; the postmark date did not determine the date of service, and being one day late in service of discovery responses could not be deemed a sufficient violation of the Mississippi Rules of Civil Procedure to warrant dismissal with prejudice. Harvey v. Stone County Sch. Dist., 862 So. 2d 545, 2003 Miss. App. LEXIS 938 (Miss. Ct. App. 2003).

**Litigation materials.**

In determining whether investigative materials prepared by insurance claims adjusters are work-product prepared in anticipation of litigation, court should look to the facts of each case, and should consider the nature of the documents, the nature of the litigation and investigation, the relationship between the parties, and any other fact peculiar to the case. Haynes v. Anderson, 597 So. 2d 615, 1992 Miss. LEXIS 126 (Miss. 1992).

Burden rests on the party resisting discovery to show that the material sought was prepared in anticipation of litigation. Haynes v. Anderson, 597 So. 2d 615, 1992 Miss. LEXIS 126 (Miss. 1992).

Trial court did not err in declining to require railroad to produce notes and drawings of its investigator regarding accident at crossing; decedent's representative failed to allow at least ten days for documents to be produced, and she also had same opportunity as railroad to observe crossing in an unaltered state subsequent to accident. Mitcham v. Illinois C. G. R. Co., 515 So. 2d 852, 1987 Miss. LEXIS 2779 (Miss. 1987).

**Matters exempt from discovery.**

Legal research memo prepared for the defendant by an attorney was research undertaken to respond to a client's request; it fell within the purview of the attorney-client privilege and was thus not discoverable. Hewes v. Langston, 848 So. 2d 800, 2003 Miss. LEXIS 300 (Miss.), op. withdrawn, sub. op., 853 So. 2d 1237, 2003 Miss. LEXIS 405 (Miss. 2003).

Letters, draft affidavits, and other correspondence circulated among counsel on matters of common interest. were protected under the "common interest" prong of the attorney-client privilege as well as under the work product doctrine. Hewes v. Langston, 848 So. 2d 800, 2003 Miss. LEXIS 300 (Miss.), op. withdrawn, sub. op., 853 So. 2d 1237, 2003 Miss. LEXIS 405 (Miss. 2003).

**Protective orders.**

Where the Harrison County Development Commission (HCDC), a political subdivision of the State of Mississippi, willfully and knowingly denied a county citizen access to certain records related to a planned development (in part, by unilaterally requiring fees that were not part of its policy), and which were not exempt under the Mississippi Public Records Act of 1983, Miss. Code Ann. § 25-61-1 to Miss. Code Ann. § 25-61-17, it was properly ordered to produce those records not specifically exempt, and pay a civil penalty, as well as attorney's fees. Pursuant to Miss. Code Ann. § 25-61-9(2), HCDC should have separated information on its director's salary and leave time (subject to disclosure), from his personnel file and disclosed any non exempt material; further, the information on its business partners or prospects were not confidential and were subject to disclosure, and therefore, it was not entitled to a protective order per Miss. R. Civ. P. 26(d). Harrison County Dev. Comm'n v. Kinney, 920 So. 2d 497, 2006 Miss. App. LEXIS 51 (Miss. Ct. App. 2006).

Circuit court violated its protective responsibility by allowing asexual assault victim premature inspection of allegedly privileged documents produced by the perpetrator's employer because counsel for the victim was in possession of the documents hours before the employer was even aware that they had been released and before it was given a chance to appeal the court's decision. Simply issuing a protective order in conjunction with the order compelling production was not enough to protect the employer's rights. McKinley v. Lamar Bank, 2005 Miss. LEXIS 611 (Miss. Sept. 22, 2005), op. withdrawn, sub. op., 919 So. 2d 918, 2005 Miss. LEXIS 811 (Miss. 2005).

Because a service provider failed to base its allegations of fraud on any specific facts, a chancery court did not abuse its discretion in refusing to allow the provider access to the highly confidential pricing models of its primary competitor under Miss. R. Civ. P. 26(d)(7) and Miss. Code Ann. § 75-26-3(d). Elec. Data Sys. Corp. v. Miss. Div. of Medicaid, 853 So. 2d 1192, 2003 Miss. LEXIS 411 (Miss. 2003).

Deponent in a deposition taken in Mississippi for use in an out-of-state case was entitled to a protective order concerning sensitive matters as to which a protective order had been obtained in the out-of-state court. Barnes v. A Confidential Party, 628 So. 2d 283, 1993 Miss. LEXIS 527 (Miss. 1993).

Information sought in wrongful death action against tobacco company constituted a trade secret deserving of protective order under subdivision (d)(7) of this rule; contents of protective order were primary responsibility of circuit court, which did not abuse its discretion. American Tobacco Co. v. Evans, 508 So. 2d 1057, 1987 Miss. LEXIS 2498 (Miss. 1987).

**Sanctions.**

Trial court's order prohibiting a patient's expert from testifying in a medical malpractice case as a discovery sanction was reversed where, instead of analyzing whether sanctions were appropriate based on the patient's failure to produce the expert for a deposition as the court had ordered, the trial court went behind the previous order and sanctioned the patient for insufficient supplementation. Boyd v. Nunez, 135 So. 3d 114, 2014 Miss. LEXIS 3 (Miss. 2014).

Chancery court did not abuse its discretion in excluding the testimony of an occurrence witness, who was private investigator hired to investigate a husband's gambling issues, under Miss. R. Civ. P. 26(b)(4)(A)(i), because he was not identified by a wife until three days before the divorce proceeding. Irby v. Estate of Irby, 7 So. 3d 223, 2009 Miss. LEXIS 146 (Miss. 2009).

While the trial court's frustration with the discovery process was understandable, the ordering of a new trial after a unanimous jury verdict for a vehicle manufacturer, based on a perceived violation of court orders which were never placed on record, was an abuse of discretion; the manufacturer violated a single order concerning the time frame for the submission of documents which it submitted two days late. Ford Motor Co. v. Tennin, 960 So. 2d 379, 2007 Miss. LEXIS 201 (Miss. 2007).

When an injured employee, who brought suit against her employer and a related casino alleging bad faith in connection to her workers' compensation claim, failed to comply with a trial court's discovery deadline, the trial court properly struck the employee's expert's affidavit. Buchanan v. Ameristar Casino Vicksburg, Inc., 957 So. 2d 969, 2007 Miss. LEXIS 130 (Miss. 2007).

Although the plaintiff failed to seasonably supplement her discovery responses so as to divulge the names of her experts in a medical malpractice action, the penalty should have been something less drastic than striking her supplemented responses and the affidavit of one of those experts where (1) the plaintiff pursued her case not perfectly but fairly diligently from filing until dismissal, (2) prior to the hearings on the motion to dismiss, she supplemented in detail and presented possible arguable questions of fact of medical negligence, and (3) no trial date had been set at the time of supplementation. Thompson v. Patino, 784 So. 2d 220, 2001 Miss. LEXIS 127 (Miss. 2001).

The exclusion of the plaintiff's supplementation of her discovery responses identifying her expert witnesses and the striking of the affidavit of one of her experts were inappropriate sanctions in a medical malpractice action, notwithstanding the plaintiff's neglect, where a trial date had not been set at the time of dismissal. Thompson v. Patino, 2000 Miss. LEXIS 91 (Miss. Apr. 20, 2000), sub. op., 784 So. 2d 220, 2001 Miss. LEXIS 127 (Miss. 2001).

Where there was no violation of discovery rules or pre-trial court order, circuit judge was without authority to impose sanctions against plaintiff for scheduling deposition for a date two days before Pre-Trial Conference, after plaintiff had requested that Pre-Trial Conference be set. Jones v. Wiese, 652 So. 2d 175, 1995 Miss. LEXIS 147 (Miss. 1995).

**Scope of discovery.**

Attorney's memorandum to the office file and other attorneys, noting conversations with third parties, is protected by the work product doctrine; such memos receive even greater protection because they necessarily reveal the attorney's mental impressions, and they may be obtained through discovery only in rare situations and upon a far stronger showing than for other work product documents. Hewes v. Langston, 853 So. 2d 1237, 2003 Miss. LEXIS 405 (Miss. 2003).

Miss. R. Civ. P. 26(b), as amended and made effective May 29, 2003, adds subsection (5) to make specific provision for discovery of data and information existing in electronic and magnetic form. Recognizing that special problems may exist in the retrieval of such data, the rule limits the duty of production of electronic and magnetic data to that which is reasonably available to the responding party in its ordinary course of business; further, if extraordinary steps are required to retrieve and produce the information, a court may require the requesting party to pay the expense of those steps, in addition to costs that may be assessed under Rule 26(d)(9); finally, the production of data compilations that are subject to production under Miss. R. Civ. P. 34 is also subject to the limitations of Rule 26(b)(5). In re Miss. Rules of Civ. Procedure, 2003 Miss. LEXIS 262 (Miss. May 29, 2003).

Where attorney responded to interrogatories without revealing incident relevant to causation of injury in suit against his client, his actions went far beyond what could be considered a discovery dispute, and amounted to conduct involving dishonesty, deceit, misrepresentation, obstructing another party's access to evidence, conduct prejudicial to administration of justice, and both failure to disclose a material fact and making a false statement of material fact to a tribunal. The Mississippi Bar v. Land, 653 So. 2d 899, 1994 Miss. LEXIS 631 (Miss. 1994).

**Supplementation of responses.**

In a malpractice case, as the trial testimony of plaintiff's medical expert differed vastly from the opinion stated in his affidavit and disclosed in plaintiff's interrogatory responses, defendant surgeon was entitled to a new trial due to the unfair surprise caused by plaintiff's failure to supplement her discovery responses as required by Miss. R. Civ. P. 26(f)(1)(B). Cleveland v. Hamil, 155 So. 3d 829, 2013 Miss. App. LEXIS 112 (Miss. Ct. App.), aff'd in part and rev'd in part, 119 So. 3d 1020, 2013 Miss. LEXIS 404 (Miss. 2013).

Defendant surgeon's unexercised right to depose plaintiff's medical expert did not excuse plaintiff's unfulfilled duty to supplement and amend her expert's opinion; therefore, the trial court erred in allowing the expert to testify concerning opinions not disclosed in his answers to defendant's interrogatories. Cleveland v. Hamil, 155 So. 3d 829, 2013 Miss. App. LEXIS 112 (Miss. Ct. App.), aff'd in part and rev'd in part, 119 So. 3d 1020, 2013 Miss. LEXIS 404 (Miss. 2013).

While a surgeon was properly qualified as an expert in surgery under Miss. R. Evid. 702, a doctor was entitled to a new trial in a medical malpractice matter as a decedent's wife failed to supplement her discovery responses regarding the substance of the expert's testimony as required by Miss. R. Civ. P. 26(f)(1)(B) and 26(f)(2)(A) to disclose the substance of the expert's evolving-second-ulcer theory and to provide meaningful information about the decedent's hemoglobin and hematocrit levels as to enable the doctor's counsel to meet the expert's testimony at trial; the doctor's unexercised right to depose the expert did not excuse the wife's unfulfilled duty to supplement and amend her expert's opinion. Cleveland v. Hamil, 2012 Miss. App. LEXIS 593 (Miss. Ct. App.

Sept. 25, 2012), op. withdrawn, 2013 Miss. App. LEXIS 94 (Miss. Ct. App. Mar. 12, 2013), sub. op., 155 So. 3d 829, 2013 Miss. App. LEXIS 112 (Miss. Ct. App. 2013).

According to the testimony, the pedestrian's medical bills were incurred due to the injury at issue; under Miss. Code Ann. § 41-9-119, the trial court committed reversible error by refusing to allow them to be submitted to the jury; and a new trial was ordered, with directions that the parties be allowed to supplement their discovery responses with respect to expert witnesses. Estate of Bolden v. Williams, 17 So. 3d 1069, 2009 Miss. LEXIS 275 (Miss. 2009).

Trial court erred in granting defendants summary judgment on the family's wrongful death action as it erroneously equated a discovery deadline with a deadline for supplementation of an expert opinion; Miss. R. Civ. P. 26(f)(1) required supplements; no trial date had been set and the expert's supplemental affidavit did not change his original opinions. Young v. Meacham, 999 So. 2d 368, 2008 Miss. LEXIS 580 (Miss. 2008).

Trial court's judgment in favor of a corporation was affirmed; the corporate executives were not required to supplement their deposition testimony about the coporation's stock going public as the statements were truthful when made and no further questions were asked. Welsh v. Mounger, 883 So. 2d 46, 2004 Miss. LEXIS 781 (Miss. 2004).

A supplemental response pertaining to an expert witness was timely, notwithstanding that it was delivered only five days before the resumption of trial after a continuance, where the expert witness was identified by the plaintiff several months before trial, the expert's opinion had been supplemented once before, and the defendant failed to show surprise or unfair prejudice caused by the timeliness of the final supplementation. Holladay v. Holladay, 776 So. 2d 662, 2000 Miss. LEXIS 194 (Miss. 2000).

There was no violation of subsection (f) in a divorce proceeding where the wife identified a large credit card debt in her interrogatory responses, but did not supplement her responses to state when and why the debt was incurred; such information did not fall into any of the categories of information for which supplementation is required and the husband sought no further information. Keller v. Keller, 763 So. 2d 902, 2000 Miss. App. LEXIS 228 (Miss. Ct. App. 2000).

Where defense counsel in a medical malpractice action failed to notify plaintiff's counsel of the status of a witness as an expert or of her opinions until a mere seven days before trial, the court erred allowing the witness to testify. Coltharp v. Carnesale, 733 So. 2d 780, 1999 Miss. LEXIS 86 (Miss. 1999).

The trial court did not abuse its discretion in striking the plaintiff's supplemental responses to interrogatories as untimely where she requested an extension of discovery 292 days after the deadline and two months after this motion was denied, she finally filed her supplemental responses. Thompson v. Patino, 1999 Miss. App. LEXIS 280 (Miss. Ct. App. May 18, 1999), rev'd, 2000 Miss. LEXIS 91 (Miss. Apr. 20, 2000).

In an eminent domain proceeding, the court properly refused to allow the untimely submission of a supplemental report only six days before trial, even though the report did not contain radically new information, since the admission of the report would nevertheless have been prejudicial. Blanton v. Board of Supervisors, 720 So. 2d 190, 1998 Miss. LEXIS 390 (Miss. 1998).

The defendant could not claim prejudice by an expert's testimony for the plaintiffs on the basis that the plaintiffs did not seasonably supplement its interrogatories with respect to the substance of the expert's opinion where the defendant was afforded the opportunity to depose the expert but chose not to do so. Mississippi Valley Gas Co. v. Estate of Walker, 725 So. 2d 139, 1998 Miss. LEXIS 367 (Miss. 1998).

Although defendant failed to adequately supplement his response to interrogatories, there was no reversible error where plaintiff was unable to show any resulting prejudice. Terrain Enters. v. Mockbee, 654 So. 2d 1122, 1995 Miss. LEXIS 220 (Miss. 1995).

Where medical malpractice plaintiffs failed to give adequate responses to discovery so that defendant would understand that an attack on propriety of performing hysterectomy was part of the claim against him, trial court did not err in refusing to grant instruction concerning defendant's alleged deviation from minimum standard of care in performing hysterectomy. West v. Sanders Clinic for Women, P.A., 661 So. 2d 714, 1995 Miss. LEXIS 448 (Miss. 1995).

Permanent disability was a separate subject matter from causation, and plaintiffs' supplemental answer to expert interrogatory was insufficient to put defendant on notice that extent of disability might be a part of expert's testimony; expert's opinion therefore should have been excluded. T. K. Stanley, Inc. v. Cason, 614 So. 2d 942, 1992 Miss. LEXIS 844 (Miss. 1992).

Chancellor did not err in allowing testimony of two witnesses whose names were not supplied to plaintiff in a timely fashion; there was no prejudice since individuals were not expert witnesses, and plaintiff had managed to have an investigator interview one of the witnesses. Eastover Bank for Sav. v. Hall, 587 So. 2d 266, 1991 Miss. LEXIS 670 (Miss. 1991).

Trial court erred in excluding testimony of plaintiff's expert as to matters in affidavit, where defendant's counsel admitted she had known that doctor would be plaintiff's expert since the time she had received his affidavit, and she had been in possession of it for three months prior to trial; accordingly, the requirement of seasonable supplementation of responses was met. Hudson v. Parvin, 582 So. 2d 403, 1991 Miss. LEXIS 363 (Miss. 1991).

Trial court did not err in allowing testimony of expert witness first disclosed in supplemental interrogatory responses ten calendar days before trial. Motorola Communications & Electronics, Inc. v. Wilkerson, 555 So. 2d 713, 1989 Miss. LEXIS 517 (Miss. 1989).

Plaintiff's expert should not have been allowed to testify, where his name was not provided to opposing counsel until four days before trial; moreover, no information was given regarding expert's testimony, which apparently came as a complete surprise to defense counsel, who first learned of plaintiff's broken neck and permanent damage at the same time as the jury. Jones v. Hatchett, 504 So. 2d 198, 1987 Miss. LEXIS 2392 (Miss. 1987).

**Work product.**

Where defendant truck driver gave a statement to defendant employer's insurer after an attorney notified the insurer he was representing plaintiff, the trial court abused its discretion in ordering the recorded statement to be produced without conducting a detailed analysis of defendants' claim of work-product privilege under Miss. R. Civ. P. 26(b)(3). Powell v. McLain, 105 So. 3d 308, 2012 Miss. LEXIS 613 (Miss. 2012).

Where defendant truck driver gave a statement to defendant employer's insurer after an attorney notified the insurer he was representing plaintiff, the trial court abused its discretion in ordering the recorded statement to be produced without conducting a detailed analysis of defendants' claim of work-product privilege under Miss. R. Civ. P. 26(b)(3). Powell v. McLain, 105 So. 3d 308, 2012 Miss. LEXIS 613 (Miss. 2012).

DVD recording was not protected by work product because the supreme court was unpersuaded that the DVD recording of the subsequent confrontation represented mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation, Miss. R. Civ. P. 26(b)(3). Furthermore, the "work-product" doctrine pertained to pretrial discovery, not admissibility, such that the circuit court abused its discretion in predicating its admissibility determination thereon. Baker Donelson Bearman Caldwell & Berkowitz, P.C. v. Seay, 42 So. 3d 474, 2010 Miss. LEXIS 291 (Miss. 2010).

In a civil suit against a church administration regarding allegations of sexual abuse by a priest, the church administration was required to review minutes of its investigative committee and include in a privilege log all portions it claimed were protected by the work-product privilege of Miss. R. Civ. P. 26(b)(3). Roman Catholic Diocese v. Morrison, 905 So. 2d 1213, 2005 Miss. LEXIS 295 (Miss. 2005).

Attorney's memorandum to the office file and other attorneys noting a conversation with a third party was protected by the work product doctrine, and the crime-fraud exception did not apply, as there was no proof of either a crime or fraud. Hewes v. Langston, 848 So. 2d 800, 2003 Miss. LEXIS 300 (Miss.), op. withdrawn, sub. op., 853 So. 2d 1237, 2003 Miss. LEXIS 405 (Miss. 2003).

**Workers' compensation proceedings.** This rule does not apply to proceedings before the Workers' Compensation Commission. Mid-Delta Home Health, Inc. v. Robertson, 749 So. 2d 379, 1999 Miss. App. LEXIS 603 (Miss. Ct. App. 1999).

## RESEARCH REFERENCES

**ALR.**

Discovery of Deleted Email and Other Deleted Electronic Records. 27 A.L.R.6th 565.

Crime-fraud exception to work product privilege in Federal courts. 178 A.L.R. Fed. 87.

**Law Reviews.**

Baumer, Eminent Domain: Should an Expert's Appraisal Report be Subject to Pretrial Discovery?, 67 Miss. L.J. 801, Spring, 1998.

**Practice References.**

Bender's Forms of Discovery (Matthew Bender).

## Rule 27. Depositions before action or pending appeal.

(a) *Before action.* —

(1) *Petition.* — A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of this state may file a verified petition in the circuit or chancery court in the county of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: (1) that the petitioner expects to be a party to an action cognizable in a court of this state but is presently unable to bring it or cause it to be brought, (2) the subject matter of the expected action and his interest therein, (3) the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, (4) the names or a description of the persons he expects will be adverse parties and their addresses so far as known, and (5) the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) *Notice and service.* — The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least twenty days before the date of hearing the notice shall be served in the same manner for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided by law, an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent.

(3) *Order and examination.* — If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories.

The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rule 34. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) *Use of deposition.* — If a deposition to perpetuate testimony is taken under these rules, it may be used in any action involving the same subject matter subsequently brought in a circuit, chancery or county court in accordance with Rule 32(a).

(b) *Pending appeal.* — If an appeal has been taken from a judgment of a court, or before the taking of an appeal if the time therefor has not expired, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the court. In such case the party who desires to perpetuate the testimony may make a motion in the court for leave to take the depositions, upon the same notice and service thereof as if the action were pending in the court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rule 34, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the court.

(c) *Perpetuation by action.* — This rule does not limit the power of a court to entertain an action to perpetuate testimony.

**HISTORY: Comments repealed effective July 1, 2014.**

## JUDICIAL DECISIONS

### ANALYSIS

Applicability.
Procedure.

**Applicability.**

Insofar as they may be applicable, procedures contemplated by this rule are available to either party in a bar disciplinary matter for the taking of depositions of parties or witnesses. Mississippi State Bar v. Attorney L., 511 So. 2d 119, 1987 Miss. LEXIS 2615 (Miss. 1987).

**Procedure.**

In a case in which plaintiff filed a petition to perpetuate testimony in a circuit court, the matter was then removed to federal court, wherein plaintiff sought dismissal, and plaintiff filed a complaint in the circuit court raising the same claims against the same parties before the federal court had dismissed the matter, the circuit court erred in dismissing plaintiff's post-dismissal complaint because the record supported a finding that the federal court's dismissal was based upon a "matter of form" not affecting the merits–namely, a lack of jurisdiction due to the absence of a complaint–as its order stated that no "civil action" yet existed. Plaintiff had inadvertently found himself in a procedural quagmire, but he made a good-faith effort to preserve his claim, at no time envincing an intent to abandon his claim, and, accordingly, application of the savings statute, Miss. Code Ann. § 15-1-69, to his post-dismissal complaint was appropriate and consistent with the purposes of the statute because he filed the complaint within one year of the federal court's dismissal. Crawford v. Morris Transp., Inc., 990 So. 2d 162, 2008 Miss. LEXIS 421 (Miss. 2008).

## Rule 28. Persons before whom depositions may be taken.

(a) *Within the united states.* — Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be initiated by an oath or affirmation administered to the deponent by an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or by a person specially appointed by the court in which the action is pending.

(b) *In foreign countries.* — In a foreign country, depositions may be taken: (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed To the Appropriate Authority in (here name the country). Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

(c) *Disqualification for interest.* — No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

**HISTORY: Comments repealed effective July 1, 2014.**

## Rule 29. Stipulations regarding discovery procedure.

Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery, except that stipulations extending the time for any form of discovery must have court approval if extension would interfere with the time set for completing discovery, for hearing a motion, or for trial.

**HISTORY: Comments repealed effective July 1, 2014; amended effective October 7, 2021, and Advisory Committee Historical Note added.**

### ADVISORY COMMITTEE HISTORICAL NOTE

Effective October 7, 2021, M.R.C.P. 29 was amended so as to authorize the parties to stipulate to extensions of time for any form of discovery without court approval unless such extension would interfere with a court-ordered discovery deadline, a hearing date, or trial.

### Rule 30. Depositions upon oral examination.

(a) *When depositions may be taken.* — After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of thirty days after service of the summons upon any defendant, except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given under subsection (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) *Notice of examination: general requirements; special notice; non-stenographic recording; production of documents and things; deposition of organization.* —

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice. A notice may provide for the taking of testimony by telephone. If necessary, however, to assure a full right of examination of any deponent, the court in which the action is pending may, on motion of any party, require that the deposition be taken in the presence of the deponent.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice: (A) states that the person to be examined is about to go out of the state and will be unavailable for examination unless his deposition is taken before expiration of the thirty-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true.

If a party shows that when he was served with notice under this subsection (b)(2) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(4) The notice of deposition required under (1) of this subsection (b) may provide that the testimony be recorded by other than stenographic means, in which event the notice shall designate the manner of recording and preserving the deposition. A court may require that the deposition be taken by stenographic means if necessary to assure that the recording be accurate. A motion by a party for such an order shall be addressed to the court in which

the action in pending; a motion by a witness for such an order may be addressed to the court in the district where the deposition is taken.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

(6) A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(7) For purposes of this Rule, and Rules 28(a), 37(a)(1), 37(b)(1), and 45(b), a deposition shall be deemed to be taken in the county where the deponent is physically present to answer questions propounded to him.

(c) *Examination and cross-examination; record of examination; objections.* — Examination and cross-examination of witnesses may proceed as permitted at the trial. The testimony of the witness shall be recorded either stenographically or as provided in subsection (b)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed upon the payment of the reasonable charges therefor. All objections made at the time of the examination to the qualifications of the person taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted upon the transcription or recording. Evidence objected to shall be taken subject to the objections. An objection must be stated concisely and in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion to limit or terminate the deposition under M.R.C.P. 30(d). In lieu of participating in the oral examination, parties may serve written questions on the party taking the deposition, who shall propound them to the witness and see that the answers thereto are recorded verbatim.

(d) *Motion to terminate or limit examination.* — At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending may order the officer conducting the examination to cease forthwith from taking the deposition or may limit the scope and manner of the taking of the deposition as provided in Rule 26(d). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. Rule 37(a)(4) applies to the award of expenses incurred in relation to the motion.

(e) *Submission to witness; changes; signing.* — When the testimony is taken by stenographic means, or is recorded by other than stenographic means as provided in subsection (b)(4) of this rule, and if the transcription or recording thereof is to be used at any proceeding in the action, such transcription or recording shall be submitted to the witness for examination, unless such examination is waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the transcription or stated in a writing to accompany the recording, together with a statement of the reasons given by the witness for making them. Notice of such changes and reasons shall promptly be served upon all parties by the party taking the deposition. The transcription or recording shall then be affirmed in writing as correct by the witness, unless the parties by stipulation waive the affirmation. If the transcription or recording is not affirmed as correct by the witness within thirty days of its submission to him, the reasons for the refusal shall be stated under penalty of perjury on the transcription or in a writing to accompany the recording by the party desiring to use such transcription or recording. The transcription or recording may then be used fully as though affirmed in writing by the witness, unless on a motion to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to affirm require rejection of the deposition in whole or in part.

(f) *Certification; exhibits; copies; notice of filing.* —

(1) When a deposition is stenographically taken, the stenographic reporter shall certify, under penalty of perjury, on the transcript that the witness was sworn in his presence and that the transcript is a true record of the testimony given by the witness. When a deposition is recorded by other than stenographic means as provided in subsection 30(b)(4) of this Rule, and thereafter transcribed, the person transcribing it shall certify, under penalty of perjury, on the transcript that he heard the witness sworn on the recording and that the transcript is a correct writing of the recording. A deposition so certified shall be considered prima facie evidence of the testimony of the witness.

(2) Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to the deposition, and may be inspected and copied by any party. Whenever the person producing materials desires to retain the originals, he may substitute copies of the originals, or afford each party an opportunity to make copies thereof. In the event the original materials are retained by the person producing them, they shall be marked for identification and the person producing them shall afford each party the subsequent opportunity to compare any copy with the original. He shall also be required to retain the original materials for subsequent use in any proceeding in the same action. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(3) Upon payment of reasonable charges therefor, the stenographic reporter, or in the case of a deposition taken pursuant to subsection 30(b)(4) of this rule, the party taking the deposition shall furnish a copy of the deposition to any party or to the deponent.

(4) If all or part of the deposition is filed with the court, the party making the filing shall give prompt notice thereof to all other parties.

(g) *Failure to attend or to serve subpoena; expenses.* —

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(h) *Expenses generally not treated as court costs.* — No part of the expenses of taking depositions, other than the serving of subpoenas, shall be adjudged, assessed or taxed as court costs.

**HISTORY: Amended effective March 1, 1989; Amended effective July 1, 1997; Amended effective October 7, 2021, and Advisory Committee Historical Note amended.**

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective October 7, 2021, M.R.C.P. 30(c) was amended to require that objections be stated concisely and non-argumentatively and to specify the limited instances in which a deponent may be instructed not to answer a question.

Effective July 1, 1997, Rule 30(b)(7) was amended to correct the reference to Rule 45. 689-692 So. 2d XLIX (West Miss. Cas. 1997).

Effective July 1, 1997, Rule 30(b)(7) was amended to correct the reference to Rule 45. 689-692 So. 2d XLIX (West Miss. Cas. 1997).

Effective March 1, 1989, Rule 30 was amended to abrogate the requirement that the party taking a deposition out of state pay certain expenses of the other party incident thereto. 536-538 So. 2d XXV (West Miss. Cas. 1989).

[Amended effective July 1, 1997; Amended effective October 7, 2021.]

## JUDICIAL DECISIONS

### ANALYSIS

Applicability.
Admissibility.
Non-stenographic depositions.
Place of deposition.
Preserving objections.

**Applicability.**

Insofar as they may be applicable, procedures contemplated by this rule are available to either party in a bar disciplinary matter for the taking of depositions of parties or witnesses. Mississippi State Bar v. Attorney L., 511 So. 2d 119, 1987 Miss. LEXIS 2615 (Miss. 1987).

**Admissibility.**

Deposition of one party's counsel was admissible into evidence because Miss. R. Civ. P. 30(a) permitted either party to take a deposition of any person, Miss. R. Civ. P. 32(a)(3) permitted the admission of the deposition in the absence of the witness, and the counsel was authorized, under Miss. R. Evid. 801(d)(2)(C), to make the statement that co-counsel had informed the counsel the borrowers had accepted a settlement agreement. Williams v. Homecomings Fin. Network, 134 So. 3d 779, 2012 Miss. App. LEXIS 827 (Miss. Ct. App. 2012).

**Non-stenographic depositions.**

Trial courts must allow the use of video depositions at the discretion of the party taking the deposition without any requirement of stipulation by the other party or prior court approval unless a deposition taken by stenographic means is necessary to assure the accuracy of the recording. Robert v. Colson, 729 So. 2d 1243, 1999 Miss. LEXIS 27 (Miss. 1999).

**Place of deposition.**

Party seeking to take deposition has original prerogative of designating place, and if any other party objects, that party has burden of persuasion that designated place would result in undue hardship or expense; such a burden may seldom be carried by mere conclusory allegations, and questions regarding place of taking of deposition are committed to sound discretion of trial court. H & W Transfer & Cartage Service, Inc. v. Griffin, 511 So. 2d 895, 1987 Miss. LEXIS 2610 (Miss. 1987).

**Preserving objections.**

Counsel for plaintiff at deposition properly preserved his objection to alleged hearsay statement, where parties stipulated that substantive objections would be reserved until trial. Moody v. RPM Pizza, 659 So. 2d 877, 1995 Miss. LEXIS 382 (Miss. 1995).

## Rule 31. Depositions upon written questions.

(a) *Serving questions; notice.* — After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided by law. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with Rule 30(b)(6).

Within thirty days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within ten days after being served with cross questions, a party may serve redirect questions upon all other parties. Within ten days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

(b) *Officer to take responses and prepare record.* — A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(c), (e), and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching, thereto the copy of the notice and the questions received by him.

**HISTORY: Comments repealed effective July 1, 2014.**

### JUDICIAL DECISIONS

#### ANALYSIS

Applicability.
Illustrative cases.

**Applicability.**

Insofar as they may be applicable, procedures contemplated by this rule are available to either party in a bar disciplinary matter for the taking of depositions of parties or witnesses. Mississippi State Bar v. Attorney L., 511 So. 2d 119, 1987 Miss. LEXIS 2615 (Miss. 1987).

**Illustrative cases.**

Correspondence between employer's

counsel and claimant's treating physician was not an impermissible non-consensual ex parte communication because the claimant's counsel was copied on the correspondence requesting clarification of the physician's opinions, but made no objection to the communication or the physician's response in a letter report. Therefore, the administrative judge and the Mississippi Workers' Compensation Commission did not err in considering the physician's letter report. Jones v. Univ. of Miss. Med. Ctr., 309 So. 3d 1135, 2021 Miss. App. LEXIS 7 (Miss. Ct. App. 2021).

Wife failed to object under Miss. R. Civ. P. 31 to the deposition questions or the certification by the deposing officer with reasonable promptness. Because the wife waived any objection to the deposition questions pursuant to Miss. R. Civ. P. 32, the appellate court found no error in the chancellor's admission of the deposition testimony into evidence. McCullough v. McCullough, 52 So. 3d 373, 2009 Miss. App. LEXIS 671 (Miss. Ct. App. 2009).

## Rule 32. Use of depositions in court proceedings.

(a) *Use of depositions.* — At the trial or upon the hearing of a motion of an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Mississippi Rules of Evidence.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party, may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than one hundred miles from the place of trial or hearing, or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) that the witness is a medical doctor or (F) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be so used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the Mississippi Rules of Evidence.

(b) *Objections to admissibility.* — Subject to the provisions of Rule 28(b) and subsection (d)(3) of this rule, objection may be made at the trial or hearing to receive in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) *[Abrogated].*

(d) *Effect of errors and irregularities in depositions.* —

(1) As to Notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) As to Disqualification of Officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) As to Taking of Deposition.

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of the parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereof is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within five days after service of the last questions authorized.

(4) As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

**HISTORY: Amended effective January 10, 1986; March 1, 1989; October 21, 1999; Comments repealed and Advisory Committee Notes amended effective July 1, 2014; Advisory Committee Note amended effective January 16, 2020.**

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective March 1, 1989, Rule 32 was amended by providing that the deposition of a medical doctor may be used by any party for any purpose. 536-538 So. 2d XXV (West Miss. Cas. 1989).

Effective January 10, 1986, Rule 32 was

amended by deleting references to the Mississippi Rules of Evidence; and Rule 32(c) [Effect of Taking or Using Depositions] was abrogated. 478-481 So. 2d XXIII (West Miss. Cas. 1986).

## ADVISORY COMMITTEE NOTE

M.R.E. 801(d)(1)(A) defines a prior inconsistent statement given under oath as nonhearsay. M.R.E. 801(d)(1)(A) applies when a witness testifies at trial in a manner that is inconsistent with a previous sworn statement. The previous sworn statement, which may have been made during a deposition, is non-hearsay, and is admissible at trial, assuming no other evidentiary rule bars its introduction. *See Craft v. State,* 656 So. 2d 1156, 1164 (Miss. 1995).

M.R.E. 804(b)(1) permits the introduction of deposition testimony by a witness who is unavailable at trial. Though the deposition of the unavailable witness need not have been taken in the same proceeding as that in which it is offered, the party against whom the deposition testimony is being offered, must have had an opportunity and similar motive to develop the testimony. *See Naylor v. State,* 759 So. 2d 406, 410-11 (Miss. 2000).

If a deposition is offered into evidence at trial, the offering party's attorney is responsible for providing the court with a written transcript of the deposition. In addition, if an audio or video recording of the deposition is played for the jury at trial, the offering party must also provide the court with a true and correct copy of such audio or video recording. If the entire deposition is not admitted into evidence, the attorneys for both parties should ensure that the court reporter is given an accurate record indicating the specific portions of the deposition that are introduced into evidence at trial. Such record should refer to the page and line numbers of the written transcript of the deposition. In addition, the attorneys for both parties should ensure that the court reporter complies with M.R.A.P. Appendix III, governing the manner in which trial transcripts are to be prepared and filed.

A deposition admissible pursuant to M.R.C.P. 32 does not have to meet the requirements for admissibility pursuant to M.R.E. 804.

## JUDICIAL DECISIONS

### ANALYSIS

In general.
Construction.
Applicability.
Illustrative cases.

**In general.**

Trial court did not err by excluding the deposition testimony of plaintiffs' expert to be used at trial as the trial court excluded the testimony on the defense objection that the expert was not qualified. Poole v. Avara, 908 So. 2d 716, 2005 Miss. LEXIS 486 (Miss. 2005).

It is not necessary either for a witness to be unavailable or that he must first testify at trial for a deposition to be admissible as evidence. Keller v. Keller, 763 So. 2d 902, 2000 Miss. App. LEXIS 228 (Miss. Ct. App. 2000).

**Construction.**

Whether testimony of witness in investigatory hearing against attorney was a deposition or earlier sworn testimony was a question of form over substance, and did not hinder introduction of the testimony. Emil v. The Mississippi Bar, 690 So. 2d 301, 1997 Miss. LEXIS 3 (Miss. 1997).

**Applicability.**

Insofar as they may be applicable, procedures contemplated by this rule are available to either party in a bar disciplinary matter for the taking of depositions of parties or witnesses. Mississippi State Bar v. Attorney L., 511 So. 2d 119, 1987 Miss. LEXIS 2615 (Miss. 1987).

**Illustrative cases.**

There was no abuse of discretion in allowing the use of a deposition transcript from one partner's divorce proceeding for impeachment purposes in a dispute among business partners over partnership assets. Latham v. Johnson, 262 So. 3d 569, 2018 Miss. App. LEXIS 314 (Miss. Ct. App. 2018), cert. denied, 260 So. 3d 798, 2019 Miss. LEXIS 48 (Miss. 2019).

Chancery court did not abuse its discretion in excluding proffered deposition testimony because the testimony was more of a statement than a deposition; opposing counsel was unable to attend the deposition due to short notice and, therefore, did not participate in the questioning of the witness. Baggett v. Baggett, 246 So. 3d 887, 2017 Miss. App. LEXIS 631 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 883, 2018 Miss. LEXIS 297 (Miss. 2018).

Deposition of one party's counsel was admissible into evidence because Miss. R. Civ. P. 30(a) permitted either party to take a deposition of any person, Miss. R. Civ. P. 32(a)(3) permitted the admission of the deposition in the absence of the witness, and the counsel was authorized, under Miss. R. Evid. 801(d)(2)(C), to make the statement that co-counsel had informed the counsel the borrowers had accepted a settlement agreement. Williams v. Homecomings Fin. Network, 134 So. 3d 779, 2012 Miss. App. LEXIS 827 (Miss. Ct. App. 2012).

Wife failed to object under Miss. R. Civ. P. 31 to the deposition questions or the certification by the deposing officer with reasonable promptness. Because the wife waived any objection to the deposition questions pursuant to Miss. R. Civ. P. 32, the appellate court found no error in the chancellor's admission of the deposition testimony into evidence. McCullough v. McCullough, 52 So. 3d 373, 2009 Miss. App. LEXIS 671 (Miss. Ct. App. 2009).

Granting of a directed verdict in favor of a physician provider, a physician, and a medical center, in a claim for medical malpractice was appropriate pursuant to Miss. R. Civ. P. 32(a) because, although the circuit court erred in refusing to allow the patient to play an edited video deposition of a doctor, the error was legally harmless since the patient was permitted to examine the doctor and then impeach him with his videotaped deposition statements on cross-examination if it was inconsistent with his live testimony. Hartel v. Pruett, 998 So. 2d 979, 2008 Miss. LEXIS 578 (Miss. 2008).

Where a son sought to set aside a warranty deed that transferred property from the son's mother to a daughter, the case was properly dismissed for failure to prosecute because, inter alia, (1) there was a significant delay during the litigation, and (2) the daughter was prejudiced because of their mother's intervening death since the purpose of the mother's deposition was not to conduct discovery or elicit testimony for trial. Cox v. Cox, 976 So. 2d 869, 2008 Miss. LEXIS 125 (Miss. 2008).

Finding in favor of the patient in his medical malpractice action was improper pursuant to Miss. R. Civ. P. 32(a)(3)(C) because his mother-in-law's deposition should not have been excluded solely on the basis of drug use. Blake v. Clein, 903 So. 2d 710, 2005 Miss. LEXIS 235 (Miss. 2005).

In a dispute over a construction contract, a trial court did not err in admitting an expert's deposition into evidence because the expert was unavailable due to the fact that the expert was out of state during part of the trial; moreover, the evidence showed that a builder had an opportunity to question the expert about an existing report at the time of the deposition. DiMa Homes, Inc. v. Stuart, 873 So. 2d 140, 2004 Miss. App. LEXIS 418 (Miss. Ct. App. 2004).

The trial court committed reversible error when it allowed the defendant in a personal injury action to introduce a video deposition of a witness who did not appear at trial; although the video deposition was obtained after the defendant learned that the witness had had a heart attack after the incident at issue, the clerk's docket sheet did not reflect proof of service of a subpoena on the witness, there was no evidence of the health of the witness at the time of trial, and there was no suggestion that any effort was made to determine the health of the witness at the time of trial. Robinson v. Lee, 821 So. 2d 129, 2000 Miss. App. LEXIS 461 (Miss. Ct. App. 2000).

Injured patient should have been permitted to enter portions of nurse's deposition into evidence without calling nurse as a witness, even though nurse was available to be called as a witness, since nurse was an employee of defendant hospital and statements were categorized as admissions by a party-opponent under M.R.E. Rule 801(d)(2)(D), which was incorporated by general reference into M.R.C.P. Rule 32(a)(1). McMillan v. King, 557 So. 2d 519, 1990 Miss. LEXIS 42 (Miss. 1990).

In absence of prejudice, failure to procure presence of surgeon at trial, and use of his deposition instead, did not constitute reversible error. Mutual Life Ins. Co. v. Estate of Wesson, 517 So. 2d 521, 1987 Miss. LEXIS 2901 (Miss. 1987), cert. denied, 486 U.S. 1043, 108 S. Ct. 2035, 100 L. Ed. 2d 620, 1988 U.S. LEXIS 2521 (U.S. 1988), overruled, General Am. Life Ins. Co. v. McCraw, 963 So. 2d 1111, 2007 Miss. LEXIS 325 (Miss. 2007).

## Rule 33. Interrogatories to parties.

(a) *Availability; procedures for use.* — Any party may serve as a matter of right upon any other party written interrogatories not to exceed thirty in number to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Each interrogatory shall consist of a single question. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. Leave of court, to be granted upon a showing of necessity, shall be required to serve in excess of thirty interrogatories.

(b) *Answers and Objections.* —

(1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for the objection and shall answer to the extent the interrogatory is not objectionable.

(2) The answers are to be signed by the person making them, and the objections signed by the attorney making them.

(3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within thirty days after the service of the interrogatories, except that a defendant may serve answers or objections within forty-five days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time.

(4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.

(5) The party submitting the interrogatories may move for an order under Rule 37 (a) with respect to any objection to or other failure to answer an interrogatory.

(c) *Scope; use at trial.* — Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

(d) *Option to produce business records.* — Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such business records, or from a compilation, abstract, or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries. The specification provided shall include sufficient detail to permit the interrogating party to identify readily the individual documents from which the answer may be ascertained.

**HISTORY: Amended effective April 13, 2000; Comments repealed and Advisory Committee Notes amended effective July 1, 2014; Amended October 7, 2021, and Advisory Committee Historical Note added.**

## ADVISORY COMMITTEE HISTORICAL NOTE

The thirty interrogatories permitted as a matter of right are to be computed by counting each distinct question as one of the thirty, even if labeled a sub-part, subsection, threshold question, or the like. In areas well suited to non-abusive exploration by interrogatory, such as inquiries into the names and locations of witnesses, or the existence, location, and custodians of documents or physical evidence, greater leniency may be appropriate in construing several questions as one interrogatory.

Rule 33(b)(4) requires that the grounds for any objection be stated with specificity. "'General objections' applicable to each and every interrogatory…are clearly outside the bounds of this rule." *See Ford Motor Co. v. Tennin,* 960 So. 2d 379 (Miss. 2007). If an interrogatory is only partially objectionable, the responding party shall clearly indicate the extent to which the interrogatory is objectionable and the basis for the partial objection. The responding party must also fully respond to the extent the interrogatory is not objectionable. If, for example, an interrogatory seeking information about 30 facilities is deemed objectionable, but an interrogatory seeking information about 10 facilities would not have been objectionable, the interrogatory should be answered with respect to the 10 facilities, and the grounds for the objection to providing the information with respect to the remaining facilities should be stated specifically.

Effective October 7, 2021, Rule 33(d) was amended to require a party who chooses to respond to an interrogatory by producing business records to specify the records from which each response may be ascertained in sufficient detail so that the requesting party may locate and identify the records as readily as the responding party could.

## JUDICIAL DECISIONS

### ANALYSIS

In general.
Failure to disclose witnesses.
Failure to respond.
Medical malpractice.
Timeliness.
Waiver of objections.

**In general.**

Medical malpractice complaint was properly dismissed with prejudice because, when plaintiffs (1) did not submit answers to interrogatories until 435 days past the deadline in Miss. R. Civ. P. 33(b)(3), (2) did not begin discovery until almost a year past the deadline in Miss.

Unif. Cir. & Cty. R. 4.04(A), and (3) did not reply to the motion to dismiss within ten days, under Miss. Unif. Cir. & Cty. R. 4.03(2), it was unnecessary to show plaintiffs' contumacious conduct, prejudice from plaintiffs' unreasonable delay was presumed, even though defendants did not show witnesses' fading memories and no aggravating factors were present, and lesser sanctions would not suffice, since the case was not an isolated incident of one missed deadline or a short, delayed response. Holder v. Orange Grove Med. Specialties, P.A., 54 So. 3d 192, 2010 Miss. LEXIS 640 (Miss. 2010).

Order by a trial court that granted the individuals' motion to compel a doctor to respond to a set of interrogatories was reversed; the state supreme court held that the trial court abused its discretion in granting the order as one interrogatory alone had more than 1000 subparts and the interrogatories were unduly burdensome, and oppressive as many were confusing, and therefore, ambiguous. Moreover, the individuals had not obtained leave of court to propound more than 30 interrogatories as required by Miss. R. Civ. P. 33(a). Haley v. Harbin, 933 So. 2d 261, 2005 Miss. LEXIS 531 (Miss. 2005).

Where an invitee's responses to a motion to compel did not comply with Miss. R. Civ. P. 33, the invitee sought late discovery in violation of Miss. Unif. Cir. & County Ct. Prac. R. 4.04, and did not show good cause for failing to prosecute after two notices of dismissal under Miss. R. Civ. P. 41(d), the trial court properly dismissed the lawsuit and denied a motion for reconsideration. Guidry v. Pine Hills Country Club, Inc., 858 So. 2d 196, 2003 Miss. App. LEXIS 984 (Miss. Ct. App. 2003).

**Failure to disclose witnesses.**

Since witness's testimony was elicited by plaintiff's cross-examination, any objection based upon failure to provide witness's name in answers to interrogatories was waived. Maryland Casualty Co. v. Jackson, 493 So. 2d 955, 1986 Miss. LEXIS 2595 (Miss. 1986).

**Failure to respond.**

Dismissal of the patient's medical-negligence action under Miss. R. Civ. P. 41(b) was inappropriate because there was no clear record of actual prejudice caused to the physician or medical center, or even that of presumptive prejudice; thus, the trial court erred in its decision to dismiss the patient's case with prejudice. Holder v. Orange Grove Med. Specialties, P.A., 54 So. 3d 244, 2010 Miss. App. LEXIS 17 (Miss. Ct. App.), rev'd, 54 So. 3d 192, 2010 Miss. LEXIS 640 (Miss. 2010).

**Medical malpractice.**

Administratrix was not precluded from maintaining that a nursing home owner and its operator were liable for the negligence of individual nursing home staff members because an answer to an interrogatory made it clear that the administratrix was pursuing two theories of negligence, which were not inconsistent with one another. The administratrix never admitted through her answer to the interrogatory at issue or otherwise that no caregivers breached the standard of care. Estate of Guillotte v. Delta Health Group, Inc., 5 So. 3d 393, 2009 Miss. LEXIS 123 (Miss. 2009).

**Timeliness.**

Responses to requests for admissions were filed by the proper deadline because the requests were served by mail and, pursuant to Miss. R. Civ. P. 6(e), the end of the thirty-day period to respond fell on a Sunday, which, pursuant to Miss. R. Civ. P. 6(a), extended the period to respond to the following day, Monday. Bell v. Miss. Dep't of Human Servs., 126 So. 3d 999, 2013 Miss. App. LEXIS 826 (Miss. Ct. App. 2013).

**Waiver of objections.**

Since defendant did not object to plaintiff's discovery requests within the allotted time, defendant's objections were waived. Taylor Mach. Works v. Great Am. Surplus Lines Ins. Co., 635 So. 2d 1357, 1994 Miss. LEXIS 78 (Miss. 1994).

## Rule 34. Production of documents and things and entry upon land for inspection and other purposes.

(a) *Scope.* — Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents or electronically stored information (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably useable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody, or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26 (b).

(b) *Procedure.* —

(i) *Requests.* The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced.

(ii) *Responses and Objections.*

(A) *Time to Respond.* The party upon whom the request is served shall serve a written response within thirty days after the service of the request, except that a defendant may serve a response within forty-five days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time.

(B) *Responding to Each Item.* The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the grounds for objection shall be stated with specificity, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

(C) *Objections.* An objection must state whether any responsive materials are being withheld on the basis of the objection. An objection to a part of a request must specify the part and permit inspection of the rest.

(D) *Responding to a Request for Production of Electronically Stored Information.* The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form - or if no form was specified in the request - the responding party must state the form or forms it intends to use. Pursuant to Rule 26(b)(5), a responding party may also object to production of electronically stored information that is not reasonably accessible because of undue burden or cost.

(E) *Producing the Documents or Electronically Stored Information.* When producing documents, the producing party shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request that call for their production. If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. A party need not produce the same electronically stored information in more than one form.

(F) *Motion to Compel.* The party submitting the request may move for an order to compel discovery under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(c) *Persons not parties.* — As provided in Rule 45, a party may compel a nonparty to produce documents and tangible things or to permit inspection.

**HISTORY: Amended effective July 1, 2013, to address production of electronically stored information; Comments repealed effective July 1, 2014; Amended effective October 7, 2021, and Advisory Committee Historical Note added.**

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective October 7, 2021, M.R.C.P. 34 was amended. M.R.C.P. 34(b) was subdivided and captions were added. In addition, the amendment requires an objecting party to state the objection with specificity, including the reasons for the objection, and to indicate whether any materials are being withheld based upon the objection. M.R.C.P. 34(c) was amended to include a reference to M.R.C.P. 45.

## JUDICIAL DECISIONS

### ANALYSIS

Construction.
Applicability.
Dismissal.
Photographs.

**Construction.**

Chancery court did not err in failing to appoint a guardian ad litem, sua sponte, to investigate a father's allegations of neglect because the allegations were either not severe enough to require investigation or were adequately investigated by an agent of the court who acted as a guardian ad litem in all but name, the agent, the parties, and the court all seemed to have understood the agent to have been assigned to act as a neutral, investigative agent for the court, and, while the mother's home environment could have had some harmful effects on the child and the father was more attendant to her care, a pediatric endocrinologist found no evidence that the child was abused or neglected. Carter v. Carter, 204 So. 3d 803, 2015 Miss. App. LEXIS 687 (Miss. Ct. App. 2015), aff'd on other grounds, 204 So. 3d 747, 2016 Miss. LEXIS 489 (Miss. 2016).

If objection is made to part of an item or category, the part shall be specified, and "general objections" applicable to each and every interrogatory or request for production are clearly outside the bounds of this rule; if a party wishes to lodge an objection to a question or request submitted by the opposition, that party must make such objection to that specific question or request. Ford Motor Co. v. Tennin,

960 So. 2d 379, 2007 Miss. LEXIS 201 (Miss. 2007).

This rule does not require party receiving a discovery request to deliver requested materials to opposing party, merely to make such materials available for inspection. Harrison v. The Mississippi Bar, 637 So. 2d 204, 1994 Miss. LEXIS 266 (Miss. 1994).

**Applicability.**

Civil rule of procedure governing requests for production of documents was not applicable to a losing candidate's request to examine, inspect, and photocopy the contents of the ballot boxes because the ballot-box materials were not in the possession, custody, or control of the winning candidate. Smith v. Webster, 233 So. 3d 242, 2017 Miss. LEXIS 207 (Miss. 2017).

**Dismissal.**

Appellate court did not find that dismissal was the appropriate remedy when a party asserting a mechanic's lien against an excavator which it repaired did not permit the party which asserted a replevin claim against the excavator to inspect the excavator. On remand, the parties, or the court if necessary, were encouraged to see to it that the inspection occurred promptly and the appellate court expected the parties to work together to ensure that a prompt and reasonable inspection occurred early in the litigation. Caterpillar Fin. Servs. Corp. v. Burroughs Diesel, Inc., 125 So. 3d 659, 2013 Miss. App. LEXIS 175 (Miss. Ct. App.), cert. denied, 125 So. 3d 658, 2013 Miss. LEXIS 586 (Miss. 2013), cert. denied, 125 So. 3d 658, 2013 Miss. LEXIS 587 (Miss. 2013).

Dismissal of action for discovery misconduct was proper where requested documentation regarding revenues and expenses was not produced despite court orders by employee who was alleging improper termination of his employment, and the willfulness and bad faith of the employee was clearly demonstrated where he refused to answer interrogatories and to produce documents for well over one year, in the face of at least two court orders. Smith v. Tougaloo College, 805 So. 2d 633, 2002 Miss. App. LEXIS 53 (Miss. Ct. App. 2002).

**Photographs.**

While the trial court's frustration with the discovery process was understandable, the ordering of a new trial after a unanimous jury verdict for a vehicle manufacturer, based on a perceived violation of court orders which were never placed on record, was an abuse of discretion; the manufacturer violated a single order concerning the time frame for the submission of documents which it submitted two days late. Ford Motor Co. v. Tennin, 960 So. 2d 379, 2007 Miss. LEXIS 201 (Miss. 2007).

Photographs should not have been admitted into evidence in condemnation proceeding where they were not disclosed pursuant to both specific request and court order compelling discovery; remand was required since court could not say that introduction of the photographs could not have adversely affected integrity of the verdict. State Highway Comm'n v. Jones, 649 So. 2d 201, 1995 Miss. LEXIS 55 (Miss. 1995).

## Rule 35. Physical and mental examinations of persons.

(a) *Order for examination.* — When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. A party or person may not be required to travel an unreasonable distance for an examination. The party requesting the examination shall pay the examiner and shall advance all necessary expenses to be incurred by the party or person in complying with the order.

(b)(1) *Report of examiner.* — If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of the detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition unless, in the case of a report of examination of a person not a party, the party shows that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the court may exclude the examiner's testimony if offered at trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other rule.

(c) *Limited applicability to actions under Title 93 of the Mississippi Code of 1972.* — This rule does not apply to actions under Title 93 of the Mississippi Code of 1972, except in the discretion of the Chancery Judge.

**HISTORY: Adopted effective January 16, 2003; Comments repealed effective July 1, 2014.**

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 16, 2003, Rule 35 was adopted to allow a court to order a physical or mental examination of a person for good cause on motion. – So.2d – (West Miss. Cases ).

## JUDICIAL DECISIONS

### ANALYSIS

In general.
Denial of motion to compel appropriate.

**In general.**

Chancery court did not err by refusing to order the husband to undergo a mental evaluation under Miss. R. Civ. P. 35(a) before awarding him unsupervised visitation; although the wife cited various incidents, the record did not support her contention that the husband had harmed their minor child in the past or that he would have presented an immediate danger to her health and safety in the future. LeBlanc v. Andrews, 931 So. 2d 683, 2006 Miss. App. LEXIS 462 (Miss. Ct. App. 2006).

**Denial of motion to compel appropriate.**

Trial court erred when it denied the motion for an IME, because the complaint was sufficient to meet the "in controversy" requirement in this rule, there was a reason to find good cause for an IME since the patient's medical records only covered about six months, and there was no medical professional who could testify as a fact or expert witness as to the patient's medical condition and permanent injury. Emergency Med. Assocs. v. Glover, 189 So. 3d 1247, 2016 Miss. App. LEXIS 239 (Miss. Ct. App. 2016).

In the client's tort action against the attorney and law firm, given the dearth of Mississippi caselaw on Miss. R. Civ. P. 35, rendering the issue one of first impression for the supreme court, along with the limited nature of the record with respect to the issue (only the motion and subsequent order), the circuit court did not abuse its discretion in denying the law firm's motion to compel physical and mental examination of the client. Baker Donelson Bearman Caldwell & Berkowitz, P.C. v. Seay, 42 So. 3d 474, 2010 Miss. LEXIS 291 (Miss. 2010).

## RESEARCH REFERENCES

**Law Reviews.**

Mississippi's Adoption of Rule 35 Independent Medical Examinations: A Whole New Can of Worms, 23 Miss. C. L. Rev. 41, Fall, 2003.

Now Open for Business: The Transformation of Mississippi's Legal Climate, 24 Miss. C. L. Rev. 393, Spring, 2005.

Taming an Elephant: A Closer Look at Mass Tort Screening and the Impact of Mississippi Tort Reforms, 26 Miss. C. L. Rev. 253, 2006/2007.

## Rule 36. Requests for admission.

(a) *Request for admission.* — A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of forty-five days after service of the summons upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to Rule 37(c), deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this section, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. Rule 37(a)(4) applies to the award of expenses incurred in relation to the motion.

(b) *Effect of admission.* — Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

**HISTORY: Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

## ADVISORY COMMITTEE NOTE

The purpose of Rule 36 is to identify and establish facts that are not in dispute. *DeBlanc v. Stancil,*814 So. 2d 796, 802 (Miss. 2002). "[T]he requests must be reasonable and must be unambiguous. A request is ambiguous if the request is subject to more than one reasonable interpretation. The purpose of requests for admissions is to narrow and define issues for trial." *See Haley v. Harbin,* 933 So. 2d 261, 262-63 (Miss. 2005). "Requests for admissions 'should not be of such great number and broad scope as to cover all the issues [even] of a complex case, and [o]bviously...should not be sought in an attempt to harass an opposing party.'" *See Haley,* 933 So. 2d at 263.

Rule 36 will be enforced according to its terms; matters admitted or deemed admitted upon the responding party's failure to timely respond are conclusively established unless the court, within its discretion, grants a motion to amend or withdraw the admission. "Any admission that is not amended or withdrawn cannot be rebutted by contrary testimony or ignored by the court even if the party against whom it is directed offers more credible evidence." *DeBlanc,* 814 So. 2d at 801 (citing 7 James W. Moore, et al., Moore's Federal Practice ¶ 36.03[2], at 36 (3d ed. 2001)). However, in the matter of child custody, the trial court may, as justice requires, allow the withdrawal of the issue admitted. *Gilcrease v. Gilcrease,* 918 So. 2d 854 (Miss. Ct. App. 2005).

The rule sets out a two-pronged test that trial courts may use when determining whether to grant a motion to withdraw or amend an admission. Courts may consider whether "presentation of the merits...will be subserved [by amendment or withdrawal] and whether the party who obtained the admission has satisfied the court that withdrawal or amendment would prejudice him or her.... [A] trial court 'may,' but is not required to, consider the twopronged test in denying a motion to withdraw or amend." *See Young v. Smith,* 67 So. 3d 732, 740 (Miss. 2011).

Generally, a party has no knowledge concerning the authenticity or admissibility of the opposing party's medical records and, therefore, has no obligation to admit the authenticity or admissibility of such documents absent proper authentication of such records in accordance with M.R.E. 901 or 902 and proper demonstration that such records are records of regularly conducted activity pursuant to M.R.E. 803(6). See *Rhoda v. Weathers,* 87 So. 3d 1036 (Miss. 2012).

## JUDICIAL DECISIONS

### ANALYSIS

In general.
Construction.
Conclusiveness.
Deemed admission.
Failure to admit.
Scope.
Time to respond.
Withdrawal or amendment.

**In general.**

Trial court did not err in granting the motion to reconsider filed by the truck driver's employer and denying the motion to amend, withdraw or strike the tardiness of the admissions filed by the driver and his wife, as the test contained in this rule for allowing admissions to be withdrawn or amended was not mandatory. Dillon v. Pico, Inc., 239 So. 3d 527, 2017 Miss. App. LEXIS 558 (Miss. Ct. App. 2017), cert. denied, 245 So. 3d 395, 2018 Miss. LEXIS 159 (Miss. 2018).

Trial court did not err by considering a wife's responses to a truck driver's federal-court requests for admission; considering responses to requests for admission in a prior action does not use the response as an admission by him for any other purpose or against him or her in any other proceeding because the responses serve only to determine whether the party took an inconsistent prior position. Clark v. Neese, 131 So. 3d 556, 2013 Miss. LEXIS 643 (Miss. 2013).

Where an employee was mounting a moving locomotive when a foot slipped due to mud, causing the employee to fall and sustain serious leg injuries, the employed sued the railroad for his injuries under the Federal Employer's Liability Act, 45 U.S.C. § 51; the employee's admission at trial that the employee was speculating as to whether employee's boots contained the slippery substance was not a judicial admission for purposes of Miss. R. Civ. P. 36. Canadian Nat'l/Ill. Cent. R.R. v. Hall, 953 So. 2d 1084, 2007 Miss. LEXIS 208 (Miss. 2007).

Order by a trial court granting the individuals' motion to compel a doctor to respond to 250 requests for admissions was reversed; the state supreme court held that the trial court had abused its discretion in granting the order, finding the requests, requiring the doctor to respond to more than 1000 questions, excessive in number, unduly burdensome, and oppressive in violation of Miss. R. Civ. P. 36. Haley v. Harbin, 933 So. 2d 261, 2005 Miss. LEXIS 531 (Miss. 2005).

Where defendants failed to respond to plaintiff's requests for admissions in a proper legal format after being ordered to do so by the trial court following plaintiff's motion to compel responses, the trial court did not abuse its discretion in ordering that the responses be deemed admitted. Prime Rx, LLC v. McKendree, Inc., 917 So. 2d 791, 2005 Miss. LEXIS 671 (Miss. 2005).

Defendant school district denied plaintiff student's request to admit that "sexual contact" had occurred between her and two male students; the trial court did not err in allowing school board members to testify about their disciplining of the students based on the principal's assessment that some sexual contact had occurred, as that court's determination of what remedy was warranted given the differences between the responses to the requests for admission and the testimony had to be viewed in a discretionary light and the court's decision was entitled to deference, as it was the trier of fact and its decision took into consideration the differences when it weighed the credibility of the school board members' testimony. T.K. v. Simpson County Sch. Dist., 846 So. 2d 312, 2003 Miss. App. LEXIS 470 (Miss. Ct. App. 2003).

The fact that answers to requests for admission, when compared with the testimony of other witnesses at trial, might raise doubts about the credibility of the answering party is not a reason to reject their evidentiary value; thus, regardless of testimony given at trial, answers to requests for admission are admissible as evidence. Keller v. Keller, 763 So. 2d 902, 2000 Miss. App. LEXIS 228 (Miss. Ct. App. 2000).

**Construction.**

Trial court did not err by considering a truck driver's requests for admission and a wife's responses thereto because the truck driver propounded requests for admission during discovery in federal court pursuant to Fed. R. Civ. P. 36; the wife admitted nothing and denied the relevant requests, and neither the federal rule nor the state rule addressed denials to requests for admission. Clark v. Neese, 131 So. 3d 556, 2013 Miss. LEXIS 643 (Miss. 2013).

Rule was meant to provide, and should provide, an authoritative manner of procedure; where trial court made a ruling within its authority under the Rule, the attorney's affidavit could not be used to negate the admissions, even though the affidavit could be viewed as contradictory. DeBlanc v. Stancil, 814 So. 2d 796, 2002 Miss. LEXIS 95 (Miss. 2002).

This rule is to be enforced according to its terms, and facts set forth in request for admissions were therefore taken as admitted, where defendant filed no response or objection to request, and failed to offer any explanation or excuse as to why he could not have responded. Educational Placement Services v. Wilson, 487 So. 2d 1316, 1986 Miss. LEXIS 2445 (Miss. 1986).

Purpose of this rule is to bind party making the admission, not party requesting it. Shell Oil Co. v. Murrah, 493 So. 2d 1274, 1986 Miss. LEXIS 2613 (Miss. 1986).

Defendants' timely filed motion to stay the requirement that they respond to plaintiffs' request for admissions was equivalent to a motion for an extension of time within which to respond, and the motion operated to prevent matters set forth in request from being deemed admitted. Schmidt v. City of Jackson, 494 So. 2d 348 (Miss. 1986).

**Conclusiveness.**

In a divorce proceeding, where the husband failed to answer the wife's requests for admissions, and they were deemed admitted, it was not error to deny the wife's motion to alter or amend judgment in regard to the weight given to the admissions, because the admissions were taken into consideration, but they were not conclusive, in and of themselves, of the ultimate issue. Kumar v. Kumar, 976 So. 2d 957, 2008 Miss. App. LEXIS 156 (Miss. Ct. App. 2008).

Conclusiveness of matters deemed admitted, due to defendant's failure to file a timely response, was not established. Skipworth v. Rabun, 704 So. 2d 1008, 1996 Miss. LEXIS 644 (Miss. 1996).

**Deemed admission.**

In an option contract dispute, a buyer was entitled to partial summary judgment as to damages because (1) the buyer was entitled to partial summary judgment as to liability, and (2) the buyer established sums the buyer paid sellers pursuant to the contract, as the sellers were deemed to have admitted the sums by not timely responding to the buyer's request for admissions. Maness v. K & A Enters. of Mississippi, LLC, 2018 Miss. LEXIS 61 (Miss. Feb. 8, 2018), op. withdrawn, 2018 Miss. LEXIS 349 (Miss. Aug. 9, 2018), sub. op., 250 So. 3d 402, 2018 Miss. LEXIS 338 (Miss. 2018).

It was not error to hold a quitclaim deed did not meet sellers' duty under an option contract to provide clear title because, inter alia, the sellers' response to a request for admission conclusively established the property at issue was not free or clear or even in existence. Maness v. K & A Enters. of Mississippi, LLC, 2018 Miss. LEXIS 61 (Miss. Feb. 8, 2018), op. withdrawn, 2018 Miss. LEXIS 349 (Miss. Aug.

9, 2018), sub. op., 250 So. 3d 402, 2018 Miss. LEXIS 338 (Miss. 2018).

Because the wife's deemed admissions produced contradictory results, it was within the chancellor's discretion to rely on the trial testimony to resolve any conflicts; it was within her discretion to review the reason for the wife's failure to timely answer the requests for admissions; and the chancellor found the delay of 33 days was not critical. Williams v. Williams, 224 So. 3d 1282, 2017 Miss. App. LEXIS 482 (Miss. Ct. App. 2017).

Chancellor did not err by relying on the parents' deemed admissions to find that the natural-parent presumption had been overcome and to award child custody to the paternal grandparents because the chancellor heard all of the testimony at trial and used the guardian ad litem's report as part of the chancellor's consideration, in addition to the admissions by the parents, in awarding child custody to the grandparents. Randallson v. Green, 203 So. 3d 1190, 2016 Miss. App. LEXIS 401 (Miss. Ct. App.), cert. denied, 204 So. 3d 290, 2016 Miss. LEXIS 484 (Miss. 2016).

Chancery court did not err in awarding property owners punitive damages because their neighbor could not contradict his own admissions by arguing his trespass was not intentional. Locklear v. Sellers, 126 So. 3d 978, 2013 Miss. App. LEXIS 797 (Miss. Ct. App. 2013).

Chancery court did not err in awarding property owners damages in their action alleging that a neighbor constructed a road across their property against their express direction because it was deemed admitted that the owners were entitled to restoration damages since the neighbor failed to respond to their request for admissions. Locklear v. Sellers, 126 So. 3d 978, 2013 Miss. App. LEXIS 797 (Miss. Ct. App. 2013).

Chancellor erred in awarding grandparents visitation because they failed to show they met the criterion of the establishment of a viable relationship with their granddaughters; the chancellor erred in ignoring the grandparents' admissions and permitting contradictory testimony that they had contributed financially and had frequently visited the grandchildren because they never moved for withdrawal or amendment of their admissions. Aydelott v. Quartaro, 124 So. 3d 97, 2013 Miss. App. LEXIS 327 (Miss. Ct. App. 2013).

Trial court did not abuse its discretion in deeming a company's request for admissions under Miss. R. Civ. P. 36 as admitted because through his attorneys, a stock purchaser moved for and received a continuance of the hearing on the motion, and his attorney appeared at the hearing and conceded the motion; the purchaser never filed a response to the motion to have the request deemed admitted. Tyler v. Auto. Fin. Co., 113 So. 3d 1236, 2013 Miss. LEXIS 142 (Miss. 2013).

Trial court erred when it did not deem admitted a landowner's requests for admissions from a contractor because the contractor failed to timely respond under Miss. R. Civ. P. 36 and never moved to have the admissions withdrawn or amended; as a result, the trial court erred in granting summary judgment to the contractor on the landowner's breach of contract claim because the admissions were sufficient to establish the claim. Montgomery v. Stribling, 115 So. 3d 823, 2012 Miss. App. LEXIS 607 (Miss. Ct. App. 2012), cert. denied, 2013 Miss. LEXIS 358 (Miss. June 20, 2013).

Because each element of legal malpractice was fulfilled, including both proximate cause and the amount of damages, by the failure to answer or deny requests for admission, and because Miss. R. Civ. P. 36 was self-executing and did not differentiate matters that would not be deemed admitted, admissions were properly used as a basis for granting summary judgment and for entering an award of damages of $2,000,000, jointly and severally, against a law firm and individual lawyers. Byrd v. Bowie, 992 So. 2d 1202, 2008 Miss. App. LEXIS 367 (Miss. Ct. App. 2008).

Summary judgment was properly awarded to a contractor in a subcontractor's action for nonpayment where the subcontractor had waited to file its responses to requests for admissions and its motion to withdraw the deemed admitted requests for admissions until after the contractor had moved for summary judgment; the trial court determined that the contractor would be prejudiced if the admissions were allowed to be withdrawn.

Triangle Constr. Co. v. Foshee Constr. Co., 976 So. 2d 978, 2008 Miss. App. LEXIS 144 (Miss. Ct. App. 2008).

In a tort suit filed against a nursing home and its administrators following the death of a patient, the estate failed to provide sufficient responses to a request for admissions concerning the standard of care; under Miss. R. Civ. P. 36, the deemed admissions established that none of the caregivers deviated from the standard of care in treating the patient, and therefore summary judgment was entered in favor of the caregivers. Estate of Finley v. Beverly Health & Rehab. Servs., 933 So. 2d 1026, 2006 Miss. App. LEXIS 534 (Miss. Ct. App. 2006).

Requests for admission did not violate the Rule as the requests clearly applied the legal standard of care to the facts of the case and the husband was aware that the doctor had made discovery requests. Cole v. Buckner, 819 So. 2d 527, 2002 Miss. LEXIS 196 (Miss. 2002).

The court properly deemed a request for admissions admitted for lack of timeliness pursuant to subsection (a) where there was a five-month delay before the defendants responded to the request for admissions and they did not object to the request for admissions, request withdrawal or amendment, or seek from the court any extension of time for responding. Deblanc v. Stancil, 2000 Miss. App. LEXIS 453 (Miss. Ct. App. Sept. 26, 2000), op. withdrawn, sub. op., 2001 Miss. App. LEXIS 39 (Miss. Ct. App. Jan. 23, 2001).

**Failure to admit.**

M.R.C.P. Rule 37(c) did not contemplate sanctions where party denied requests for admissions which were, in effect, an accusation of arson, and therefore trial court did not err in failing to award sanctions for alleged discovery violations. Cooper v. State Farm Fire & Casualty Co., 568 So. 2d 687, 1990 Miss. LEXIS 273 (Miss. 1990).

**Scope.**

In a wrongful death case, a widow was not allowed to argue that dispositive admissions were conclusions of law that were beyond the scope of this rule since the argument was raised for the first time on appeal. Procedural bar notwithstanding, a defendant in a medical malpractice case was permitted to request an admission that the patient's treatment complied with the applicable standard of care. Brooks v. Landmark Nursing Ctr., Inc., 230 So. 3d 1032, 2017 Miss. App. LEXIS 141 (Miss. Ct. App. 2017).

**Time to respond.**

Circuit court did not err in granting summary judgment in favor of a doctor in a wrongful death action filed by a personal representative (PR) because, while the PR answered the doctor's first set of interrogatories and requests for production of documents, she did not respond to his requests for admissions within 30 days and never filed a motion to amend or withdraw, and the doctor's motion for summary judgment included, as an exhibit, the certificate of service sent with the requests for admission as evidence that the doctor did send the requests for admission to the PR. Ross v. Wallack, 188 So. 3d 597, 2015 Miss. App. LEXIS 554 (Miss. Ct. App. 2015).

Trial court did not err in denying a stock purchaser's motion to amend admissions when it was filed years after the fact and after the entry of a final judgment because the purchaser waited almost four years after the hearing to file a motion to amend his admissions and, thereby, obtain relief from the trial court's order deeming them admitted; the purchaser failed to file the motion within a reasonable time pursuant to Miss. R. Civ. P. 60(b) when he waited almost four years and until after a final judgment had been entered to file his motion for relief. Tyler v. Auto. Fin. Co., 113 So. 3d 1236, 2013 Miss. LEXIS 142 (Miss. 2013).

Grant of summary judgment against the child and parents in their medical malpractice action against the doctors, medical center, and clinic, was appropriate pursuant to Miss. R. Civ. P. 36(b) because the conduct of the child and parents' counsel after his illness had resolved was insufficient to merit withdrawal of the deemed admissions. Langley v. Miles, 956 So. 2d 970, 2006 Miss. App. LEXIS 720 (Miss. Ct. App. 2006), cert. denied, 957 So. 2d 1004, 2007 Miss. LEXIS 305 (Miss. 2007).

Notwithstanding that the defendant failed to timely respond to the plaintiff's requests for admission in an action to set aside two deeds from the plaintiff to the defendants, remand was necessary to determine the issue of whether the plaintiff intended to deed her property to the defendants as this was a genuine issue of material fact that went directly to the merits of the case, and to pursue the answer to the question would not serve any prejudice upon the plaintiff. Deblanc v. Stancil, 2001 Miss. App. LEXIS 39 (Miss. Ct. App. Jan. 23, 2001), rev'd, 814 So. 2d 796, 2002 Miss. LEXIS 95 (Miss. 2002).

**Withdrawal or amendment.**

Circuit court did not err in allowing a deceased tenant's heir to withdraw her admissions because the heir's mistaken belief that an agreed-upon extension included the requests for admission was likely justifiable considering the landlord's acknowledgment that it did not clearly communicate otherwise. Allen v. Jackson Square Apt. Homes, LLC, 231 So. 3d 251, 2017 Miss. App. LEXIS 675 (Miss. Ct. App. 2017).

In a wrongful death case, a denial of a motion to withdraw admissions made under this rule was not an abuse of discretion where there was no justifiable cause or good reason for the delay of five months; inter alia, the widow never provided responses to the requests. Brooks v. Landmark Nursing Ctr., Inc., 230 So. 3d 1032, 2017 Miss. App. LEXIS 141 (Miss. Ct. App. 2017).

Regarding a motion to withdraw an admission pursuant to Miss. R. Civ. P. 36(b), the mere filing of a summary judgment motion is not "prejudice" within the meaning of rule 36(b). Sanford v. Dudley, 196 So. 3d 1106, 2016 Miss. App. LEXIS 458 (Miss. Ct. App. 2016).

In a case in which plaintiff alleged that defendants had taken certain actions that caused damage to her property, the circuit court had discretion to grant plaintiff's motion under Miss. R. Civ. P. 36(b) to withdraw her deemed admissions, as withdrawal would aid the presentation of the merits of the case and would not prejudice defendants' ability to defend the case on the merits. The circuit court abused its discretion by denying plaintiff's motion to withdraw her admissions. Sanford v. Dudley, 196 So. 3d 1106, 2016 Miss. App. LEXIS 458 (Miss. Ct. App. 2016).

In a personal injury suit arising from a dog bite, a county court did not abuse its discretion in denying an injured party's motion to withdraw the deemed-admitted responses under this rule; mis-filing and mis-laying documents in the attorney's office failed to rise to a compelling and justifiable excuse for not timely responding. Hawkins v. Hale, 185 So. 3d 1076, 2016 Miss. App. LEXIS 74 (Miss. Ct. App. 2016).

It was within a trial judge's discretion to deny a former employee's request to withdraw deemed-admitted responses because, although the employee's counsel offered a reasonable explanation for counsel's initial failure to respond – not receiving the employer's requests for admissions – counsel gave no justifiable explanation for counsel's continued failure to respond after receipt of the employer's good-faith letter giving counsel more time to respond. Rainer v. Wal-Mart Assocs., Inc., 119 So. 3d 398, 2013 Miss. App. LEXIS 462 (Miss. Ct. App. 2013).

In a child custody modification case, a trial court did not err by failing to deem a mother's requests for admission admitted since a father filed a motion to amend his responses, and the decision to grant such was in the trial court's discretion. Giannaris v. Giannaris, 962 So. 2d 574, 2006 Miss. App. LEXIS 668 (Miss. Ct. App. 2006), rev'd, 960 So. 2d 462, 2007 Miss. LEXIS 399 (Miss. 2007).

Where the lawyer, a defendant in a malpractice case, did not respond to plaintiff's request for admissions for over nine months, the trial court did not abuse its discretion in refusing to allow the lawyer to withdraw his admissions, since (1) he never sought an extension of time to respond to the request; (2) he had no legal justification for his delay in responding; and (3) his dilatory response had prejudiced the plaintiff by delaying his case. Earwood v. Reeves, 798 So. 2d 508, 2001 Miss. LEXIS 198 (Miss. 2001).

Trial court erred in allowing defendant on oral motion to withdraw admissions and file responses out of time, where there was no record of good and sufficient reason offered by defendant and if argument was that defendant was financially unable to defend himself, this was not a justifiable excuse. Skipworth v. Rabun, 568 So. 2d 289, 1990 Miss. LEXIS 603 (Miss. 1990).

Chancellor properly held that defendants' Request for Admissions would be deemed admitted, where plaintiffs filed their response eleven days late, and failed to move for withdrawal or amendment of admissions under subdivision (b) of this rule. Martin v. Simmons, 571 So. 2d 254, 1990 Miss. LEXIS 707 (Miss. 1990).

## Rule 37. Failure to make or cooperate in discovery: sanctions.

(a) *Motion for order compelling discovery.* — A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate court.* — An application for an order may be made to the court in which the action is pending.

(2) *Motion.* — If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rules 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(d).

(3) *Evasive or incomplete answer.* — For purposes of this section, an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of expenses of motion.* — If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party of the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expense unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) *Failure to comply with order.* —

(1) Sanctions by Court. If a deponent fails to be sworn or to answer a question after being directed to do so by the court, the failure may be considered a contempt of court.

(2) Sanctions by Court in Which Action Is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rules 30(b)(6) or 31(a) to testify in behalf of a party fails to obey an order to provide or permit discovery, including an order made under subsection (a) of this rule, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders.

In lieu of any of the foregoing orders or in addition, thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) *Expenses on failure to admit.* — If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable under Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) *Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.* — If a party or an officer, director, or managing agent of a party or a person designated under Rules 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subsections (A), (B), and (C) of subsection (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order under Rule 26(d).

(e) *Additional sanctions.* — In addition to the application of those sanctions, specified in Rule 26(d) and other provisions of this rule, the court may impose upon any party or counsel such sanctions as may be just, including the payment of reasonable expenses and attorneys' fees, if any party or counsel (i) fails without good cause to cooperate in the framing of an appropriate discovery plan by agreement under Rule 26(c), or (ii) otherwise abuses the discovery process in seeking, making or resisting discovery.

**HISTORY: Comments repealed effective July 1, 2014.**

## JUDICIAL DECISIONS

### ANALYSIS

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**In general.**

Chancellor did not err in denying a husband's motion to compel a wife's responses to interrogatories in a divorce case as the husband did not give reasonable notice to the wife of the motion, as required by Miss. R. Civ. P. 37(a), in that the husband did not file his motion until less than one business day prior to the hearing and after the trial court had already rescheduled the hearing. Moreover, the husband failed to show that he was prejudiced by the wife's untimely responses. Vaughn v. Vaughn, 56 So. 3d 1283, 2011 Miss. App. LEXIS 155 (Miss. Ct. App. 2011).

Where an employee sued the railroad for injuries sustained while mounting a moving locomotive, the trial court did not err by allowing an expert to testify regarding reasons why the major railroads were amending their safety rules and to refer to statistical information; the subject matter contained in the expert report included the subject matter testified to at trial, and there was no discovery violation. Canadian Nat'l/Ill. Cent. R.R. v. Hall, 953 So. 2d 1084, 2007 Miss. LEXIS 208 (Miss. 2007).

While the trial court's frustration with the discovery process was understandable, the ordering of a new trial after a unanimous jury verdict for a vehicle manufacturer, based on a perceived violation of court orders which were never placed on record, was an abuse of discretion; the manufacturer violated a single order concerning the time frame for the submission of documents which it submitted two days late. Ford Motor Co. v. Tennin, 960 So. 2d 379, 2007 Miss. LEXIS 201 (Miss. 2007).

Trial judge did not err by denying the passenger a mistrial for the driver's discovery violations under Miss. R. Civ. P. 37 as there was no evidence that the driver's interrogatory response was intended to mislead opposing counsel, and the driver clearly did not exhibit a pattern of such, and there was no indication that the passenger was prejudiced by the driver's incomplete answer to Interrogatory No. 10; there was no indication of how the passenger's trial strategy would have changed in the event the driver had divulged the kissing episode at an earlier stage in the litigation process. Payne v. Whitten, 2006 Miss. LEXIS 620 (Miss. Oct. 26, 2006), op. withdrawn, sub. op., 948 So. 2d 427, 2007 Miss. LEXIS 38 (Miss. 2007).

Where defendants failed to respond to plaintiff's requests for admissions in a proper legal format after being ordered to do so by the trial court following plaintiff's motion to compel responses, the trial court did not abuse its discretion in ordering that the responses be deemed admitted even though Miss. R. Civ. P. 37 allowed for a lesser sanction as plaintiff propounded requests for admissions and Miss. R. Civ. P. 36 provided for a specific sanction for the failure to respond. Prime Rx, LLC v. McKendree, Inc., 917 So. 2d 791, 2005 Miss. LEXIS 671 (Miss. 2005).

Trial court's suspension of monetary sanctions against defendant school district's attorneys for a discovery violation was not an abuse of discretion: (1) there was not an unequivocal showing that the district or its attorneys intended to deceive, nor was it clear where the fault in failing to disclose arose; and (2) as the discovery violation went to breach of duty and proximate cause, and plaintiff student could not have prevailed had she proven breach of duty and proximate cause, because no causation in fact was shown, she was not prejudiced by the discovery violation. T.K. v. Simpson County Sch. Dist., 846 So. 2d 312, 2003 Miss. App. LEXIS 470 (Miss. Ct. App. 2003).

Trial court did not err in excluding evidence not identified during discovery, pursuant to Miss. R. Civ. P. 37(b)(2)(B); a witness testified about census results, but an objection to the introduction of the witness's written findings was properly sustained because the findings were not furnished during discovery and there was no showing that the exclusion of the evidence had any prejudicial effect. Prestridge v. City of Petal, 841 So. 2d 1048, 2003 Miss. LEXIS 53 (Miss. 2003).

In a divorce case, the chancellor cured any error that might have occurred in denying the husband's motion to compel when the chancellor allowed the husband leniency in questioning the wife at trial; therefore, the chancellor's denial of the husband's motion to compel did not warrant an interlocutory appeal. Boutwell v. Boutwell, 829 So. 2d 1216, 2002 Miss. LEXIS 214 (Miss. 2002).

Where there was no violation of discovery rules or pre-trial court order, circuit judge was without authority to impose sanctions against plaintiff for scheduling deposition for a date two days before Pre-Trial Conference, after plaintiff had requested that Pre-Trial Conference be set. Jones v. Wiese, 652 So. 2d 175, 1995 Miss. LEXIS 147 (Miss. 1995).

A motion for sanctions against a party unable to comply is not per se an abuse of discovery. Read v. Southern Pine Electric Power Asso., 515 So. 2d 916, 1987 Miss. LEXIS 2893 (Miss. 1987).

**Construction.**

Imposition of a $10,000 sanction against the tire company was improper where the trial court effectively held the tire company in constructive criminal contempt and the company therefore had the right to present its defense regarding contempt. Under Miss. R. Civ. P. 37 and the inherent power to protect the integrity of its process, the trial court had the broad authority to impose sanctions for discovery violations and violations of its orders; however, a purely punitive fine could be imposed only after the offending party be held in contempt. Cooper Tire & Rubber Co. v. McGill, 890 So. 2d 859, 2004 Miss. LEXIS 939 (Miss. 2004).

Subdivision (b)(2) of this rule did not totally control trial court's authority to impose sanctions, and $200 fine against plaintiff's counsel, and not plaintiff, for counsel's failure to notify court of his planned absence was authorized under subdivision (e). Cunningham v. Mitchell, 549 So. 2d 955, 1989 Miss. LEXIS 442 (Miss. 1989).

**Applicability.**

It was not error to find, as a sanction, that a manufacturer waived privilege because it was unnecessary to conduct an itemized review of discovery materials, since the manufacturer did not comply with discovery. Fresenius Med. Care Holdings, Inc. v. Hood, 269 So. 3d 36, 2018 Miss. LEXIS 405 (Miss. 2018).

It was not error to compel, as a sanction, the separate production of emails and email attachments because (1) use of the "family" logging method in which only the last email in a chain was logged did not suffice, and (2) a manufacturer had previously been ordered to separately log the emails and attachments. Fresenius Med. Care Holdings, Inc. v. Hood, 269 So. 3d 36, 2018 Miss. LEXIS 405 (Miss. 2018).

Under Miss. R. Civ. P. 37(c), the chancellor abused his discretion by not imposing sanctions against the wife for admitted perjury and destruction of evidence as the wife resisted discovery; the wife resisted discovery by admitted lying under oath about staying the night at another man's hours and having sexual intercourse with him, and she lied about when her sexual relationship began and intentionally destroyed her personal computer immediately after her March 8 deposition. Jones v. Jones, 995 So. 2d 706, 2008 Miss. LEXIS 581 (Miss. 2008).

With respect to a casino customer who was injured when a security guard collided with her, a trial court did not abuse its discretion in denying a motion to compel production of copies of the casino's rules for handling customer injuries because the production request did not include what the customer actually sought, which was security manuals. Smith v. Ameristar Casino Vicksburg, Inc., 991 So. 2d 1228, 2008 Miss. App. LEXIS 72 (Miss. Ct. App.), cert. denied, 997 So. 2d 924, 2008 Miss. LEXIS 504 (Miss. 2008).

Finding that the passenger was 30 percent at fault for an accident was improper pursuant to Miss. R. Civ. P. 37(e), where the driver never elaborated on his contributory negligence claim during discovery and instead waited until he was testifying at trial before asserting that the passenger was partially negligent because the two were kissing. That testimony resulted in a discovery violation. Payne v. Whitten, 948 So. 2d 431, 2006 Miss. App. LEXIS 97 (Miss. Ct. App. 2006), rev'd, 2006 Miss. LEXIS 620 (Miss. Oct. 26, 2006).

Where the heirs' motion for extension of time to designate an expert was filed two months after the deadline for such designation and more than a month after the filing by defendants of one or more motions for summary judgment, the trial court granted defendants summary judgment, as the heirs were unable to make out a prima facie case of medical malpractice without a medical expert. Bowie v. Montfort Jones Mem'l Hosp., 861 So. 2d 1037, 2003 Miss. LEXIS 877 (Miss. 2003).

Correct standard for awarding sanctions for a vexatiously overbroad subpoena is that under M.R.C.P. Rule 45, not Rules 26 or 37. SLM v. Clinton Pub. Sch. Dist., 677 So. 2d 737, 1996 Miss. LEXIS 284 (Miss. 1996).

Deponent in a deposition taken in Mississippi for use in an out-of-state case could not be compelled to respond to questions which he had declined to answer pursuant to privilege provided by other state's law, but not available under Mississippi law. Barnes v. A Confidential Party, 628 So. 2d 283, 1993 Miss. LEXIS 527 (Miss. 1993).

**Appellate review.**

Disagreeing with the implementation of one of several permissible sanctions does not approach abuse of discretion, much less equate to abuse; if the appellate court stays true to and honors the appropriate standard of review, a discretionary decision of a trial judge must stand. Ashmore v. Miss. Auth. on Educ. TV, 148 So. 3d 977, 2014 Miss. LEXIS 407 (Miss. 2014).

Case law does not require trial courts to address each case law consideration in considering whether a trial court abused its discretion under the rule in dismissing a case with prejudice. Ashmore v. Miss. Auth. on Educ. TV, 148 So. 3d 977, 2014 Miss. LEXIS 407 (Miss. 2014).

**Attorney's fees.**

Nothing in the rule mandates that the expenses be paid only to the party and not to the attorney who incurred fees; if the attorneys incurred the "reasonable expenses" of attorneys' fees, then it is acceptable under the rules and the supreme court's precedent to order the fees paid directly to them under the rule. Smith v. Hickman, Goza & Spragins, PLLC, 265 So. 3d 139, 2019 Miss. LEXIS 22 (Miss. 2019).

Because the trial court's finding of multiple, intentional discovery violations was erroneous, so too was its award of attorney fees and expenses in amount in excess of $200,000 to plaintiffs (presumably under Miss. R. Civ. P.37(e)), although plaintiffs were owed some amount of reasonable attorney fees and expenses; the court should have assessed the reasonable expenses incurred by plaintiffs caused by defendant's compliance with the court's ruling two days later than ordered. Ford Motor Co. v. Tennin, 960 So. 2d 379, 2007 Miss. LEXIS 201 (Miss. 2007).

Trial court erred by denying plaintiffs attorney's fees under subdivision (a)(4) of this rule, where plaintiffs succeeded on their motion to compel discovery. Willard v. Paracelsus Health Care Corp., 681 So. 2d 539, 1996 Miss. LEXIS 496 (Miss. 1996).

**Dismissal.**

Deciding against lesser sanctions was appropriate where any lesser sanction than dismissal would have permitted plaintiff to get away with having lied under oath, and the neglect in disclosing the medical records was attributable to plaintiff, not her counsel. Edwards v. Coca Cola Bottling Co. United, 264 So. 3d 763, 2019 Miss. LEXIS 94 (Miss. 2019).

Trial court did not abuse its discretion in dismissing a personal injury action for discovery violations where plaintiff's medical records established a history of middle and lower back problems, which directly contradicted her numerous assertion in her sworn interrogatory responses and deposition testimony that she had no such problems and had never seen a medical provider for such problems, and given the complete misrepresentation of years of medical history, it was within the court's discretion to find that she had lied under oath. Edwards v. Coca Cola Bottling Co. United, 264 So. 3d 763, 2019 Miss. LEXIS 94 (Miss. 2019).

After determining that an auto accident victim committed various, egregious discovery violations by continuously providing false answers and failing to disclose relevant information concerning the victim's past injuries and accidents, significantly prejudicing the opposing motorist's ability to proceed with the case, a trial court did not abuse its discretion by ordering that the victim's personal injury action be dismissed with prejudice. May v. Austin, 240 So. 3d 389, 2018 Miss. LEXIS 164 (Miss. 2018).

Anytime a defendant asks for dismissal of the action for a discovery violation, the trial judge and the appellate court must begin with the important admonition that dismissal is appropriate only under the most extreme circumstances and only where lesser sanctions will not suffice. Bowdry v. T. Mart, Inc., 240 So. 3d 489, 2018 Miss. App. LEXIS 109 (Miss. Ct. App. 2018).

Circuit court committed a clear error of judgment in dismissing a police officer's action against gas station owners because dismissal was simply not a reasonable sanction; there was no evidence to support the owners' conclusion that the officer intentionally misled or blatantly lied when he testified that he had not suffered prior neck and lower-back problems; a lesser sanction of attorney's fees and costs associated with obtaining medical records would be an appropriate sanction. Bowdry v. T. Mart, Inc., 240 So. 3d 489, 2018 Miss. App. LEXIS 109 (Miss. Ct. App. 2018).

Circuit court committed a clear error of judgment in dismissing a driver's complaint based on discovery violations because there was no evidence that the driver intentionally misled or blatantly lied in her discovery responses; the driver provided a medical authorization, and the employer and employee obtained the complete medical records of her doctor and was she had been treated for other problems that she contended were not related to the injuries from the accident in question. Westfall v. Goggins, 247 So. 3d 244, 2017 Miss. App. LEXIS 599 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 883, 2018 Miss. LEXIS 256 (Miss. 2018).

In a slip and fall case, the trial court did not commit reversible error by not dismissing the suit for plaintiff's willful discovery violations. The trial court was within its discretion to impose monetary sanctions, rather than dismiss the case in its entirety. IOC-Lula, Inc. v. Smartt, 198 So. 3d 455, 2016 Miss. App. LEXIS 469 (Miss. Ct. App. 2016).

Trial court abused its discretion in imposing only monetary sanctions on plaintiff for his numerous egregious acts. Along with the monetary sanctions, the only appropriate remedy was to reverse plaintiff's judgment against defendant and dismiss the case. Ill. Cent. Gulf R.R. Co. v. McLain, 174 So. 3d 1279, 2015 Miss. LEXIS 380 (Miss. 2015).

Trial court committed clear, reversible error in dismissing the personal injury action where the perceived falsehood was an isolated incident, the individual's statements in discovery did not indicate any kind of pattern of misleading or false responses, and the trial court paid only lip service to the possibility and practicality of lesser sanctions. Kinzie v. Belk Dep't Stores, L.P., 164 So. 3d 974, 2015 Miss. LEXIS 128 (Miss. 2015).

Where the discovery violation at issue is less extreme and open to potential truthful interpretations, the Supreme Court of Mississippi will not hesitate to reverse a trial court's Miss. R. Civ. P. 37 dismissal. Kinzie v. Belk Dep't Stores, L.P., 164 So. 3d 974, 2015 Miss. LEXIS 128 (Miss. 2015).

Affirmation of a default judgment in favor of the property owners was appropriate because the city's discovery response was false and despite an offer from the trial court, the city declined to offer any evidence to explain its discovery failure. City of Jackson v. Rhaly, 95 So. 3d 657, 2011 Miss. App. LEXIS 224 (Miss. Ct. App. 2011), aff'd, 95 So. 3d 602, 2012 Miss. LEXIS 207 (Miss. 2012).

Dismissal of the patient's medical-negligence action under Miss. R. Civ. P. 37(d) was inappropriate because there was no clear record of actual prejudice caused to the physician or medical center, or even that of presumptive prejudice, and the delays were solely the result of the negligence of plaintiff's counsel; thus, the trial court erred in its decision to dismiss the patient's case with prejudice and should have applied lesser sanctions. Holder v. Orange Grove Med. Specialties, P.A., 54 So. 3d 244, 2010 Miss. App. LEXIS 17 (Miss. Ct. App.), rev'd, 54 So. 3d 192, 2010 Miss. LEXIS 640 (Miss. 2010).

Plaintiff's failure to reply to discovery requests was a result of his attorney being unable to contact him for an extended period of time. Since plaintiff repeatedly missed the deadlines to respond to discovery and failed to file completed responses, the trial court did not abuse its discretion in dismissing the case with prejudice. Young v. Merritt, 40 So. 3d 587, 2009 Miss. App. LEXIS 931 (Miss. Ct. App. 2009).

Trial court did not err by ordering the customer's case against the restaurant to be dismissed without prejudice for failing to respond to discovery, Miss. R. Civ. P. 37(b)(2)(c), as the customer's noncompliance was based on inability to comply; the customer was fully aware of the trial court's order requiring him to respond to the interrogatories, and still he chose not to fully comply. Marshall v. Burger King, 2 So. 3d 702, 2008 Miss. App. LEXIS 555 (Miss. Ct. App. 2008), overruled in part, Knight v. Knight, 85 So. 3d 832, 2012 Miss. LEXIS 24 (Miss. 2012).

Trial court properly granted a contractor's motion to dismiss with prejudice plaintiffs' complaint on the basis of plaintiffs' repeated failure to timely provide full and complete supplemental responses to written discovery requests; although the result may have been harsh for plaintiffs, the record on appeal did not provide sufficient reasons for finding the trial court abused its discretion in dismissing the action. Beck v. Sapet, 937 So. 2d 945, 2006 Miss. LEXIS 484 (Miss. 2006).

Where an assistant conductor sued the railroad for personal injuries pursuant to the Federal Employers' Liability Act, 45 USCS § 51 et seq., the trial court did not abuse its discretion in ordering a Miss. R. Civ. P. 37 dismissal due to the conductor's failure to disclose a previous back injury and workers' compensation claim. Allen v. AMTRAK, 934 So. 2d 1006, 2006 Miss. LEXIS 381 (Miss. 2006).

Court did not err in dismissing insured's action against insurers for payment of full benefits under a policy because the insured failed to comply with the court's discovery order. Trial judge's action in dismissing the case without prejudice was clearly within his discretion. Ngo v. Centennial Ins. Co., 893 So. 2d 1076, 2005 Miss. App. LEXIS 1 (Miss. Ct. App. 2005).

In an insurance case, a court properly dismissed funeral home owners' suit against an insurer where the owners chose to disregard the trial court's order and did not submit themselves for their scheduled depositions. Salts v. Gulf Nat'l Life Ins. Co., 872 So. 2d 667, 2004 Miss. LEXIS 491 (Miss. 2004).

As a trial court did not find that appellees' misrepresentations during discovery were manifestly false and it was not convinced that there had been any lying, its refusal to dismiss the action as a sanction for discovery misconduct was affirmed. Ross v. Nat'l Forms & Sys. Group, Inc., 2004 Miss. App. LEXIS 70 (Miss. Ct. App. Feb. 3, 2004), op. withdrawn, sub. op., 882 So. 2d 245, 2004 Miss. App. LEXIS 603 (Miss. Ct. App. 2004).

Dismissal of action for discovery misconduct was proper where requested documentation regarding revenues and expenses was not produced, despite court orders, by employee who was alleging improper termination of his employment, and the willfulness and bad faith of the employee was clearly demonstrated where he refused to answer interrogatories and to produce documents for well over one year, in the face of at least two court orders. Smith v. Tougaloo College, 805 So. 2d 633, 2002 Miss. App. LEXIS 53 (Miss. Ct. App. 2002).

In an action against a pharmaceutical company and a physician arising from a massive stroke suffered by the plaintiff after taking a medication manufactured by the pharmaceutical company, an expert witness was properly allowed to testify on behalf of the pharmaceutical company where the expert had been designated as an expert witness by the physician and a supplemental discovery response by the pharmaceutical company stated that it reserved the right to call in its case-in-chief any treating physician, any expert witness listed by the plaintiffs and any expert witness listed by any co-defendant; although the supplemental response was evasive or incomplete, the plaintiff failed to meet her burden to seek relief from the court prior to trial, by requesting the court to enter an order compelling additional information and, instead, waited until trial to object to the presentation of the expert witness. Her appeal was dismissed. Warren v. Sandoz Pharms. Corp., 783 So. 2d 735, 2000 Miss. App. LEXIS 395 (Miss. Ct. App. 2000).

It was error for the court to dismiss a personal injury action arising from an automobile accident where (1) an answer by the plaintiff to an interrogatory stated that his injuries "affected my attitude, my concentration, my school work, and my ability to do manual labor. I no longer am able to enjoy tinkering with automobiles as the stooping, bending, and squatting are painful;" but (2) video surveillance of the defendant showed him bending, twisting, and squatting while performing manual tasks and performing manual tasks at the tire shop at which he worked. Dismissal was inappropriate as the answer to the interrogatory was ambiguous and could be interpreted to not assert that he was completely incapable of bending, lifting, or performing manual labor, but rather that he was unable to enjoy performing such tasks. Wood by & Through Wood v. Biloxi Pub. Sch. Dist., 757 So. 2d 190, 2000 Miss. LEXIS 44 (Miss. 2000), aff'd, Harrison v. State, 800 So. 2d 1134, 2001 Miss. LEXIS 223 (Miss. 2001).

The dismissal of the plaintiff's slip and fall case was not an abuse of discretion where the plaintiff willfully submitted false answers to interrogatories and knowingly did not answer deposition questions truthfully. Scoggins v. Ellzey Bevs., Inc., 743 So. 2d 990, 1999 Miss. LEXIS 242 (Miss. 1999).

It was an abuse of discretion for the trial judge to impose the death penalty of dismissal where (1) discovery proceedings were controlled and managed by the parties and the trial court was involved only when the defendant could not through a good faith effort persuade the plaintiff to comply with his request to name an expert, and (2) after the plaintiff complied, discovery continued. Robert v. Colson, 729 So. 2d 1243, 1999 Miss. LEXIS 27 (Miss. 1999).

Trial court's dismissal of suit, as a sanction against plaintiffs who were dilatory in the prosecution of their claim, was reversed and remanded in view of defendant's own dilatory conduct. Palmer v. Biloxi Regional Medical Ctr., 564 So. 2d 1346, 1990 Miss. LEXIS 239 (Miss. 1990).

Dismissal of divorce defendant's pleading as a sanction for his discovery violations was reversed, where trial court made no finding of willfulness or bad faith, plaintiff was not prejudiced, and other sanctions were available. White v. White, 509 So. 2d 205, 1987 Miss. LEXIS 2466 (Miss. 1987).

**Expenses.**

Because expenses incurred on behalf of heirs and their attorneys were a direct result of a railroad company's failure to attend scheduled depositions as ordered by the trial court, and the heirs acted reasonably in relying on the trial court's order that the depositions proceed, with which order the company chose not to comply, an award of sanctions was proper and reasonable. Ill. Cent. R.R. v. Winters, 863 So. 2d 955, 2004 Miss. LEXIS 15 (Miss. 2004).

Miss. R. Civ. P. 37 required a railroad to pay the reasonable expenses, including attorney's fees, caused by its failure to comply with a discovery order to produce certain officers for oral depositions by the heirs in a wrongful death action; however, the sanction should have only included the heirs' expenses to attend the scheduled depositions, not the expenses to attend rescheduled depositions, which the heirs would have incurred anyway. Ill. Cent. R.R. Co. v. Winters, 815 So. 2d 1168, 2002 Miss. LEXIS 149 (Miss. 2002), overruled in part, Cooper Tire & Rubber Co. v. McGill, 890 So. 2d 859, 2004 Miss. LEXIS 939 (Miss. 2004).

As losing party in motion to compel discovery, husband in divorce action was required to pay expenses incurred by deponent in opposing motion, where deponent was entitled to assert privilege, husband's motion was not substantially justified, and circumstances did not make the award unjust. Barnes v. A Confidential Party, 628 So. 2d 283, 1993 Miss. LEXIS 527 (Miss. 1993).

Trial court erred in failing to award defendant reasonable expenses and attorney's fees incurred in preparing for and attending trial on date originally set; continuance was due to plaintiff's failure to timely disclose expert's name, and defendant was prepared to go to trial on date originally scheduled, as were its experts. Read v. Southern Pine Electric Power Asso., 515 So. 2d 916, 1987 Miss. LEXIS 2893 (Miss. 1987).

**Preclusion.**

Chancery court did not err in denying the husband's motion for sanctions against the wife pursuant to Miss. R. Civ. P. 37(e), in part because the chancery court was faced with misconduct from both parties. Thus, it was within the chancellor's discretion to refuse to award sanctions. Jones v. Jones, 995 So. 2d 743, 2007 Miss. App. LEXIS 846 (Miss. Ct. App. 2007), aff'd in part and rev'd in part, 995 So. 2d 706, 2008 Miss. LEXIS 581 (Miss. 2008).

After dismissing an insured's suit against insurers for payment of full benefits under a policy, the court abused its discretion in ordering, pursuant to Miss. R. Civ. P. 37(e), that the insured respond to prior discovery requests prior to refiling suit against the insurers because the order essentially enjoined the insured from proceeding with his claims anew until he complied with the prior order of the court. There was no evidence that the court considered any of the relevant factors for an injunction in its order. Ngo v. Centennial Ins. Co., 893 So. 2d 1076, 2005 Miss. App. LEXIS 1 (Miss. Ct. App. 2005).

Less than two business days before the trial was scheduled was not "reasonable" notice for a motion to compel discovery. Boutwell v. Boutwell, 829 So. 2d 1216, 2002 Miss. LEXIS 214 (Miss. 2002).

Where a party fails to comply with a court order permitting discovery, court may refuse to allow disobedient party to support its claims with the undisclosed evidence. Broadhead v. Bonita Lakes Mall, Ltd. Pshp., 702 So. 2d 92, 1997 Miss. LEXIS 531 (Miss. 1997).

Trial court erred by excluding written timber bid, where plaintiff disclosed its possible existence in answer to defendant's interrogatory; defendant could have discovered the document via a notice of deposition and subpoena duces tecum directed to witness, and therefore defendant was not ambushed by mid-trial discovery of the written bid. Kinard v. Morgan, 679 So. 2d 623, 1996 Miss. LEXIS 422 (Miss. 1996).

Photographs should not have been admitted into evidence in condemnation proceeding where they were not disclosed pursuant to both specific request and court order compelling discovery; remand was required since court could not say that introduction of the photographs could not have adversely affected integrity of the verdict. State Highway Comm'n v. Jones, 649 So. 2d 201, 1995 Miss. LEXIS 55 (Miss. 1995).

Chancery court was within its authority in excluding testimony of defendant's expert witness, where defendant failed to disclose expert's name in response to interrogatories and failed to supplement its answers before trial. Simmons v. Bank of Mississippi, 593 So. 2d 40, 1992 Miss. LEXIS 13 (Miss. 1992).

Permanent disability was a separate subject matter from causation, and plaintiffs' supplemental answer to expert interrogatory was insufficient to put defendant on notice that extent of disability might be a part of expert's testimony; expert's opinion therefore should have been excluded. T. K. Stanley, Inc. v. Cason, 614 So. 2d 942, 1992 Miss. LEXIS 844 (Miss. 1992).

Trial court did not err in applying sanctions and disallowing testimony and appraisal of expert not disclosed until day prior to trial. Varner v. Patrick, 523 So. 2d 319 (Miss. 1988).

Trial court was not required to exclude testimony of defendants' expert, where plaintiff did not request an order compelling discovery when defendants gave what plaintiff deemed to be unsatisfactory responses to its expert witness interrogatory. State Highway Com. v. Havard, 508 So. 2d 1099, 1987 Miss. LEXIS 2582 (Miss. 1987).

**Requirements.**

Imposition of a joint and several monetary sanction against plaintiff and its attorney due to discovery misconduct and false answers to interrogatories was proper in its action that arose from conduct by former employees with a competitor, despite the absence of a motion to compel because such a motion would have been futile due to plaintiff's tactics throughout the matter. Eaton Corp. v. Frisby, 133 So. 3d 735, 2013 Miss. LEXIS 596 (Miss. 2013).

Due to the lateness of the husband's motion to compel, coupled with the fact that the hearing date was set two months previously by agreed order, the chancellor determined that the hearing should proceed with limitations on the wife's presentation of evidence, Miss. R. Civ. P. 37(a). That resolution of the matter was within the chancellor's sound discretion. Pool v. Pool, 989 So. 2d 920, 2008 Miss. App. LEXIS 33 (Miss. Ct. App.), cert. denied, 993 So. 2d 832, 2008 Miss. LEXIS 383 (Miss. 2008).

A prior written court order is not required for issuance of sanctions under this rule. Herrington v. Herrington, 660 So. 2d 215, 1995 Miss. LEXIS 379 (Miss. 1994).

Not only may willful and intentional conduct be sanctioned, but courts have inherent power to impose sanctions to protect integrity of their processes, and when counsel's carelessness causes his opponent to expend time and money needlessly, it is not an abuse of discretion for court to require offending counsel to pay for his mistake, especially where out-of-town travel is involved. Vicksburg Refining, Inc. v. Energy Resources, Ltd., 512 So. 2d 901, 1987 Miss. LEXIS 2751 (Miss. 1987).

Trial court did not err in allowing plaintiff's expert to testify; although expert's name had not been provided to defendant until three days before scheduled trial, court granted plaintiff a continuance of almost three months and therefore there was no surprise to defendant. Read v. Southern Pine Electric Power Asso., 515 So. 2d 916, 1987 Miss. LEXIS 2893 (Miss. 1987).

Medical malpractice action was properly dismissed due to plaintiff's procrastination, disobedience to lower court's orders, willful failure to comply with most areas of discovery, and obvious contempt for court's processes. Williams v. Puryear, 515 So. 2d 1231, 1987 Miss. LEXIS 2925 (Miss. 1987).

**Sanctions available.**

Trial court did not abuse its discretion by sanctioning an attorney for violating its order sealing a portion of a document because the order was issued as a response to discovery issues in the course of discovery and thus, could properly be deemed a discovery order for which sanctions were appropriate; the order sealing a portion of the expert report was issued in the course of discovery to protect the victim from embarrassment from the salacious allegation. Smith v. Hickman, Goza & Spragins, PLLC, 265 So. 3d 139, 2019 Miss. LEXIS 22 (Miss. 2019).

When did lying under oath lose its egregious nature; such rationalization is not a standard of review, nor should it be a guide to the court's determination of a dismissal under the rule. Ashmore v. Miss. Auth. on Educ. TV, 148 So. 3d 977, 2014 Miss. LEXIS 407 (Miss. 2014).

Rule on sanctions not only empowers, but specifically grants trial courts the authority to dismiss a case with prejudice as may be just; any attempt to subvert the judicial process, as in this case, cuts against the very core of promoting the ends of justice and the ascertainment of the truth. Ashmore v. Miss. Auth. on Educ. TV, 148 So. 3d 977, 2014 Miss. LEXIS 407 (Miss. 2014).

Damages award entered after a default judgment based on discovery violations was not speculative where the cause of the damages was not on the table due to the default judgment, the conjectural nature of the minority shareholder's projected figures was addressed at length by the chancellor, and it was for the chancellor to weigh the evidence. Crossley v. Moore, 182 So. 3d 462, 2015 Miss. App. LEXIS 213 (Miss. Ct. App. 2015), cert. denied, 181 So. 3d 1010, 2016 Miss. LEXIS 22 (Miss. 2016).

Trial court was not manifestly wrong in its determination that there was, in fact, a discovery violation where the injured individual's answered an interrogatory about the extent of his injuries in a misleading manner. Kinzie v. Belk Dep't Stores, L.P., 164 So. 3d 974, 2015 Miss. LEXIS 128 (Miss. 2015).

Imposition of a joint and several monetary sanction against plaintiff and its attorney due to discovery misconduct and false answers to interrogatories was not an abuse of discretion in its action arising from former employees' conduct with a competitor, as plaintiff asserted a privilege but it failed to identify any of the "privileged" documents; further, its invocation of the privilege was in conjunction with a false and misleading response. Eaton Corp. v. Frisby, 133 So. 3d 735, 2013 Miss. LEXIS 596 (Miss. 2013).

Imposition of a joint and several monetary sanction against plaintiff and its attorney for "intentional discovery violations" was not an abuse of discretion in its action that arose from conduct by former employees with a competitor because plaintiff took affirmative actions to conceal a consulting agreement, such as responding falsely to an interrogatory. Eaton Corp. v. Frisby, 133 So. 3d 735, 2013 Miss. LEXIS 596 (Miss. 2013).

Trial court properly granted summary judgment to defendant on the basis that plaintiff failed to give defendant advance notice of the opinion testimony of plaintiff's expert so as to allow defendant to meaningfully cross-examine the expert at his deposition given that plaintiff's failure to designate the expert as an expert witness clearly constituted a discovery violation, and plaintiff had not provided any reason why she was unable to formally designate the expert as an expert witness and comply with the scheduling order. Buckley v. Singing River Hosp., 146 So. 3d 365, 2013 Miss. App. LEXIS 691 (Miss. Ct. App. 2013).

Chancery court did not abuse its discretion in excluding various documents relating to a husband's alleged gambling problems, under Miss. R. Civ. P. 37, because a wife failed to provide a reasonable explanation for not having produced these documents in a timely manner. Irby v. Estate of Irby, 7 So. 3d 223, 2009 Miss. LEXIS 146 (Miss. 2009).

In a child custody case, a chancellor's exclusion of all of a mother's witnesses was justified because the father had requested their identities during discovery, but the mother did not respond to the discovery request until two days before trial. Klink v. Brewster, 986 So. 2d 1060, 2008 Miss. App. LEXIS 382 (Miss. Ct. App. 2008).

Trial court properly exercised its authority to impose sanctions for abuse-of-discovery violations; while the striking of the corporation's expert witnesses was an extreme measure, the trial court acted within its discretion to do so. E.I. DuPont de Nemours & Co. v. Strong, 968 So. 2d 410, 2007 Miss. LEXIS 574 (Miss. 2007).

In a wrongful death action against defendant nursing home, exclusion of labor-hour reports was well within the discretion of the trial court; the trial judge, in considering whether a continuance to review the daily time sheets would have cured the prejudice to plaintiff estate, determined that a continuance would have pushed the trial back almost a year, and ruled that the only means of preventing prejudice was to exclude the time sheets. Mariner Health Care, Inc. v. Estate of Edwards, 964 So. 2d 1138, 2007 Miss. LEXIS 520 (Miss. 2007).

When an injured employee, who brought suit against her employer and a related casino alleging bad faith in connection to her workers' compensation claim, failed to comply with a trial court's discovery deadline, the trial court properly struck the employee's expert's affidavit. Buchanan v. Ameristar Casino Vicksburg, Inc., 957 So. 2d 969, 2007 Miss. LEXIS 130 (Miss. 2007).

Court properly denied defendant's motion for relief from a default judgment in plaintiff's action to recover damages for timber that was cut from land; plaintiff was not required to first obtain an entry of default by the clerk of the court, pursuant to Miss. R. Civ. P. 55(a), prior to obtaining the default judgment based on the entirely separate ground of discovery abuse, pursuant to Miss. R. Civ. P. 37(b)(2)(C). Miss. R. Civ. P. 37(b)(2)(C) is a totally distinct avenue for obtaining a default judgment than the provisions of Miss. R. Civ. P. 55. Hood v. Mordecai, 900 So. 2d 370, 2004 Miss. App. LEXIS 873 (Miss. Ct. App. 2004), cert. denied, 898 So. 2d 679, 2005 Miss. LEXIS 278 (Miss. 2005).

Although Miss. R. Civ. P. 37(b)(2) gave a trial judge several options to compel a party to comply with discovery, and the decision to impose sanctions for discovery abuse was vested in the trial court's discretion, a trial court had to consider other alternatives before summarily dismissing a case, thereby depriving a litigant of his rights; the circumstances of the case did not warrant such an extreme and harsh remedy as a dismissal with prejudice. Harvey v. Stone County Sch. Dist., 862 So. 2d 545, 2003 Miss. App. LEXIS 938 (Miss. Ct. App. 2003).

Sanction for providing an unsworn supplementation to a prior sworn response should possibly be monetary, but should not be the complete exclusion of that evidence, when an apparent good faith effort was made to disclose the evidence. Caracci v. International Paper Co., 699 So. 2d 546, 1997 Miss. LEXIS 322 (Miss. 1997).

Chancellor erred in imposing same discovery sanctions on second defendant that it imposed on first, where second defendant was not a named party in chancellor's earlier order compelling discovery. TXG Intrastate Pipeline Co. v. Grossnickle, 716 So. 2d 991, 1997 Miss. LEXIS 512 (Miss. 1997).

Imposition of monetary sanctions could not be upheld in absence of a discovery order which was violated. January v. Barnes, 621 So. 2d 915, 1992 Miss. LEXIS 832 (Miss. 1992).

Circuit judge did not err in assessing $500 sanction against plaintiff for his false answer to interrogatory, which neither he nor his counsel ever attempted to correct. Nichols v. Munn, 565 So. 2d 1132, 1990 Miss. LEXIS 295 (Miss. 1990).

M.R.C.P. Rule 37(c) did not contemplate sanctions where party denied requests for admissions which were, in effect, an accusation of arson, and therefore trial court did not err in failing to award sanctions for alleged discovery violations. Cooper v. State Farm Fire & Casualty Co., 568 So. 2d 687, 1990 Miss. LEXIS 273 (Miss. 1990).

Trial court was required to state with particularity its reasons for denying defendant's motion for sanctions under subdivision (c) of this rule, and court's failure to comply with that requirement was error. Cooper v. State Farm Fire & Casualty Co., 568 So. 2d 687, 1990 Miss. LEXIS 273 (Miss. 1990).

**Sanctions improper.**

In a products liability case, a trial court abused its discretion by imposing sanctions arbitrarily since the record reflected that an injured party and his expert witness complied with a subpoena duces tecum actually served by a ladder company. The attendance of a nonparty expert witness had to be obtained by a proper subpoena; a subpoena ad testificandum requiring the presence of the expert witness was not served. Laws v. Louisville Ladder, Inc., 146 So. 3d 380, 2014 Miss. App. LEXIS 454 (Miss. Ct. App. 2014).

**Sanctions properly denied.**

Circuit court properly denied passenger's motion for sanctions against a truck driver and a trucking company under Miss. R. Civ. P. 37(c) for their failure to admit fault for the underlying accident in responses to requests for admission because they had reasonable grounds to conclude that the automobile driver's negligence contributed to the collision. While the truck driver and company admitted liability during the trial, the issue of whether automobile driver was partially at fault was an issue to be tried regardless of the fact that the truck driver and/or the company denied or conceded their negligence. Perkins v. Star Transp., Inc., 75 So. 3d 1065, 2011 Miss. App. LEXIS 209 (Miss. Ct. App.), cert. denied, 76 So. 3d 169, 2011 Miss. LEXIS 556 (Miss. 2011).

**Setting aside answer.**

The trial court properly set aside the defendant's answer where (1) he was advised by his own attorney, both verbally and through certified mail, as well as the circuit clerk's mailed copy of the order compelling response to discovery, that discovery had to be complied with, yet he took no action, and (2) during a hearing held upon his motion to set aside the default judgment, he admitted that after he retained an attorney, he made no further contact with him even though he was aware of the pending action. Duckworth v. Strite, 748 So. 2d 794, 1999 Miss. App. LEXIS 186 (Miss. Ct. App. 1999).

### RESEARCH REFERENCES

**ALR.**

Sanctions available under Rule 37, Federal Rules of Civil Procedure, other than exclusion of expert testimony, for failure to obey discovery order not related to expert witness. 156 A.L.R. Fed. 601.

# CHAPTER VI. TRIALS

## Rule 38. Jury trial of right.

(a) *Right preserved.* — The right of trial by jury as declared by the Constitution or any statute of the State of Mississippi shall be preserved to the parties inviolate.

(b) *Waiver of jury trial.* — Parties to an action may waive their rights to a jury trial by filing with the court a specific, written stipulation that the right has been waived and requesting that the action be tried by the court. The court may, in its discretion, require that the action be tried by a jury notwithstanding the stipulation of waiver.

**HISTORY: Comments repealed effective July 1, 2014.**

### JUDICIAL DECISIONS

#### ANALYSIS

In general.
Forfeiture.
Waiver.

**In general.**

Neither Art. 3, § 31 of the Mississippi Constitution nor M.R.C.P. 38, both of which provide for the right to a jury trial, require that right extend to appellate proceedings. Cockrell v. City of Southaven, 730 So. 2d 1119, 1998 Miss. LEXIS 634 (Miss. 1998), cert. denied, 528 U.S. 817, 120 S. Ct. 57, 145 L. Ed. 2d 50, 1999 U.S. LEXIS 5010 (U.S. 1999).

Chancery court was not required to transfer case to circuit court in order to provide injured bus passengers with a jury trial, where plaintiff insurer, in good faith, interpled $25,000 coverage on bus involved, and chancellor, in good faith, received and proceeded with jurisdiction of case in his court. Cossitt v. Nationwide Mut. Ins. Co., 551 So. 2d 879, 1989 Miss. LEXIS 318 (Miss. 1989), overruled in part, Meyers v. Am. States Ins. Co., 914 So. 2d 669, 2005 Miss. LEXIS 322 (Miss. 2005).

**Forfeiture.**

Sellers tried a breach of contract issue to the bench and failed to demand a jury trial until the damages phase. Because the sellers forfeited the right to a jury trial by failing to exercise the right in a timely manner, the sellers were not entitled to a jury trial on the issues of damages and attorney fees. Rolison v. Fryar, 204 So. 3d 725, 2016 Miss. LEXIS 488 (Miss. 2016).

**Waiver.**

An implied waiver cannot be derived from a plaintiff's election of forum; a specific, written stipulation waiving the right to a jury is required. Burnette v. Hartford Underwriters Ins. Co., 770 So. 2d 948, 2000 Miss. LEXIS 218 (Miss. 2000).

## Rule 39. Trial by jury or by the court. [Omitted].

## Rule 40. Assignment of cases for trial.

(a) *Methods.* — Courts shall provide for placing of actions upon the trial calendar

(1) without request of the parties; or
(2) upon request of a party and notice to the other parties; or,
(3) in such other manner as the court deems expedient.

Prior to the calling of a case for trial, the parties shall be afforded ample opportunity, in the sound discretion of the court, for completion of discovery.

(b) *Notice.* — The court shall provide by written direction to the clerk when a trial docket will be set. The clerk shall at least five (5) days prior to the date on which the trial docket will be set notify all attorneys and parties without attorneys having cases upon the trial calendar of the time, place, and date when said docket shall be set. All cases shall be set on the trial docket at least twenty (20) days before the date set for trial unless a shorter period is agreed upon by all parties or is available under Rule 55. The trial docket shall be prepared by the clerk at the time actions are set for trial and shall state the case to be tried, the date of trial, the attorneys of record in the case, and the place of trial. Additionally, said trial docket shall reflect such attorneys of record and parties representing themselves as were present personally or by designee when the trial docket was set. The clerk shall within three (3) days after a case has been placed on the trial docket notify all parties who were not present personally or by their attorney of record at the docket setting as to their trial setting. Notice shall be by personal delivery or by mailing of a notice within said three (3) day period. Matters in which a defendant is summoned to appear and defend at a time and place certain pursuant to Rule 81 or in which a date, time and place for trial have been previously set shall not be governed by this rule.

(c) *Trial by agreement.* — Parties, including those who are in a representative or judicial capacity, may waive any waiting period imposed by these rules or statute and agree to a time and place for trial.

**HISTORY: Amended effective July 1, 1986; September 1, 1987; March 1, 1989; Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective March 1, 1989, Rule 40(a) was amended by abrogating reference to local rules. 536-538 So. 2d XXX (West Miss. Cas. 1989).

Effective September 1, 1987, Rule 40 was amended by adding subsection (c) providing for the scheduling of trials by agreement of the parties. 508-511 So. 2d XXVIII (West Miss. Cas. 1987).

Effective July 1, 1986, Rule 40(b) was amended by substantially rewriting it to shorten the time period provided for giving interested attorneys and parties notice of the setting of the trial docket; to provide for at least twenty days between the time of the setting of a case on the docket and the time of the trial; to provide for certain information to be recorded on the docket; and for other purposes. 486-490 So. 2d XXI (West Miss. Cas. 1986).

## ADVISORY COMMITTEE NOTE

The twenty-day waiting period is inapplicable to hearings conducted by the court in connection with default judgments under Rule 55.

## JUDICIAL DECISIONS

### ANALYSIS

In general.
Notice.

**In general.**

The parties to the action did not agree to a trial date and the clerk did not provide mandatory written notice of the trial date; thus, the judgment should have been set aside and a new trial date fixed. King v. King, 556 So. 2d 716, 1990 Miss. LEXIS 32 (Miss. 1990).

**Notice.**

Father's claim that a chancellor violated Miss. R. Civ. P. 40 lacked merit where, but for his incarceration, the father could have represented himself at the docket call, Mississippi law did not allow non-lawyers to represent others, and it was clear that the father did not suffer any permanent prejudice as a result of not being notified of the hearing . Young v. O'Beirne, 147 So. 3d 877, 2014 Miss. App. LEXIS 311 (Miss. Ct. App. 2014).

Trial court did not err in denying appellant's motion to set aside a judgment entered in favor of appellees because appellant had sufficient notice of his trial when he admittedly signed the agreed order setting the trial, appellant's presence at the hearing for setting the trial date was sufficient notice to satisfy Miss. R. Civ. P. 40(b), and his agreement to reschedule the trial date was explicitly allowed under Rule 40(c); appellant provided no evidence that the trial court awarded relief to appellees based solely on the fact that he was not present on the day of trial because testimony and other documentary evidence were received and admitted into evidence. Dufrene v. Slade, 21 So. 3d 703, 2009 Miss. App. LEXIS 773 (Miss. Ct. App. 2009).

Chancery court was not required, under Miss. R. Civ. P. 40(b), to send a husband notice of a divorce hearing because the husband did not respond to the chancery court regarding the action, after he was personally served with process, under Miss. R. Civ. P. 4(h), within 120 days of the filing of the complaint by a wife. Carlisle v. Carlisle, 11 So. 3d 142, 2009 Miss. App. LEXIS 234 (Miss. Ct. App. 2009).

Appellate court in no way suggests, intimates or holds that the date of a divorce trial must be set on the trial docket at least 20 days prior to trial. In many instances, if not most, complaints for divorce may be set for trial outside of the normal docket setting of the civil trial docket because a divorce case may not be set down on the issue docket unless at the request of one of the parties. Miss. Code Ann. § 93-5-7. The appellate court simply holds that once a party appears in a temporary phase of the divorce proceeding, the party is entitled to notice of the subsequent hearing on the underlying divorce proceeding unless the party is so notified during the temporary proceeding. Brown v. Brown, 872 So. 2d 787, 2004 Miss. App. LEXIS 439 (Miss. Ct. App. 2004).

Subsection (b) does not require that a notice of hearing be sent to a party who never answered the complaint. Stinson v. Stinson, 738 So. 2d 1259, 1999 Miss. App. LEXIS 225 (Miss. Ct. App. 1999).

The notice requirement of subsection (b) does not apply to the uncontested motion schedule. Stinson v. Stinson, 738 So. 2d 1259, 1999 Miss. App. LEXIS 225 (Miss. Ct. App. 1999).

Although the mailing of a notice to an incorrect address – the last number in the zip code was incorrect – negated the presumption of delivery, the trial court properly found that there was proper and timely delivery based on the evidence. Thames v. Smith Ins. Agency, 710 So. 2d 1213, 1998 Miss. LEXIS 238 (Miss. 1998).

## Rule 41. Dismissal of actions.

(a) *Voluntary dismissal effect thereof.* —

(1) By Plaintiff By Stipulation. Subject to the provisions of Rule 66, or of any statute of the State of Mississippi, and upon the payment of all costs, an action may be dismissed by the plaintiff without order of court:

(i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs; or

(ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action.

Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice.

(2) By Order of Court. Except as provided in paragraph (a)(1) of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counter-claim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action may be dismissed but the counter-claim shall remain pending for adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) *Involuntary dismissal: effect thereof.* — For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court may then render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court may make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any other dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(c) *Dismissal of counter-claim, cross-claim or third-party claim.* — The provisions of this rule apply to the dismissal of any counter-claim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (a)(1) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) *Dismissal on clerk's motion.* —

(1) Notice. In all civil actions wherein there has been no action of record during the preceding twelve months, the clerk of the court shall mail notice to the attorneys of record that such case will be dismissed by the court for want of prosecution unless within thirty days following said mailing, action of record is taken or an application in writing is made to the court and good cause shown why it should be continued as a pending case. If action of record is not taken or good cause is not shown, the court shall dismiss each such case without prejudice. The cost of filing such order of dismissal with the clerk shall not be assessed against either party.

(2) Mailing Notice. The notice shall be mailed in every eligible case not later than thirty days before June 15 and December 15 of each year, and all such cases shall be presented to the court by the clerk for action therein on or before June 30 and December 31 of each year. These deadlines shall not be interpreted as a prohibition against mailing of notice and dismissal thereon as cases may become eligible for dismissal under this rule. This rule is not a limitation upon any other power that the court may have to dismiss any action upon motion or otherwise.

(e) *Cost of previously dismissed action.* — If a plaintiff whose action has once been dismissed in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

**HISTORY: Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

## ADVISORY COMMITTEE NOTE

After the court clerk has given notice pursuant to Rule 41(d), a party seeking to avoid dismissal for lack of prosecution must either take some "action of record" or apply in writing to the court and demonstrate good cause for continuing the case. Rule 41(d) does not define what constitutes "an action of record." *See Ill. Central R.R. Co. v. Moore,* 99 So. 2d 723, 726 (Miss. 2008). Pleadings, discovery requests, and deposition notices are "actions of record." Id. at 728. An ex parte letter to the court clerk simply requesting that the case remain on the court's active docket is not an application in writing that demonstrates good cause. Id. at 729-730. Rather than writing a letter to the clerk, a party should file a written motion with the court that complies with Rule 7(b)(1) and that demonstrates good cause, and should serve such motion in accordance with M.R.C.P. 5. Id. at 727-730. But see *Cucos, Inc. v. McDaniel,* 938 So. 2d 238, 247 (Miss. 2006) (finding that the trial court did not abuse its discretion in considering the plaintiff's attorney's letter to the clerk requesting that the case remain on the court's active docket as sufficient to prevent dismissal where:...(i) the court held a hearing and the plaintiff's lawyer also represented he was trying to schedule conferences so that defense counsel could talk to plaintiff's expert witnesses in an effort to facilitate settlement; (ii) local practice was to treat such letters as sufficient; and (iii) the plaintiff was not served with a proper copy of the order of dismissal). Generally, compliance with local practice that is inconsistent with the Mississippi Rules of Civil Procedure will not, standing alone, be sufficient to prevent dismissal. *See Ill. Central R.R. Co. v. Moore,* 994 So. 2d 723, 728 (Miss. 2008).

## JUDICIAL DECISIONS

### ANALYSIS

In general.
Construction.
Applicability.
Abuse of discretion.
Bench trials.
Dismissal for discovery misconduct.
Dismissal not warranted.
Dismissal warranted.
Dismissal with prejudice.
Dismissal without prejudice.
Failure to prosecute.
Findings.
Reinstitution of cases.
Requirements.
Res judicata.
Review.
Waiver.
What constitues "application in writing."

**In general.**

Motion for involuntary dismissal applies to cases tried without a jury and may be made by the defendant after the plaintiff presents its evidence. The trial judge, who is also the trier of fact, then considers the evidence fairly and determines whether or not the evidence which has not been rebutted would entitle the plaintiff to a judgment. W.R. Berkley Corp. v. Rea's Country Lane Constr., 140 So. 3d 437, 2013 Miss. App. LEXIS 464 (Miss. Ct. App. 2013), cert. denied, 139 So. 3d 74, 2014 Miss. LEXIS 234 (Miss. 2014).

Aggravating factors to be considered include: (1) the extent to which the plaintiff, as distinguished from his counsel, was personally responsible for the delay, (2) the degree of actual prejudice to the defendant, and (3) whether the delay was the result of intentional conduct. Hillman v. Weatherly, 14 So. 3d 721, 2009 Miss. LEXIS 387 (Miss. 2009).

Trial court did not abuse its discretion in dismissing without prejudice, pursuant to Miss. R. Civ. P. 41(b), the claims of severed plaintiffs which were not properly filed in Noxubee County; the trial court's actions were in conformity with a procedure later prescribed by the supreme court where upon plaintiffs could refile in a proper venue. Gordon v. Honeywell Int'l., Inc., 962 So. 2d 547, 2007 Miss. LEXIS 439 (Miss. 2007).

Where a divorce action was filed ten years earlier and temporary support was ordered, it was properly not considered the line of demarcation for the equitable division of marital assets because the case was subsequently dismissed as being stale under Miss. R. Civ. P. 41; the dismissal relieved the husband of his support obligations. Marshall v. Marshall, 979 So. 2d 699, 2007 Miss. App. LEXIS 411 (Miss. Ct. App. 2007).

There was nothing to prevent a chancellor in one case from dismissing litigation in another case, pursuant to the parties' agreement. Hayes v. Leflore County Bd. of Supervisors, 935 So. 2d 1015, 2006 Miss. LEXIS 445 (Miss. 2006).

Because the driver failed to prove that the State Aid defendants were negligent, the trial court properly dismissed the State Aid defendants under Miss. R. Civ. P. 41(b). Ladner v. Stone County, 938 So. 2d 270, 2006 Miss. App. LEXIS 49 (Miss. Ct. App.), cert. denied, 937 So. 2d 450, 2006 Miss. LEXIS 542 (Miss. 2006).

Trial court's grant of the county's motion for voluntary dismissal without prejudice was an adverse and final appealable order, and the award of attorney's fees under Miss. R. Civ. P. 41(a)(2) was well supported but the reasonableness of fee amount was never substantiated, therefore the fee award was vacated and the case was remanded for the trial court to determine the reasonableness of the fees pursuant to the factors provided in Miss. R. Prof. Conduct 1.5. BellSouth Pers. Commun., LLC v. Bd. of Supervisors, 912 So. 2d 436, 2005 Miss. LEXIS 390 (Miss. 2005).

Paramedic testified that the "hallmark signs" of a placental abruption, excruciating pain and excessive bleeding, were not present, and both paramedics testified that they did not see blood. The pregnant employee testified that blood was not found because her co-workers had wiped the blood from the floor, but the trial court properly found that since neither paramedic testified that they saw blood then it could only find such a decision to be discretionary; therefore, given that the employee's condition was abnormal, whether to have treated the situation as a "load and go" required the paramedics to use their own judgment, the trial court correctly deemed the paramedic's decision as discretionary, and it correctly granted the city's motion to dismiss the wrongful death action under Miss. R. Civ. P. 41(b). Sanders v. Riverboat Corp., 913 So. 2d 351, 2005 Miss. App. LEXIS 272 (Miss. Ct. App. 2005).

Power to dismiss for failure to prosecute under Miss. R. Civ. P. 41(b) was inherent in any court of law or equity, being a means necessary to the orderly expedition of justice and the court's control of its own docket; no action in the client's case had been taken during the preceding 12 months and no application was made and good cause shown why his case should not have been dismissed, and the client's motion for reconsideration was void as it was not timely filed. Curry v. Walls, 871 So. 2d 762, 2004 Miss. App. LEXIS 324 (Miss. Ct. App. 2004).

In the context of reviewing a dismissal for failure to prosecute under Miss. R. Civ. P. 41(b), there is no requirement that a party must be represented by an attorney, and dismissing a party's lawsuit simply because that party does not acquire an attorney is clearly an abuse of discretion. Camacho v. Chandeleur Homes, Inc., 862 So. 2d 540, 2003 Miss. App. LEXIS 754 (Miss. Ct. App. 2003).

Though the testimony of a natural mother and maternal grandmother of an adopted child in support of the mother's complaint to revoke consent suggested at least an inference of undue influence, the chancellor had the opportunity to observe the witnesses' manner and demeanor; accordingly, the chancellor did not manifestly err by finding that the mother had failed to meet her burden of proof or err in granting dismissal to the adoptive parents under Miss. R. Civ. P. 41(b). C.T. v. R.D.H., 843 So. 2d 690, 2003 Miss. LEXIS 201 (Miss. 2003).

Federal court granted plaintiffs' motion to dismiss the removed action where plaintiffs filed a stipulation of dismissal in the state court action under Miss. R. Civ. P. 41(a) after the notice of removal had been filed in the federal court but before the state court had been notified of the removal, as the state court's jurisdiction continued until it had notice of the removal, and the filing of defendants' answer in federal court had no effect on the state court's jurisdiction. Davis v. Estate of Harrison, 214 F. Supp. 2d 695, 2002 U.S. Dist. LEXIS 15130 (S.D. Miss. 2002).

The applicable standard of review to an appeal of grant or denial of a motion to dismiss is substantial evidence/manifest error. Alexander v. Brown, 793 So. 2d 601, 2001 Miss. LEXIS 212 (Miss. 2001).

The rule is clear and unambiguous on its face and admits of no exceptions that call for the exercise of judicial discretion by any court; other than to determine, should the question arise, whether an answer or a motion for summary judgment has in fact been filed prior to the filing of a notice of dismissal, a court has no function under the rule. McGriggs v. Montgomery, 710 So. 2d 886, 1998 Miss. App. LEXIS 192 (Miss. Ct. App. 1998).

Unless otherwise specifically ordered by the court, an involuntary dismissal under subsection (b) ordinarily operates as an adjudication upon the merits and is with prejudice. Taylor v. GMC, 717 So. 2d 747, 1998 Miss. LEXIS 361 (Miss. 1998).

Standard of review applicable on motion to dismiss under subdivision (b) of this rule is distinguished from that applicable on motion for directed verdict. Stewart v. Merchants Nat'l Bank, 700 So. 2d 255, 1997 Miss. LEXIS 237 (Miss. 1997).

**Construction.**

Miss. R. Civ. P. 41(b) embodies the tenet that any court of law or equity may exercise the power to dismiss for want of prosecution; this power, inherent to the courts, is necessary as a means to the orderly expedition of justice and the court's control of its own docket. However, the remedy of dismissal with prejudice is an extreme and harsh sanction that deprives a litigant of the opportunity to pursue his claim, and any dismissals with prejudice are reserved for the most egregious cases; what constitutes failure to prosecute is considered on a case-by-case basis. Hillman v. Weatherly, 14 So. 3d 721, 2009 Miss. LEXIS 387 (Miss. 2009).

Case should be dismissed with prejudice under Miss. R. Civ. P. 41(b) only if lesser sanctions are inadequate; lesser sanctions include fines, costs, or damages against plaintiff or his counsel, attorney disciplinary measures, conditional dismissal, dismissal without prejudice, and explicit warnings. Where there is no indication in the record that the lower court considered any alternative sanctions to expedite the proceedings, appellate courts are less likely to uphold a Rule 41(b) dismissal. Hillman v. Weatherly, 14 So. 3d 721, 2009 Miss. LEXIS 387 (Miss. 2009).

Letter in response to a Miss. R. Civ. P. 41(d) motion for dismissal that simply requests that a case remain on the docket is an action of record when the letter is: (1) timely sent within the 30-day period which begins upon the filing of the motion; (2) found to be a sufficient action on the record and that finding is not in contradiction to an existing statute or decision of the Supreme Court of Mississippi; and (3) considered as part of a hearing where the trial court determined good cause existed for allowing the case to remain on its docket. Cucos, Inc. v. McDaniel, 938 So. 2d 238, 2006 Miss. LEXIS 488 (Miss. 2006).

Under subdivision (b) of this rule, dismissal for lack of jurisdiction does not operate as an adjudication on the merits. Jones v. Starr, 586 So. 2d 788, 1991 Miss. LEXIS 600 (Miss. 1991).

Subdivision (a)(2) of this rule could not be interpreted and interposed to prevent State of Mississippi and Attorney General from proceeding with chancery court matter until they paid intervenor's attorneys' fees. State ex rel. Pittman v. Griffin, 450 So. 2d 426, 1984 Miss. LEXIS 1714 (Miss. 1984).

**Applicability.**

Although a motion at the conclusion of the claimant's case-in-chief was described as a motion for a directed verdict at trial and on appeal, the motion was technically one for a Miss. R. Civ. P. 41 involuntary dismissal, as the civil case was tried before a judge, not a jury. Crowell v. Butts, 153 So. 3d 719, 2013 Miss. App. LEXIS 866 (Miss. Ct. App. 2013), cert. denied, 145 So. 3d 674, 2014 Miss. LEXIS 395 (Miss. 2014), aff'd in part and rev'd in part, 153 So. 3d 684, 2014 Miss. LEXIS 530 (Miss. 2014).

Order of dismissal from the justice court stated that the matter came on the "motion of the defendant requesting this Court to dismiss the appeal filed herein," and the clerk's docket entry did not indicate that a written motion to dismiss was filed; there was no transcript of a proceeding that would indicate that an oral motion was presented to the court, and there appeared to be no basis under Miss. R. Civ. P. 41 for the circuit court to have dismissed this action. Statham v. Miller, 988 So. 2d 407, 2008 Miss. App. LEXIS 401 (Miss. Ct. App. 2008).

Although the proper motion would have been one for an involuntary dismissal, a trial court erred when it granted a directed verdict in an action alleging fraud, breach of contract, and negligence because the evidence showed that a travel company held itself out as an agent of a foreign company operating an airplane, and an airport authority would not have incurred advertising costs had it known the true facts. Gulfport-Biloxi Reg'l Airport Auth. v. Montclair Travel Agency, Inc., 937 So. 2d 1000, 2006 Miss. App. LEXIS 685 (Miss. Ct. App. 2006).

Circuit court erred in its application of the law when it denied a bank's motion to substitute itself as a plaintiff and to dismiss the litigation; the bank purchased the lawsuit as a chose in action when a summary judgment against a corporation was executed, and as such the bank owned the lawsuit, and it could substitute itself as a party. Citizens Nat'l Bank v. Dixieland Forest Prods., LLC, 935 So. 2d 1004, 2006 Miss. LEXIS 409 (Miss. 2006).

Even though presented as a summary judgment motion, the chancellor's dismissal of the buyers' complaint for lack of evidence was best categorized as an involuntary dismissal under Miss. R. Civ. P. 41(b); although the seller moved for summary judgment, he substantively argued a motion to dismiss, and the appellate court would not hold him in error for that. Little v. Miller, 909 So. 2d 1256, 2005 Miss. App. LEXIS 125 (Miss. Ct. App. 2005).

Although defendant argued that the trial court erred in dismissing his appeal because it was dismissed by means of a procedure for dismissal of state civil, not criminal cases, and the appellate court initially agreed that Miss. R. Civ. P. 5 and 41 applied to civil and not criminal cases; an appeal was not perfected until a written notice of appeal and a cost bond were filed within 30 days of the judgment appealed, such that both a cost and appearance bond were required in appeals from municipal courts, and no Mississippi case permitted the filing of the required bonds past the 30-day appeal time. Riley v. Town of Lambert, 856 So. 2d 721, 2003 Miss. App. LEXIS 910 (Miss. Ct. App. 2003).

Trial court properly dismissed former university professor's tortious interference with contract claim against the university that formerly employed her and its officials because the professor's claim was covered by the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq.; accordingly, the professor had to comply with the Act's requirements as it was the exclusive remedy for the professor under Miss. Code Ann. § 11-46-7(1); furthermore, the professor's claim was time-barred under Miss. Code Ann § 11-46-11(3) as it was not timely filed. Black v. Ansah, 2003 Miss. App. LEXIS 502 (Miss. Ct. App. June 3, 2003), op. withdrawn, sub. op., 876 So. 2d 395, 2003 Miss. App. LEXIS 948 (Miss. Ct. App. 2003).

Where attorneys in trespass action discovered, on the day of trial, that plaintiffs had conveyed property in question to their daughter some five months earlier, trial court correctly granted plaintiffs' motion for a voluntary dismissal, with refiling of action conditioned upon payment of defendants' legal expenses incurred from date of conveyance to date of trial. Roebuck v. City of Aberdeen, 671 So. 2d 49, 1996 Miss. LEXIS 59 (Miss. 1996).

Chancellor properly dismissed husband's request to reduce child support payments; husband's admitted failure to report cash payments prevented him from showing the requisite inability to pay awarded amount of child support, and thus husband failed to prove the essential element of a material change in circumstances. Herrington v. Herrington, 660 So. 2d 215, 1995 Miss. LEXIS 379 (Miss. 1994).

Trial court's dismissal of intervenor as a party defendant did not constitute dismissal of action, and thus intervenor's argument that this rule required its consent before its dismissal as a party was not applicable. Country Club of Jackson, Inc. v. Saucier, 498 So. 2d 337, 1986 Miss. LEXIS 2751 (Miss. 1986).

**Abuse of discretion.**

Trial court abused its discretion in dismissing an action for failure to obtain counsel, as: (1) there was no factual basis to support the entry of the order of dismiss all; (2) the procedural requirements were not followed and proper notice was not permitted by the court's action because Miss. R. Civ. P. 6 required that defendants give plaintiffs notice of their motion to dismiss and at least five days to respond, but the court entered an order one day after the motion was executed; and (3) there was no legal basis to support the dismissal because there was no requirement that a party be represented by an attorney. Holly v. Harrah's Tunica Corp., 962 So. 2d 136, 2007 Miss. App. LEXIS 499 (Miss. Ct. App. 2007).

While an adverse decision in a will contest was on appeal, the executor, who, acting pro se, had filed the appeal, filed a motion for judgment notwithstanding the verdict, or in the alternative, for a new trial, leading to the chancery court's imposition of sanctions; however, the executor had filed a notice of withdrawal of the motion, and on that same day, the decedent's daughter's attorney filed a motion for sanctions. While it was perhaps debatable whether the executor's motion for a new trial was considered an action within the meaning of Miss. R. Civ. P. 41(a), it was significant that the executor sought a dismissal before any responsive pleading was filed, thus,the appellate court held the chancery court had abused its discretion in ordering sanctions in the amount of $ 1,425, and reduced the amount of sanctions significantly. Volmer v. Volmer (In re Estate of Volmer), 869 So. 2d 1076, 2004 Miss. App. LEXIS 281 (Miss. Ct. App. 2004).

Given the preference for merit-based dispositions of disputes, the chancellor abused his discretion in dismissing with prejudice a petition to establish heirship as a sanction for the petitioner's failure to return an automobile to the administratrix of the decedent's estate. Smith v. Hunter (In re Estate of Hunter), 736 So. 2d 440, 1999 Miss. App. LEXIS 113 (Miss. Ct. App. 1999).

**Bench trials.**

Chancery court properly dismissed a daughter's claim of undue influence on inter vivos transfers because a brother proved by clear and convincing evidence that he had acted in good faith, his father had full knowledge and deliberation of his actions and their consequences, and the father's independent consent and action; the brother had already offered the evidence before the daughter presented her evidence. Hicks v. Bowling (In re Will of Bowling), 155 So. 3d 907, 2014 Miss. App. LEXIS 480 (Miss. Ct. App. 2014).

Chancery court properly dismissed a daughter's will contest because evidence of a confidential relationship between her brother and father was not enough by itself to raise a presumption of undue influence over the father's will; the daughter pointed to no record evidence showing that the brother abused his position of trust with their father. Hicks v. Bowling (In re Will of Bowling), 155 So. 3d 907, 2014 Miss. App. LEXIS 480 (Miss. Ct. App. 2014).

On appeal in favor of the son in the daughter's action seeking to set aside a conveyance of land to the son, the motion made in the case was improperly denominated as a motion for a directed verdict under Miss. R. Civ. P. 50(a). In a bench trial, the proper motion to make at the close of the case-in-chief was a motion for involuntary dismissal under Miss. R. Civ. P. 41(b). Lynch v. Summerlin (In re Summerlin), 989 So. 2d 466, 2008 Miss. App. LEXIS 498 (Miss. Ct. App. 2008).

**Dismissal for discovery misconduct.**

Medical malpractice complaint was properly dismissed with prejudice because, when plaintiffs (1) did not submit answers to interrogatories until 435 days past the deadline in Miss. R. Civ. P. 33(b)(3), (2) did not begin discovery until almost a year past the deadline in Miss. Unif. Cir. & Cty. R. 4.04(A), and (3) did not reply to the motion to dismiss within ten days, under Miss. Unif. Cir. & Cty. R. 4.03(2), it was unnecessary to show plaintiffs' contumacious conduct, prejudice from plaintiffs' unreasonable delay was presumed, even though defendants did not show witnesses' fading memories and no aggravating factors were present, and lesser sanctions would not suffice, since the case was not an isolated incident of one missed deadline or a short, delayed response. Holder v. Orange Grove Med. Specialties, P.A., 54 So. 3d 192, 2010 Miss. LEXIS 640 (Miss. 2010).

Dismissal of action for discovery misconduct was proper where requested documentation regarding revenues and expenses was not produced, despite court orders, by employee who was alleging improper termination of his employment, and the willfulness and bad faith of the employee was clearly demonstrated where he refused to answer interrogatories and to produce documents for well over one year, in the face of at least two court orders. Smith v. Tougaloo College, 805 So. 2d 633, 2002 Miss. App. LEXIS 53 (Miss. Ct. App. 2002).

**Dismissal not warranted.**

Mother presented sufficient evidence of a material change in circumstances to survive the involuntary dismissal of the mother's motion for modification because the mother showed a material change of circumstances had occurred in the custodial home that reflected a substantial deviation from the original custody order. Furthermore, the mother presented sufficient evidence that this change adversely affected the children, who did not adjust well to change due to their autism, and that the changes in the custodial home were unforeseeable. Page v. Graves, 283 So. 3d 269, 2019 Miss. App. LEXIS 439 (Miss. Ct. App. 2019).

Special chancellor committed manifest error and was clearly erroneous in dismissing a former wife's contempt action against her former husband because the parties' agreement and the final decree of divorce complied with the writing and signature requirements of the statute of frauds; the agreement was an enforceable contract that satisfied the statute of frauds because the husband signed the agreement, and the agreement was confirmed in the judgment. Jones v. Jones, 239 So. 3d 1091, 2018 Miss. App. LEXIS 106 (Miss. Ct. App. 2018).

Trial court erred in dismissing an assignee's action on the ground that it was required to amend its pleadings to include Florida judgments against a debtor in order to recover against a guarantor individually because the assignee's complaint put the guarantor on notice that it was pursuing reimbursement according to the terms of the continuing guaranty that she personally signed. Biel REO, LLC v. Lee Freyer Kennedy Crestview, LLC, 242 So. 3d 833, 2018 Miss. LEXIS 84 (Miss. 2018).

Reversal of a chancellor's dismissal of an adverse possession claim and remand for further proceedings was necessary because the chancellor erroneously applied the relevant law when the chancellor only focused on the period of time that the neighbors held title to the real property at issue. On remand, the chancellor was to conduct further proceedings to determine whether the claimants adversely possessed the property at issue at any point prior to or overlapping their neighbors' purchase of the land. Presley v. Stokes, 205 So. 3d 619, 2016 Miss. App. LEXIS 748 (Miss. Ct. App. 2016).

In a wife's divorce action, the chancery court erred in granting a husband's motion to dismiss because it did not apply the correct legal standard when it failed to consider acts of child mistreatment by the husband in assessing whether sufficient evidence of habitual cruel and inhuman treatment existed. Pittman v. Pittman, 195 So. 3d 727, 2016 Miss. LEXIS 231 (Miss. 2016).

In a case in which appellant, along with her children, filed claims against her ex-husband's estate, the chancellor erred in finding that res judicata applied to appellant's claims of past-due child support obligations and a life insurance policy because of a prior contempt action that had resulted in a dismissal under Miss. R. Civ. P. 41(d). The rule 41(d) dismissal of the prior contempt actions was not a judgment on the merits for the application of res judicata. Strickland v. Estate of Broome, 179 So. 3d 1088, 2015 Miss. LEXIS 604 (Miss. 2015).

In a case in which appellant, along with her children, filed claims against her ex-husband's estate for child support arrears, other unpaid support obligations, and for life insurance proceeds, appellant's presentation of the divorce decree, the property settlement agreement, and other various documents was sufficient to satisfy the requirements of Miss. Code Ann. § 91-7-14. To the extent the chancellor dismissed appellant's claims on the merits pursuant to Miss. R. Civ. P. 41 for lack of prosecution, such action was improper, as the merits were not before the chancellor to decide. Strickland v. Estate of Broome, 179 So. 3d 1088, 2015 Miss. LEXIS 604 (Miss. 2015).

Trial court erred in sua sponte dismissing a vendor from a business company's lawsuit, with prejudice, because the court did not dismiss the case after a trial, but, instead, dismissed the case after a hearing about whether the company was entitled to a preliminary injunction. Furthermore, instead of the company filing the motion for dismissal, as required, the court made an ore tenus motion for dismissal. Expro Ams., LLC v. Walters, 179 So. 3d 1010, 2015 Miss. LEXIS 574 (Miss. 2015).

Circuit court properly reversed the county court's dismissal of a negligence suit filed by appellants against appellee, because appellants filed a motion for summary judgment within 30 day of the clerk's Miss. R. Civ. P. 41(d) notice to all counsel, which was a sufficient "action of record" to avoid dismissal for want of prosecution. Cascio v. Alfa Mut. Ins. Co., 164 So. 3d 452, 2013 Miss. App. LEXIS 849 (Miss. Ct. App. 2013), cert. dismissed, 2015 Miss. LEXIS 267 (Miss. May 21, 2015).

Dismissal of the patient's medical-negligence action under Miss. R. Civ. P. 41(b) was inappropriate because there was no clear record of actual prejudice caused to the physician or medical center, or even that of presumptive prejudice, and the delays were solely the result of the negligence of plaintiff's counsel; thus, the trial court erred in its decision to dismiss the patient's case with prejudice and should have applied lesser sanctions. Holder v. Orange Grove Med. Specialties, P.A., 54 So. 3d 244, 2010 Miss. App. LEXIS 17 (Miss. Ct. App.), rev'd, 54 So. 3d 192, 2010 Miss. LEXIS 640 (Miss. 2010).

In a case in which plaintiff filed a petition to perpetuate testimony in a circuit court, the matter was then removed to federal court, wherein plaintiff sought dismissal, and plaintiff filed a complaint in the circuit court raising the same claims against the same parties before the federal court had dismissed the matter, the circuit court erred in dismissing plaintiff's post-dismissal complaint because the record supported a finding that the federal court's dismissal was based upon a "matter of form" not affecting the merits–namely, a lack of jurisdiction due to the absence of a complaint–as its order stated that no "civil action" yet existed. Plaintiff had inadvertently found himself in a procedural quagmire, but he made a good-faith effort to preserve his claim, at no time envincing an intent to abandon his claim, and, accordingly, application of the savings statute, Miss. Code Ann. § 15-1-69, to his post-dismissal complaint was appropriate and consistent with the purposes of the statute because he filed the complaint within one year of the federal court's dismissal. Crawford v. Morris Transp., Inc., 990 So. 2d 162, 2008 Miss. LEXIS 421 (Miss. 2008).

Because two minor children were old enough to express their preference under Miss. Code Ann. § 93-11-65, a chancery court erred by dismissing a mother's custody modification request prior to hearing from the children; this would have been a main source of evidence regarding whether or not there was a substantial change of circumstances. Anderson v. Anderson, 961 So. 2d 55, 2007 Miss. App. LEXIS 438 (Miss. Ct. App. 2007).

Trial court erred in dismissing plaintiffs' case without prejudice pursuant to Miss. R. Civ. P. 11(a) and 41(b) based on the fact that plaintiffs were originally represented by a foreign attorney, who had not been admitted pro hac vice pursuant to Miss. R. App. P. 46 because a subsequent appearance bya member of the Mississippi bar cured the error; the foreign attorney's violation of Miss. R. App. P. 46 and La. St. Bar art. XVI, R. 5.5(a), which prohibited the unauthorized practice of law, warranted sanctions against the attorney and notification of the violation to the Louisiana state bar. Dinet v. Gavagnie, 948 So. 2d 1281, 2007 Miss. LEXIS 35 (Miss. 2007).

Trial court did not abuse its discretion in determining that plaintiffs' letter in response to the clerk's motion to dismiss, which requested that their personal injury action against the business not be dismissed, constituted an action of record such as would preclude a dismissal under Miss. R. Civ. P. 41(d); additionally, considering the clerk's failure to record or file plaintiffs' letter, correctly identify the order to dismiss, or provide notice to plaintiffs that the order to dismiss was entered, the circumstances warranted relief under Miss. R. Civ. P. 60(b)(6). Cucos, Inc. v. McDaniel, 938 So. 2d 238, 2006 Miss. LEXIS 488 (Miss. 2006).

Mississippi Supreme Court adopted the federal test for associational standing; under that test, the Supreme Court found that the trial court erred in dismissing the manufactured housing association's bill of exceptions regarding the adoption of a zoning ordinance and map restricting manufactured housing developments in the city for lack of standing by the association because (1) one of the association's members owned property and managed a retail manufacturing housing center in the city; (2) the zoning decision would have a direct negative economic impact on any member of the association that sold manufactured homes in the city because their buyer's market would be diminished; and (3) the association's challenge to the city's zoning restrictions was of importance to the association's members. Miss. Manufactured Hous. Assn v. Bd. of Aldermen, 870 So. 2d 1189, 2004 Miss. LEXIS 362 (Miss. 2004).

Trial court had to consider other alternatives before summarily dismissing a case, thereby depriving a litigant of his rights; a reviewing court was less likely to uphold a Miss. R. Civ. P. 41(b) dismissal when the lower court did not consider alternative sanctions, and the circumstances of the case did not warrant such an extreme and harsh remedy as a dismissal with prejudice. Harvey v. Stone County Sch. Dist., 862 So. 2d 545, 2003 Miss. App. LEXIS 938 (Miss. Ct. App. 2003).

Dismissal with prejudice was inappropriate because there was no evidence of deliberate carelessness as to require drastic action, no evidence of prejudice or harm to defendant, and no evidence that lesser sanctions were considered by the court. Hoffman v. Paracelsus Health Care Corp., 752 So. 2d 1030, 1999 Miss. LEXIS 396 (Miss. 1999).

**Dismissal warranted.**

Trial court properly denied an insured's motion for reconsideration of the dismissal, for lack of prosecution, of her action against her insurer and the owner of a vehicle involved in an accident because the almost 17-year delay in the case, from the date of filing to the date of the dismissal, was inexplicable, the record clearly showed that the insured was given the opportunity to argue for lesser sanctions, and the court considered the arguments the insured raised in her motion to reconsider. West v. State Farm Mut. Auto. Ins. Co., 282 So. 3d 1223, 2019 Miss. App. LEXIS 490 (Miss. Ct. App. 2019).

Ex-wife's motion to dismiss was properly granted as the ex-husband did not meet his burden of proof on his complaint to terminate alimony because he did not prove cohabitation and mutual financial support, or a de facto marriage as the wife and the other man maintained separate homes and separate finances; they did not spend the night at each other's homes; the husband had subpoenaed the wife's financial records but had found no evidence that the other man financially supported the wife or vice versa; and, although the wife and the other man were obviously in a long-term, serious relationship, there was no outright admission or other clear or direct evidence that the wife was avoiding remarriage just to continue receiving alimony. Lewis v. Lewis (In re Lewis), 269 So. 3d 230, 2018 Miss. App. LEXIS 134 (Miss. Ct. App.), cert. denied, 256 So. 3d 593, 2018 Miss. LEXIS 477 (Miss. 2018).

Trial court did not abuse its discretion in finding that a patient's expert was not qualified to offer his expert opinion in a medical malpractice action because although the expert had some familiarity with the procedure performed upon the patient, the expert did not indicate sufficient familiarity with the standard of care to which a gastroenterologist was held; absent expert testimony, there was no triable issue of fact, and the trial court properly dismissed the hospital's motion to dismiss. Fipps v. Greenwood Leflore Hosp., 237 So. 3d 194, 2018 Miss. App. LEXIS 53 (Miss. Ct. App. 2018).

Chancery court did not err in dismissing a wife's complaint for divorce because the wife failed to meet her burden of proof on the ground of habitual drunkenness; it was within the chancery court's discretion to find that the husband's actions did not rise to the level of conduct that was required for a divorce to be granted on the basis of habitual drunkenness. Baggett v. Baggett, 246 So. 3d 887, 2017 Miss. App. LEXIS 631 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 883, 2018 Miss. LEXIS 297 (Miss. 2018).

Chancery court did not err in dismissing a wife's complaint for divorce because the evidence the wife provided was insufficient to meet the standard required for a divorce on the basis of habitual cruel and inhuman treatment; the wife only presented one instance of domestic violence at trial, and while egregious, that incident occurred over ten years prior to the filing of the wife's complaint and was not the cause of the separation of the parties. Baggett v. Baggett, 246 So. 3d 887, 2017 Miss. App. LEXIS 631 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 883, 2018 Miss. LEXIS 297 (Miss. 2018).

Special court of eminent domain erred as a matter of law when it granted a petition for private road access because the Mississippi Constitution provided that such rights of way were not permissible in incorporated cities and towns. The right to seek dismissal under the Mississippi Constitution was not waived because the statutory grounds for such were not satisfied where a private road was requested, rather than a public taking; moreover, public necessity or public use did not have to be shown. High v. Kuhn, 191 So. 3d 113, 2016 Miss. LEXIS 121 (Miss. 2016).

There was sufficient evidence to support the chancellor's finding that the wife was not entitled to a divorce on the ground of cruel and inhuman treatment, as she failed to demonstrate a continuous course of conduct that was so unkind, unfeeling, or brutal as to endanger her, or put her in reasonable apprehension of danger to life, limb, or health; the chancellor did not abuse his discretion by dismissing the wife's complaint. Pittman v. Pittman, 195 So. 3d 786, 2015 Miss. App. LEXIS 149 (Miss. Ct. App. 2015), rev'd, 195 So. 3d 727, 2016 Miss. LEXIS 231 (Miss. 2016).

After a tax sale was voided because of a defect in the notice procedure, the chancery court did not err in granting appellees' motion to dismiss appellant's claim for unjust enrichment, in which it sought reimbursement for the improvements made to the house, because there was no contract or promise between appellant and appellees; and no one, acting on appellees' behalf, authorized appellant to make the improvements. SKL Invs., Inc. v. Hardin, 170 So. 3d 588, 2014 Miss. App. LEXIS 654 (Miss. Ct. App. 2014), cert. denied, 166 So. 3d 38, 2015 Miss. LEXIS 330 (Miss. 2015).

Chancellor properly concluded that a development company had failed to establish any title in an 11-acre tract of land as part of property deeded to the company by a city. The deed from the city specifically excluded the 11-acre tract from the conveyance to the company. Riverview Dev. Co. v. Golding Dev. Co., 109 So. 3d 572, 2013 Miss. App. LEXIS 22 (Miss. Ct. App. 2013).

Trial court did not err in dismissing a mother's 1998 medical malpractice action with prejudice under Miss. R. Civ. P. 41(d)(1) for failure to prosecute because from September 1999 to November 2002, the record was void of any actions by the mother to diligently pursue the cause of action; the mother was aware that the trial court had a duty to orderly dispose of the cases on its docket. Stacy v. Johnson, 25 So. 3d 365, 2009 Miss. App. LEXIS 253 (Miss. Ct. App. 2009).

Dismissal under Miss. R. Civ. P. 41(b) and a finding that the decedent's grandchildren and his common-law wife's granddaughter failed to prove fraud in the transfer of title of real property was appropriate because the grandchildren clearly desired to transfer the subject property to granddaughter's psychiatrist's daughter and the daughter never stated that she was the granddaughter's daughter. Poe v. Summers, 11 So. 3d 129, 2009 Miss. App. LEXIS 196 (Miss. Ct. App. 2009).

Dismissal under Miss. R. Civ. P. 41(b) was warranted in a case alleging undue influence because two daughters who participated in a conveyance of property were unable to assert that there was any undue influence asserted over their father; moreover, the evidence did not show that the father had a confidential relationship with the daughter who received the property. The father was not being cared for by the daughter who received the conveyances, she did not prepare the relevant documents, and the deeds at issue contained no language indicating that the father intended to reserve any rights in the property; in addition, the father was able to assist his attorney in his cause of action, and a guardian ad litem testified that the father was competent and did not require his services. Stevens v. Estate of Smith, 19 So. 3d 764, 2009 Miss. App. LEXIS 119 (Miss. Ct. App.), cert. denied, 19 So. 3d 82, 2009 Miss. LEXIS 463 (Miss. 2009).

Dismissal of the passenger's action against the driver for personal injuries resulting from a car accident was appropriate under Miss. R. Civ. P. 41(b) due to the timing of the passenger's continuance request; her failure to provide documentation to support her mother's testimony; and the trial court's explicit instructions to the passenger to comply with the order or risk dismissal of her case. Wilson v. Nance, 4 So. 3d 336, 2009 Miss. LEXIS 6 (Miss. 2009).

Dismissal of a wrongful death suit was proper because the great-nephew lacked standing to institute a wrongful death suit under Miss. Code Ann. § 11-7-13, which conferred standing only to a decedent's spouse, parent, child, or sibling and not to distant relatives; the great-nephew also lacked standing because he was not the administrator of the decedent's estate when the wrongful death suit was commenced, and standing was to be determined as of the commencement of the action. Delta Health Group, Inc. v. Estate of Pope, 995 So. 2d 123, 2008 Miss. LEXIS 485 (Miss. 2008).

Involuntary dismissal under Miss. R. Civ. P. 41(b) was warranted because a disclaimer provision in a timber removal contract protected the Mississippi Forestry Commission from liability where the timber count was lower than the Commission's estimate; moreover, there was no negligent misrepresentation, fraud, or mistake due to the clear language of the disclaimer. Hazlehurst Lumber Co. v. Miss. Forestry Comm'n, 983 So. 2d 309, 2008 Miss. LEXIS 182 (Miss. 2008).

**Dismissal with prejudice.**

There was no error in dismissing with prejudice a grandmother's complaint seeking grandparent visitation with her granddaughter because on the judgment of directed verdict, counsel for the grandmother signed the judgment as "approved as to form only" and then handwrote the words "and not content"; the dismissal with prejudice applied only to the complaint and did not bar the grandmother from filing a future claim stemming from a new set of facts establishing a viable relationship. Vermillion v. Perkett, 281 So. 3d 925, 2019 Miss. App. LEXIS 101 (Miss. Ct. App.), cert. denied, — So. 3d —, 2019 Miss. LEXIS 317 (Miss. 2019).

**Dismissal without prejudice.**

Chancellor's award of attorney's fees and expenses was reversed, and the case was remanded to the chancellor with instructions to: (1) dismiss the action without prejudice as to a deceased neighbor and then (2) reassess the distribution of the award of attorneys' fees and expenses to the remaining party because no party was ever substituted upon the neighbor's death; it did not appear that the chancellor ever dismissed the action as to the neighbor. Sullivan v. Estate of Maddox, 283 So. 3d 222, 2019 Miss. App. LEXIS 364 (Miss. Ct. App. 2019).

Trial court did not abuse its discretion in dismissing an injured party's claims of negligence, defective-design, and faulty product-inspection without prejudice, under Miss. R. Civ. P. 41(b), because it was undisputed that no action of record took place for 19 months. Hill v. Ramsey, 3 So. 3d 120, 2009 Miss. LEXIS 85 (Miss. 2009).

Dismissal without prejudice, pursuant to Miss. R. Civ. P. 41, of a justice court complaint that included a claim for the recovery of repair costs did not preclude an award of the costs in a subsequent declaratory judgment action. Cavagnaro v. Coldwell Banker Alfonso Realty, Inc., 995 So. 2d 754, 2008 Miss. App. LEXIS 108 (Miss. Ct. App.), cert. denied, 997 So. 2d 924, 2008 Miss. LEXIS 534 (Miss. 2008).

**Failure to prosecute.**

Because the delay in a guest's case against a casino was excusable, and the casino failed to prove that it suffered any actual prejudice from the delay, the circuit court abused its discretion in dismissing the guest's complaint for failure to prosecute; the lesser sanctions presented by the guest's counsel would have better served the interest of justice, and there was nothing in the record to support the notion that the delay in prosecution was intentional. Leasy v. SW Gaming, LLC, — So. 3d —, 2021 Miss. App. LEXIS 53 (Miss. Ct. App. Feb. 2, 2021), rev'd, 335 So. 3d 555, 2022 Miss. LEXIS 79 (Miss. 2022).

Chancellor did not abuse his discretion by dismissing property owners' complaint for failure to prosecute and imposing monetary sanctions because there was no effort by the owners to set the case for trial after it was continued, lesser sanctions were considered and rejected, and the owners intentionally tried to delay the case from moving forward. Sullivan v. Estate of Maddox, 283 So. 3d 222, 2019 Miss. App. LEXIS 364 (Miss. Ct. App. 2019).

Chancellor properly dismissed property owners' complaint for failure to prosecute because its judgment dismissing the complaint without notice to the owners did not violate due process. Sullivan v. Estate of Maddox, 283 So. 3d 222, 2019 Miss. App. LEXIS 364 (Miss. Ct. App. 2019).

As plaintiff failed to take action of record or show good cause, her case was properly dismissed without prejudice for failure to prosecute pursuant to Miss. R. Civ. P. 41(d). Plaintiff's response to the clerk's motion to dismiss, although filed of record, did not constitute an "action of record" for purposes of Rule 41(d). Glass v. City of Gulfport, 271 So. 3d 602, 2018 Miss. App. LEXIS 567 (Miss. Ct. App. 2018).

Circuit court did not abuse its discretion in dismissing home buyers' action with prejudice because the record sufficiently showed a clear record of delay by the buyers, issues of bankruptcy/automatic stay and litigation over an arbitration clause in a contract did not explain why the buyers made no effort to prosecute their claims, the opposing parties were prejudiced by the buyers' dilatory conduct, and lesser sanctions would not have served the best interests of justice. Smith v. Coldwell Banker Graham & Assocs., 271 So. 3d 489, 2018 Miss. App. LEXIS 439 (Miss. Ct. App. 2018), cert. denied, 268 So. 3d 1281, 2019 Miss. LEXIS 208 (Miss. 2019).

Taxpayer was prejudiced by the chancery court's dismissal of its complaint with prejudice because its circuit-court case was an appeal from a decision of the county board of supervisors concerning the assessment of ad valorem taxes; in that case, the circuit court was sitting as an appellate body, and a tax refund was the only relief authorized by statute governing the taxpayer's appeal. SW 98/99, LLC v. Pike Cty., 242 So. 3d 847, 2018 Miss. LEXIS 218 (Miss. 2018).

Chancery court erred in dismissing a taxpayer's complaint with prejudice because the taxpayer's actions did not amount to a clear record of delay or contumacious conduct; the taxpayer agreed with the county and county officials to set a trial date by order, believing its tax appeals would be finally resolved within the intervening months, thereby fulfilling the condition for lifting a stay. SW 98/99, LLC v. Pike Cty., 242 So. 3d 847, 2018 Miss. LEXIS 218 (Miss. 2018).

Because there was a clear record of delay, and a couple displayed reactionary conduct, the circuit court did not abuse its discretion in dismissing the case with prejudice since it served the best interests of justice; therefore, there was no abuse of discretion in the circuit court dismissal of the couple's claim against a nurse for failure to prosecute. Havard v. Sumrall, 250 So. 3d 1282, 2017 Miss. App. LEXIS 634 (Miss. Ct. App. 2017), cert. denied, 250 So. 3d 1268, 2018 Miss. LEXIS 354 (Miss. 2018), cert. denied, 2018 Miss. LEXIS 351 (Miss. Aug. 9, 2018).

Circuit court did not abuse its discretion in granting a nurse's motion to dismiss a couple's medical-malpractice action for failure to prosecute because the couple failed to begin their own discovery until approximately two years after the nurse answered the amended complaint, and the couple only did so after the nurse filed her motion to dismiss; the record clearly reflected the couple began discovery as a reactionary measure to the nurse filing her motion to dismiss. Havard v. Sumrall, 250 So. 3d 1282, 2017 Miss. App. LEXIS 634 (Miss. Ct. App. 2017), cert. denied, 250 So. 3d 1268, 2018 Miss. LEXIS 354 (Miss. 2018), cert. denied, 2018 Miss. LEXIS 351 (Miss. Aug. 9, 2018).

Circuit court properly granted a hospital's motion to dismiss a patient's medical-malpractice case for failure to prosecute because the patient failed to diligently pursue her claims against the hospital in the 11 years since her first claim was filed and in the past five years, the patient took only a single deposition, the hospital was presumed to be prejudiced by the patient's inactivity, the patient's delays were both lengthy and clear, and it was obvious the trial judge considered, and ultimately rejected, the patient's plea for lesser sanctions. Regan v. South Cent. Reg'l Med. Ctr., 234 So. 3d 1242, 2017 Miss. LEXIS 369 (Miss. 2017).

Circuit court properly dismissed the out-of-state plaintiffs' automobile-personal-injury civil action for failure to prosecute because their actions were dilatory and contumacious where they failed to meet discovery deadlines or appear at depositions, and allowed their claim to lie dormant for more than a year, the plaintiffs' actions hindered the prosecution of their claim, and the trial court's failure to make a finding regarding lesser sanctions was not an abuse of discretion. Holmes v. Grisby, 234 So. 3d 425, 2017 Miss. App. LEXIS 376 (Miss. Ct. App. 2017), cert. denied, 2018 Miss. LEXIS 34 (Miss. Jan. 18, 2018).

Trial court did not abuse its discretion in dismissing appellant's complaint for failure to prosecute, given that between the time mediation failed in April 2013 and appellee filed its motion to dismiss in January 2015, almost two additional years had passed without appellant taking any affirmative action to prosecute the case, and sufficient evidence supported the finding that appellant engaged in dilatory conduct that warranted the dismissal of his complaint rather than the application of a lesser sanction. Gaillard v. Rea Brothers' Auctions, Inc., 237 So. 3d 794, 2017 Miss. App. LEXIS 362 (Miss. Ct. App. 2017), cert. denied, 237 So. 3d 1269, 2018 Miss. LEXIS 119 (Miss. 2018).

Chancery court proper dismissed mortgagees' action against their mortgage carrier because the action was barred under the doctrine of res judicata since dismissal of their prior action for failure to prosecute operated as a final judgment on the merits; the dismissal of the mortgagee's prior action was not only appropriate for failure to prosecute but was also consistent with the mortgagees' new argument that the case could not be tried in court at all but rather arbitrated. Griffin v. ABN Amro Mortg. Grp., Inc., 232 So. 3d 189, 2017 Miss. App. LEXIS 279 (Miss. Ct. App.), cert. denied, 229 So. 3d 713, 2017 Miss. LEXIS 463 (Miss. 2017).

Circuit court did not abuse its discretion in dismissing an estate's medical malpractice action for failure to prosecute because there was a clear record of delay, and lesser sanctions would not serve the interests of justice; the clerk's motion to dismiss, together with the motion to dismiss filed by the doctors and hopsital, should have served as a warning that the case needed to proceed, but the patient failed to respond to either motion or even appear at the hearing on the motion. Estate of Paulk v. Lott, 217 So. 3d 747, 2017 Miss. App. LEXIS 52 (Miss. Ct. App. 2017).

Circuit court did not abuse its discretion in dismissing an estate's medical malpractice action for failure to prosecute because there was a clear record of delay since no action was taken after the complaint was filed until the case was dismissed thirty-one months later; prejudice to the doctors and hospital, an aggravating factor, was evident because the patient passed away without responding to their discovery requests, so she would be unavailable to testify at trial or in a deposition. Estate of Paulk v. Lott, 217 So. 3d 747, 2017 Miss. App. LEXIS 52 (Miss. Ct. App. 2017).

Chancery court did not abuse its discretion in dismissing for want of prosecution a case that was stagnant on the court docket for a few years because the court determined that (1) government staffing issues and settlement negotiations did not provide a legitimate excuse for the delay; (2) the defendant corporation was prejudiced by the passage of time due to the death of an individual who was of central importance to the corporation's defense of the action; and (3) lesser sanctions were not sufficient. State ex rel. Hood v. Louisville Tire Center, Inc., 204 So. 3d 1250, 2016 Miss. LEXIS 504 (Miss. 2016).

Guarantors of a loan were not entitled to a dismissal of the claim against them by a bank, for failure to prosecute, because, although years passed between the time when the bank foreclosed on the property in a foreclosure action and the time it filed its amended motion for summary judgment against the guarantors, there was no record of dilatory or contumacious conduct by the bank. Although there was a lengthy litigation process, it appeared that all the parties participated at all times. Kirby v. BancorpSouth Bank, 211 So. 3d 704, 2016 Miss. App. LEXIS 28 (Miss. Ct. App. 2016).

Where appellant allowed her medical negligence case to languish for over a year, repeatedly failed to submit timely and sufficient responses to discovery, and did not disclose the basis for her claim until over two years after the responses were requested, the trial court did not abuse its discretion in finding that a sanction lesser than dismissal would not cure the prejudice suffered by the doctor due to the delayed and dilatory disclosure. Cornelius v. Benefield, 168 So. 3d 1028, 2013 Miss. App. LEXIS 558 (Miss. Ct. App. 2013), cert. denied, 140 So. 3d 940, 2014 Miss. LEXIS 293 (Miss. 2014).

Trial court did not abuse its discretion by dismissing the case pursuant to Miss. R. Civ. P. 41(b) because an owner had filed nothing of record in the 11 years since the filing of the complaint and the four years since a remand by the state supreme court, and one of the parties had died and certain witnesses had relocated, and the owner never asserted any special circumstances regarding Hurricane Katrina entitling the owner to special relief. Hanson v. Disotell, 106 So. 3d 345, 2013 Miss. LEXIS 30 (Miss. 2013).

There is no set time limit for the prosecution of an action; a dismissal with prejudice will be affirmed only if there is a showing of a clear record of delay or contumacious conduct by the plaintiff, and where lesser sanctions would not serve the best interests of justice. The propriety of a dismissal with prejudice is bolstered by the presence of aggravating factors, including: (1) the extent to which the plaintiff, as distinguished from his counsel, was personally responsible for the delay, (2) the degree of actual prejudice to the defendant, and (3) whether the delay was the result of intentional conduct. Hillman v. Weatherly, 14 So. 3d 721, 2009 Miss. LEXIS 387 (Miss. 2009).

Circuit court was within its discretion in finding that there was a clear record of delay, that the interests of justice required no lesser sanction than dismissal with prejudice, and that aggravating factors were present in the form of the individual's personal responsibility for the delay and actual prejudice to the attorney; therefore, the circuit court did not abuse its discretion by dismissing the individual's complaint with prejudice under Miss. R. Civ. P. 41(b) for failure to prosecute. Hillman v. Weatherly, 14 So. 3d 721, 2009 Miss. LEXIS 387 (Miss. 2009).

Trial court did not abuse its discretion in dismissing an injured party's claims of negligence, defective-design, and faulty product-inspection without prejudice, under Miss. R. Civ. P. 41(b), because it was undisputed that no action of record took place for 19 months. Hill v. Ramsey, 3 So. 3d 120, 2009 Miss. LEXIS 85 (Miss. 2009).

Where plaintiff wrongful death beneficiary filed a medical malpratice/wrongful death suit and failed to pursue the claim and where the wrongful death beneficiary essentially ignored the court clerk's first motion to dismiss for failure to prosecute filed five years after the filing of the complaint, the trial court did not err in granting the court clerk's second motion to dismiss filed 14 months after its first motion because the record established a clear history of delay stretching back more than five years, the delay presumptively prejudiced defendant health care providers, and the prejudice suffered by the health care providers could not be cured through a lesser sanction. Jenkins v. Tucker, 18 So. 3d 265, 2009 Miss. App. LEXIS 78 (Miss. Ct. App.), cert. denied, 19 So. 3d 82, 2009 Miss. LEXIS 466 (Miss. 2009).

Widow's seven-year delay in taking any action in her suit against her deceased husband's employer other than letters to the clerk that were not served on the employer as required by Miss. R. Civ. P. 5, and an absence of good cause shown for the delay, required dismissal of her action pursuant to Miss. R. Civ. P. 41(d). Ill. Cent. R.R. Co. v. Moore, 994 So. 2d 723, 2008 Miss. LEXIS 422 (Miss. 2008).

Where a son sought to set aside a warranty deed that transferred property from the son's mother to a daughter, the case was properly dismissed for failure to prosecute because, inter alia, (1) there was a significant delay during the litigation, (2) lesser sanctions were considered, (3) the son bore some responsibility for the delay, (4) the daughter was prejudiced because of their mother's intervening death since the purpose of the mother's deposition was not to conduct discovery or elicit testimony for trial, and (5) it was not an abuse of discretion to refuse to provide specific findings of fact and conclusions of law. Cox v. Cox, 976 So. 2d 869, 2008 Miss. LEXIS 125 (Miss. 2008).

Pursuant to Miss. R. Civ. P. 41(b) and (d), the trial court did not err granting the doctor's motion and dismissing beneficiaries' case without prejudice for failure to prosecute as their conduct could be considered dilatory and trial court applied two, separate, lesser sanctions. Hasty v. Yoshinobu Namihira, 986 So. 2d 1036, 2008 Miss. App. LEXIS 49 (Miss. Ct. App.), cert. denied, 987 So. 2d 451, 2008 Miss. LEXIS 370 (Miss. 2008).

Inmate's action against prison employees, alleging that the inmate was negligently denied proper medical treatment, was properly dismissed for want of prosecution pursuant to Miss. R. Civ. P. 41(d) where the inmate gave no response to the clerk's motion as to why the case should not be dismissed; the trial court had no choice but to dismiss the action under the mandatory "shall dismiss" language of the rule. Madison v. Miss. Dep't of Corr., 966 So. 2d 216, 2007 Miss. App. LEXIS 684 (Miss. Ct. App. 2007).

Dismissal of a wrongful death case based on counsel's failure to attend a special docket call was not improper even though the trial court erred in calculating the time that the case had been pending, because very little activity had occurred until the dismissal; moreover, the delay was caused by the parties bringing the suit because the first person filing lacked standing, and the second person waited until after the statute of limitations had expired to file. Tolliver ex rel. Wrongful Death Beneficiaries of Green v. Mladineo, 987 So. 2d 989, 2007 Miss. App. LEXIS 467 (Miss. Ct. App. 2007).

Dismissal of a medical malpractice case under Miss. R. Civ. P. 41 was appropriate where no action was taken for four years, a first doctor was not served in the time required under Miss. R. Civ. P. 4, a patient failed to use other means of service available, service was not effectuated until the statute of limitations had expired, and proof of service was not filed until after the case was dismissed; there was no need to show contumacious conduct because there was a clear record of delay, and no lesser sanctions would have better served the interests of justice since the passage of time might have altered the evidence. Hensarling v. Holly, 972 So. 2d 716, 2007 Miss. App. LEXIS 396 (Miss. Ct. App. 2007), cert. denied, 973 So. 2d 244, 2008 Miss. LEXIS 18 (Miss. 2008).

Chancellor did not abuse his discretion in dismissing homeowners' complaint under Miss. R. Civ. P. 41(b) for failure to prosecute where homeowners admitted there had been significant delays and the chancellor's statements clearly showed that lesser sanctions were considered and rejected; also, the presence of aggravating factors was not necessary. Although some of the delays were caused by external factors, including the homeowner's battle with terminal kidney cancer and the breakup of the homeowners' marriage, the delays were not caused solely by illness and disability, but were due to a combination of factors, including the homeowners' financial constraints, which continued. Hine v. Anchor Lake Prop. Owners Ass'n, 911 So. 2d 1001, 2005 Miss. App. LEXIS 673 (Miss. Ct. App. 2005).

Trial court erred in denying a summary judgment motion filed by a casino and its employee against the malicious prosecution claim filed by certain individuals. The individuals' first claim against the casino was dismissed for want of prosecution, and the savings clause in Miss. Code Ann. § 15-1-69 did not prevent the second claim, which was based on the same facts, from being barred by the statute of limitation in Miss. Code Ann. § 15-1-35. Jackpot Miss. Riverboat, Inc. v. Smith, 874 So. 2d 959, 2004 Miss. LEXIS 641 (Miss. 2004), overruled in part, Knight v. Knight, 85 So. 3d 832, 2012 Miss. LEXIS 24 (Miss. 2012).

Trial court did not err in dismissing the driver's claims with prejudice under Miss. R. Civ. P. 41(b) where since the case was filed, the driver had taken virtually no positive action to prosecute his claim; the driver's failure to promptly act over such a lengthy period demonstrated that any further lesser sanctions would have been ineffective. Vosbein v. Bellias, 866 So. 2d 489, 2004 Miss. App. LEXIS 126 (Miss. Ct. App. 2004).

Where an invitee's responses to a motion to compel did not comply with Miss. R. Civ. P. 33, the invitee sought late discovery in violation of Miss. Unif. Cir. & County Ct. Prac. R. 4.04, and did not show good cause for failing to prosecute after two notices of dismissal under Miss. R. Civ. P. 41(d), the trial court properly dismissed the lawsuit and denied a motion for reconsideration. Guidry v. Pine Hills Country Club, Inc., 858 So. 2d 196, 2003 Miss. App. LEXIS 984 (Miss. Ct. App. 2003).

Where the buyer sued defendants regarding defects in a mobile home, and buyer's first counsel withdrew, the buyer's five-month delay, outside of court's time limit for obtaining new counsel, was not egregious, defendants did not argue that they had suffered any prejudice, and the trial court's dismissal for failure to prosecute was error, especially where the trial court failed to consider other less severe sanctions. Camacho v. Chandeleur Homes, Inc., 862 So. 2d 540, 2003 Miss. App. LEXIS 754 (Miss. Ct. App. 2003).

In a contempt proceeding for failure to pay child support, although the husband had not filed a motion to dismiss, the trial court was within its discretion to raise sua sponte the issue of dismissing the petition for lack of prosecution. Miss. Dep't of Human Servs. v. Guidry, 830 So. 2d 628, 2002 Miss. LEXIS 320 (Miss. 2002).

In a contempt proceeding for the husband's failure to pay child support, the chancellor abused its discretion in dismissing the petition for contempt with prejudice because there was no contumacious conduct by the wife, no alternative sanctions were considered and no aggravating factors were present as (1) there was nothing in the record to suggest that the wife, as opposed to her counsel was responsible for any of the delays; (2) there would be little, if any prejudice to the husband, by proceeding to trial; and (3) there was nothing in the record to indicate the delay was an intentional attempt to abuse the judicial process. Miss. Dep't of Human Servs. v. Guidry, 830 So. 2d 628, 2002 Miss. LEXIS 320 (Miss. 2002).

Trial court abused its discretion in dismissing a case for failure to prosecute, because the delay was not intentional or due to the contumacious conduct by the plaintiff or his counsel, the defendant was not unduly prejudiced, and a less drastic sanction was not considered by the court. Tims v. City of Jackson, 823 So. 2d 602, 2002 Miss. App. LEXIS 437 (Miss. Ct. App. 2002).

An action was properly dismissed under subsection (d) where (1) the plaintiff did not make a motion for entry of default judgment until May 1995, and the default was given to him on June 8, 1995, (2) the defendant then filed a motion in a timely manner to set aside the default judgment, (3) the plaintiff answered, but did not fight the motion, (4) when the motion was dismissed as stale, the defendant had it reinstated within the time allowed, (5) when the motion was finally heard, the judge found cause for the default judgment to be set aside, and (6) it was then up to the plaintiff to prosecute the case, but he did nothing further until nine months after the case had again been dismissed as stale, and 18 months after the default judgment had been set aside. Cooley v. Burge, 797 So. 2d 294, 2001 Miss. App. LEXIS 133 (Miss. Ct. App. 2001).

Conduct of counsel for the plaintiff can not be said to clearly constitute delay or contumacious conduct, notwithstanding that three terms of the circuit court passed without action by counsel for plaintiff where (1) the first full term of court following the filing of the action was avoided due to the defendants' motion to extend discovery, and (2) the second term was avoided, at least in part, due to the inability of counsel for defendants to appear at the docket call. AT&T v. Days Inn, 720 So. 2d 178, 1998 Miss. LEXIS 379 (Miss. 1998).

A judgment dismissing a stale case may be set aside during the same term of court, just as any other judgment; however, the judgment becomes final and may not be set aside after the term. Town of Winstonville v. Demco Distrib. Co., 630 So. 2d 40, 1993 Miss. LEXIS 521 (Miss. 1993).

Notice of motion to dismiss for want of prosecution was not given to plaintiffs or even to their last attorney of record, as required by rule; due to clerk's mistake, lower court should have allowed case to be reinstated. Walker v. Parnell, 566 So. 2d 1213, 1990 Miss. LEXIS 442 (Miss. 1990).

**Findings.**

Miss. R. Civ. P. 41(b) makes specific findings of fact and conclusions of law discretionary with the trial court. Cox v. Cox, 976 So. 2d 869, 2008 Miss. LEXIS 125 (Miss. 2008).

Even though there were no findings of fact regarding whether a trial court considered lesser sanctions before dismissing a medical malpractice case under Miss. R. Civ. P. 41(b), the findings were presumed. Hensarling v. Holly, 972 So. 2d 716, 2007 Miss. App. LEXIS 396 (Miss. Ct. App. 2007), cert. denied, 973 So. 2d 244, 2008 Miss. LEXIS 18 (Miss. 2008).

Involuntary dismissal under Miss. R. Civ. P. 41(b) was properly entered in a dispute over a family business because a purported owner failed to establish a prima facie case that he was entitled to one-half of the business; therefore, it was unnecessary to determine the legal status of the business at the time of a father's death. Milligan v. Milligan, 956 So. 2d 1066, 2007 Miss. App. LEXIS 339 (Miss. Ct. App. 2007).

When trial judge grants a motion to dismiss at close of plaintiff's case, he should enter into record his findings of fact and conclusions of law; failure to do so leaves appellate court in position of having to guess at trial judge's reason for granting motion, and may result in finding of manifest error when in truth there was none. Davis v. Clement, 468 So. 2d 58, 1985 Miss. LEXIS 2037 (Miss. 1985).

**Reinstitution of cases.**

Trial court had the authority to dismiss the customer's case against the restaurant where the customer waited too long to file his motion to reinstate the case and he provided no evidence that the trial court's dismissal was defective or the result of fraud, accident, or mistake. Marshall v. Burger King, 2 So. 3d 702, 2008 Miss. App. LEXIS 555 (Miss. Ct. App. 2008), overruled in part, Knight v. Knight, 85 So. 3d 832, 2012 Miss. LEXIS 24 (Miss. 2012).

Dismissed cases may be reinstituted, except in extreme situations. Taylor v. GMC, 717 So. 2d 747, 1998 Miss. LEXIS 361 (Miss. 1998).

**Requirements.**

Consideration of lesser sanctions cannot be presumed, but there should be some indication in the record that lesser sanctions were considered. Cox v. Cox, 976 So. 2d 869, 2008 Miss. LEXIS 125 (Miss. 2008).

Where a foreign attorney failed to submit and file an informational affidavit setting forth certain requirements contained in M.R.A.P. 46(b)(4)(i- xi), the trial court had no choice but to strike the plaintiff's complaint and dismiss the case pursuant to M.R.A.P. 41(b) for failure to comply with court rules. Taylor v. GMC, 717 So. 2d 747, 1998 Miss. LEXIS 361 (Miss. 1998).

In granting motion to dismiss made under subdivision (b) of this rule, trial court should consider evidence fairly, as distinguished from in the light most favorable to plaintiff, and court should dismiss case if it would find for the defendant; thus, appellate review of chancellor's decision to dismiss claim is limited to ascertaining whether record reveals substantial evidence to support trial court's findings in support of its decision. Singing River Elec. Power Ass'n v. State ex rel. Mississippi Dep't of Envtl. Quality, 693 So. 2d 368, 1997 Miss. LEXIS 154 (Miss. 1997).

Proper motion for defendant to make at the close of plaintiffs' case was a motion to dismiss pursuant to M.R.C.P. Rule 41(b), rather than Rule 12(b)(6); under Rule 41(b), judge must consider the evidence fairly, rather than in the light most favorable to the plaintiff. Century 21 Deep South Properties, Ltd. v. Corson, 612 So. 2d 359, 1992 Miss. LEXIS 804 (Miss. 1992).

When considering motion under subdivision (b) of this rule, trial judge considers plaintiff's evidence fairly, instead of in light most favorable to plaintiff; if trial court finds that evidence is insufficient to meet requisite burden of proof or to prove one or more key elements of plaintiff's claim, trial court should render judgment in favor of defendant, and if there is doubt, motion should be denied. Amyotte v. Hollingsworth, 585 So. 2d 731 (Miss. 1991).

Dismissal for failure to comply with a court order is appropriate only where there is a clear record of delay or contumacious conduct and lesser sanctions would not serve the best interests of justice; dismissal with prejudice is an extreme and harsh sanction that deprives litigant of opportunity to pursue his claim, and it is therefore reserved for the most egregious cases. Wallace v. Jones, 572 So. 2d 371, 1990 Miss. LEXIS 565 (Miss. 1990).

Under subdivision (b) of this rule, if when considering evidence fairly, as distinguished from in light most favorable to plaintiff, trial judge would find for defendant– because plaintiff has failed to prove one or more essential elements of his claim, because quality of proof offered is insufficient to sustain burden of proof cast upon plaintiff, or for whatever reason– the proceeding should be halted at that time and final judgment should be rendered in favor of defendant. Smith v. Smith, 574 So. 2d 644, 1990 Miss. LEXIS 787 (Miss. 1990), aff'd, 672 So. 2d 1194, 1996 Miss. LEXIS 226 (Miss. 1996).

When considering whether dismissal should be granted, trial court must consider effect on defendant and any other plaintiffs, and must assure fairness and protection for those affected; since a dismissal under subdivision (a) of this rule is without prejudice unless order states otherwise, trial court should grant a voluntary dismissal unless some legal prejudice occurs. Carter v. Clegg, 557 So. 2d 1187, 1990 Miss. LEXIS 125 (Miss. 1990).

When opposing a motion for dismissal pursuant to subdivision (a) of this rule, it is defendant's responsibility to demonstrate that dismissal will cause some legal prejudice; defendant can not demonstrate legal prejudice simply by relying on prospect of another lawsuit, or by showing that dismissal will result in tactical advantage for plaintiff. Carter v. Clegg, 557 So. 2d 1187, 1990 Miss. LEXIS 125 (Miss. 1990).

Trial court erred in granting plaintiff's motion for voluntary dismissal, and dismissing her complaint without prejudice, without giving defendant reasonable advance notice and an opportunity to be heard on the motion. Bolls v. Harris, 528 So. 2d 1128, 1988 Miss. LEXIS 342 (Miss. 1988).

Where motion for involuntary dismissal is presented to trial judge sitting without a jury, court is not required to look at evidence in light most favorable to plaintiff, giving plaintiff benefit of all reasonable favorable inferences, and standards applicable to motions for directed verdict or judgment notwithstanding the verdict do not apply. Mitchell v. Rawls, 493 So. 2d 361, 1986 Miss. LEXIS 2587 (Miss. 1986).

Voluntary dismissal should generally be permitted unless prejudice to a party will occur, other than prospect of another lawsuit, since dismissal under this rule is without prejudice unless order states otherwise. Hudson v. Bank of Edwards, 495 So. 2d 1349, 1986 Miss. LEXIS 2706 (Miss. 1986).

If, considering evidence fairly, as distinguished from in light most favorable to plaintiff, trial judge would find for defendant– because plaintiff has failed to prove one or more essential elements of his claim, because quality of proof offered is insufficient to sustain burden of proof cast upon plaintiff, or for whatever reason– the proceeding should be halted at that time and final judgment should be rendered in favor of defendant. Davis v. Clement, 468 So. 2d 58, 1985 Miss. LEXIS 2037 (Miss. 1985).

**Res judicata.**

Chancery court erred in dismissing a taxpayer's complaint with prejudice because there no evidence that it would have been appropriate to consider even lesser sanctions since the taxpayer did not deliberately attempt to delay the proceedings, the delay was minimal, and the defendants do not allege that they were prejudiced by the delay; the judgment did not specifically state dismissal was not on the merits, so res judicata arguably would prohibit the taxpayer from reasserting the same claims. SW 98/99, LLC v. Pike Cty., 242 So. 3d 847, 2018 Miss. LEXIS 218 (Miss. 2018).

As the chancellor acknowledged in his amended order, his use of the phrase "without prejudice" was a mistake, and his ruling was an adjudication on the merits, entered after appellant completed the presentation of his evidence; because the chancellor's order was a final ruling on the merits, the doctrine of res judicata barred appellant from relitigating his easement-by-necessity claim. King v. Gale, 166 So. 3d 589, 2015 Miss. App. LEXIS 333 (Miss. Ct. App. 2015).

Because the court has no role to play in a Miss. R Civ. P. 41(a)(1) dismissal, it is of no consequence that the court lacks jurisdiction over the defendant. If the plaintiff chooses to extinguish his rights forever he is entitled to do so, and the defendant will reap the benefit of a res judicata bar to any attempt by the plaintiff to re-litigate the dismissed claims. Derr v. Swarek, 766 F.3d 430, 2014 U.S. App. LEXIS 17421 (5th Cir. Miss. 2014).

Chancellor properly granted trustee's requested dismissal under subdivision (b) of this rule, as action contesting power of trustee to harvest timber from certain real property was barred by doctrine of res judicata. Davis v. Deposit Guar. Nat'l Bank (In re Estate of Anderson), 674 So. 2d 1254, 1996 Miss. LEXIS 199 (Miss. 1996).

**Review.**

Court of appeals had jurisdiction to review a couple's appeal of an order granting a nurse's motion to dismiss their action for failure to prosecute because the default judgment the couple obtained against the nurse finally adjudicated their claims; the couple timely raised the appeal within thirty days of entry of the judgment because they filed their appeal and raised as error the circuit court's dismissal of their complaint after the judgment was entered into the general docket. Havard v. Sumrall, 250 So. 3d 1282, 2017 Miss. App. LEXIS 634 (Miss. Ct. App. 2017), cert. denied, 250 So. 3d 1268, 2018 Miss. LEXIS 354 (Miss. 2018), cert. denied, 2018 Miss. LEXIS 351 (Miss. Aug. 9, 2018).

"Judgment for Defendant" contained in the record was a sufficient final judgment for appellate review of the trial court's award of attorney's fees and expenses to a patient under the Litigation Accountability Act because although a separate order granting the doctor's voluntary dismissal did not appear in the appellate record, the "Judgment for Defendant" was clearly predicated upon such a dismissal. Monaghan v. Autry, 229 So. 3d 201, 2017 Miss. App. LEXIS 155 (Miss. Ct. App. 2017).

After the trial court refused to dismiss the individuals' lawsuit against the railroad, wherein they claimed that they were damaged by exposure to various toxic substances, the appellate court denied the railroad's petition to appeal from an interlocutory order of the trial court, and a request for a stay because the amended complaints provided the railroad with sufficient notice of each of the individuals' claims, including the place, period of time, and instrumentality, asbestos and silica, of alleged injury, and were sufficient to meet minimum notice pleading requirements. Ill. Cent. R.R. Co. v. Easterwood, 939 So. 2d 769, 2006 Miss. LEXIS 76 (Miss. 2006).

In her wrongful death action, the pregnant employee claimed that the employer's failure to maintain and repair the elevator caused the malfunction that led to an additional 10 minute delay in her arrival at the hospital, and that the delay contributed to and was the proximate cause of her child's death. However, the testimony of her own expert showed that even with said delay, the child's survival was contingent upon being delivered within 30 minutes of a placental abruption, and even with said delay, the employee would not have arrived at the hospital in 30 minutes given the other facts; thus, the trial court properly granted the city's motion to dismiss under Miss. R. Civ. P. 41(b). Sanders v. Riverboat Corp., 913 So. 2d 351, 2005 Miss. App. LEXIS 272 (Miss. Ct. App. 2005).

In a bench trial, the trial court properly dismissed plaintiffs' wrongful death suit on the merits (though defendant's motion was improperly made under Miss. R. Civ. P. 50), finding that defendant driver breached no duty to a pedestrian he struck and killed as she was walking near an entrance ramp; the driver was traveling at prudent speed, keeping proper lookout for traffic while preparing to merge, and the pedestrian was in his lane of travel when she was hit. Partlow v. McDonald, 877 So. 2d 414, 2003 Miss. App. LEXIS 876 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66, 2004 Miss. LEXIS 858 (Miss. 2004).

Dismissal of the driver and passengers' action against the city and police officer pursuant to Miss. R. Civ. P. 41(b) after they were struck by the officer's vehicle was proper where the officer's action evinced no recklessness; he was remiss in paying attention to traffic directly in his lane, but was guilty of simple negligence and nothing more. Joseph v. City of Moss Point, 856 So. 2d 548, 2003 Miss. App. LEXIS 430 (Miss. Ct. App.), cert. denied, 860 So. 2d 315, 2003 Miss. LEXIS 720 (Miss. 2003).

Where a defending or responding party, following the overruling of a motion for a directed verdict or a motion to dismiss, goes forward with evidence of his own, he waives the right to assign on appeal error in the failure of the trial judge to grant his motion. Clements v. Young, 481 So. 2d 263, 1985 Miss. LEXIS 2373 (Miss. 1985).

**Waiver.**

Where defendants' motion to dismiss was made at conclusion of plaintiff's case, and after chancery court denied the motion defendants went forward with proof of their own, they waived the right to urge error in denial of their motion to dismiss. Stallings v. Bailey, 558 So. 2d 858, 1990 Miss. LEXIS 157 (Miss. 1990).

**What constitues "application in writing."**

"Application in writing" for purposes of avoiding dismissal under Miss. R. Civ. P. 41(d) was required to be in the form of a motion to the court under Miss. R. Civ. P. 7. Ill. Cent. R.R. Co. v. Moore, 994 So. 2d 723, 2008 Miss. LEXIS 422 (Miss. 2008).

## Rule 42. Consolidation: separate trials.

(a) *Consolidation.* — When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) *Separate trial.* — The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counter-claim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counter-claims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by Section 31 of the Mississippi Constitution of 1890.

(c) *Counties Within a Single Circuit or Chancery Court District.* — When civil actions involving common questions of fact or law are pending in different counties of a single Circuit or Chancery Court district, such actions may be consolidated for coordinated or consolidated pretrial proceedings and, if the actions do not involve trials by jury, may be consolidated for all purposes. All judges presiding over the cases to be consolidated must agree to the consolidation and to the judge who will preside over the cases for the purposes stated herein. For the purposes of this rule, "pretrial proceedings" means all matters presented to the judge prior to trial except dispositive motions.

**HISTORY: Amended February 20, 2004 to correct scrivener's error; Comments repealed effective July 1, 2014.**

### JUDICIAL DECISIONS

#### ANALYSIS

In general.
Bifurcation.
Construction with other rules.

**In general.**

There was no abuse of discretion in any manner in the chancery court's ordering the agreed-to consolidation because two actions, both pending before the chancery court, plainly involved a common question of law or fact; in one action, a grantee sought to void a purchaser's tax deeds on the subject property, and the grantor's estate sought damages for the timber cut and removed from the property, and the interpleader action concerned the proceeds from the 1994 timber harvest on the property. Alexander v. Musgrove, 311 So. 3d 668, 2021 Miss. App. LEXIS 3 (Miss. Ct. App. 2021).

Because two separate cases, an appeal petition and a petition for writ of mandamus, never were consolidated, the only issues properly before the Supreme Court of Mississippi were the issues stemming from the appeal petition, not the issues stemming from the petition for writ of mandamus. Miss. Dep't of Pub. Safety v. Smith, 243 So. 3d 172, 2018 Miss. LEXIS 228 (Miss. 2018).

Trial court abused its discretion in dismissing an injured employee's suit against a building owner because the identity of parties element had not been met and there was another option available when multiple cases were filed involving the same operative questions of law or fact, one that could be employed even when there were different parties: consolidation. Smith v. Normand Children Diversified Class Trust, 122 So. 3d 1234, 2013 Miss. App. LEXIS 396 (Miss. Ct. App. 2013).

There was no error by the consolidation of two workers' compensation cases, arising from separate accidents and separate injuries, as the employee was not prejudiced in any way. Tucker v. Bellsouth Telcoms., Inc., 130 So. 3d 96, 2013 Miss. App. LEXIS 357 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 48 (Miss. 2014), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 39 (Miss. 2014).

Chancellor did not abuse her discretion in consolidating the two cases where testimony from key witnesses that was relevant to both suits included the nature and value of the business, the ownership and relevance of the land, and the relationship between the shareholder's wife and the various employees. Cooper v. Winnie Gilder & Cooper Gilder, Inc., 156 So. 3d 262, 2009 Miss. App. LEXIS 219 (Miss. Ct. App. 2009), dismissed, 2010 Miss. LEXIS 264 (Miss. May 27, 2010).

In a civil suit following an automobile accident in which both parties had the same liability insurer, the trial court abused its discretion under Miss. R. Civ. P. 42 by denying appellant's motion to sever appellant's breach of contract and bad faith claims against the insurer from appellee's property damages and medical claims against the insurer; appellant would be unduly prejudiced because the fact that she had liability insurance would be placed squarely before the jury in violation of Miss. R. Evid. 411. Hegwood v. Williamson, 949 So. 2d 728, 2007 Miss. LEXIS 4 (Miss. 2007).

Intervenor cited Miss. R. Civ. P. 42(a) for the proposition that equity cases preserved identity of the causes, pleadings were carried on as if no consolidation had arisen, and separate decrees were to be issued; however, the intervenor failed to recognize the exception that separate decrees were required in consolidated cases unless the nature of the matters be such that it was clearly proper to include them in one decree. Hayes v. Leflore County Bd. of Supervisors, 935 So. 2d 1015, 2006 Miss. LEXIS 445 (Miss. 2006).

Where trial court ordered two separate actions consolidated for all purposes, with full acquiescence and consent of each interested party, any matter could be properly presented, litigated and decided if it lay within the scope of either action. White v. Gautier Util. Dist., 465 So. 2d 1003 (Miss. 1985).

**Bifurcation.**

All parties elected for strategic reasons to try both the bad-faith claim and the breach-of-contract/indemnity cases together, making full disclosure to the jury of the settlement agreement between the employer and the employee; the case presented multiple legal theories, and the result was a completely confused jury. Ultimately, there was no way the two verdicts could be reconciled, as they created an uncertainty that was fundamentally unacceptable; after careful consideration, the appropriate remedy was determined to be to vacate both judgments and remand the case for a new trial. Gallagher Bassett Servs. v. Malone, 30 So. 3d 301, 2010 Miss. LEXIS 15 (Miss. 2010).

Trial court abused its discretion in not allowing a trial to be bifurcated in a contractor's action against a subcontractor and an insurance company, pursuant to Miss. R. Civ. P. 42 and Miss. R. Evid. 411, because the comment to Miss. R. Civ. P. 42 authorized a separate trial to avoid prejudice such as here where the jury would learn that the subcontractor was insured, and the issue of the amount of damages the contractor or subcontractor might owe one another was completely unrelated to the issues of whether there was insurance coverage provided by the insurance company. Capital City Ins. Co. v. G.B. "Boots" Smith Corp., 889 So. 2d 505, 2004 Miss. LEXIS 1329 (Miss. 2004).

Trial court did not err in granting request for bifurcation of trial into separate liability and damages components; although some evidence relevant to damages was reviewed in liability phase, bifurcation avoided needless complexity, expense and delay, and possible confusion to jury, without prejudicing either party. Terrain Enters. v. Mockbee, 654 So. 2d 1122, 1995 Miss. LEXIS 220 (Miss. 1995).

Trial court in medical malpractice action abused its discretion in severing plaintiff's claims against a second physician, where those claims involved the same nucleus of common facts and arose from the same transaction or occurrence. Kiddy v. Lipscomb, 628 So. 2d 1355, 1993 Miss. LEXIS 445 (Miss. 1993).

Where trial court's decision to sever claims against insurance company rested on an erroneous decision on a matter of law, its decision on severance was erroneous as well, since claims were highly intertwined. Necaise v. U.S.A.A. Casualty Co., 644 So. 2d 253, 1994 Miss. LEXIS 530 (Miss. 1994).

**Construction with other rules.**

Where plaintiffs, numerous former and present employees, sued defendant, a railroad company, for occupational lung disease (all but one plaintiff residing outside of Tunica County, Mississippi, where the suit was filed, and some plaintiffs residing in Tennessee), primarily due to alleged exposure to asbestos, the railroad company successfully argued that joinder was improper because their employment consisted of work in different crafts at different work sites during different periods of time, and there was no transaction or occurrence or "distinct litigable event" common to all plaintiffs. Moreover, all claims against out-of-state defendants based on causes of action that accrued out of state were dismissed based on forum non conveniens, and all other plaintiffs' claims had to be severed from those of the Tunica County resident, including claims of plaintiffs who alleged exposure in Tunica County; all cases that could not be brought individually in Tunica County were to be transferred to a venue in which each plaintiff could have originally brought his or her claim, as required by Miss. R. Civ. P. 82(d). Ill. Cent. R.R. Co. v. Gregory, 912 So. 2d 829, 2005 Miss. LEXIS 297 (Miss. 2005).

## RESEARCH REFERENCES

**Law Reviews.**

Litigation in Mississippi Today: A Symposium: Class Actions & Joinder in Mississippi, 71 Miss. L.J. 447, Winter, 2002.

Now Open for Business: The Transformation of Mississippi's Legal Climate, 24 Miss. C. L. Rev. 393, Spring, 2005.

State Court Class Actions in Mississippi: Why Adopt Them Now?, 24 Miss. C. L. Rev. 437, Spring, 2005.

## Rule 43. Taking of testimony.

(a) *Form and admissibility.* — In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules or the Mississippi Rules of Evidence.

(b) *Affirmation in lieu of oath.* — Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(c) *Evidence on motions.* — When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

(d) *Interpreters.* — The court may appoint an interpreter of its own selection and may assess reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct and may be taxed ultimately as costs, in the discretion of the court. However, in the event and to the extent that such interpreters are required to be provided under the provisions of the Americans with Disabilities Act, 42 U.S. C. § 12131, et seq. or under rules or regulations promulgated pursuant thereto, such compensation and other costs of compliance shall be paid by the county in which the court sits, and shall not be taxed as costs.

**HISTORY: Amended effective January 10, 1986; amended June 5, 1997; Comments repealed and Advisory Committee Notes amended effective July 1, 2014; amended rule and advisory committee historical note, effective July 1, 2020.**

**Editor's Note —** Former M.R.C.P. 43(b)(4) was abrogated by M.R.E. Rule 607. Rule 607 is a repudiation of the old voucher rule. With regard to civil cases, the voucher rule was previously eliminated by former Rule 43(b)(4), which became effective January 1, 1982. Rule 607 now repudiates the voucher rule in both civil and criminal cases. See Advisory Committee Note, M.R.E. Rule 607.

M.R.E. Rule 611(a) is a verbatim restatement of former M.R.C.P. 43(b)(l). Rule 611(a) gives the court the discretion to control the order of interrogation. The three principles underlying an orderly presentation of evidence are effectiveness in determining the issues, avoidance of needless waste of time, and protection of the witness from harassment and embarrassment. Rule 611(a) is designed in part to give the judge the discretion to determine whether presentation of the evidence must be in question-and-answer form or whether it may be in narrative form. See Advisory Committee Note, M.R.E., Rule 611.

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 2020, Rule 43 was amended to re-designate former Rule 43(d) [Affirmation in Lieu of Oath] as Rule 43(b); to re-designate former Rule 43(e) [Evidence on Motions] as Rule 43(c); and to re-designate former Rule 43(1) [Interpreters] as Rule 43(d).

Effective July 1, 1998, Rule 43(f) [Interpreters] was amended in regard to compliance with the Americans with Disabilities Act, 42 U.S.C. § 12131, et seq.

Effective January 10, 1986, Rule 43(a) was amended to provide that testimony may be taken other than in open court, as provided by the Mississippi Rules of Evidence, and to delete references to the admissibility of evidence; Rule 43(b) [Mode and Order of Interrogation], and Rule 43(c) [Record of Excluded Evidence] were abrogated. 478-481 So. 2d XXVII (West Miss. Cas. 1986). [Amended effective July 1, 2020.]

## ADVISORY COMMITTEE NOTE

The admission of telephonic testimony in lieu of a personal appearance in open court by the witness is within the sound discretion of the trial court. *See Byrd v. Nix,* 548 So. 2d 1317 (Miss. 1989) (interpreting M.R.C.P. 43(a) and M.R.E. 611(a)).

## JUDICIAL DECISIONS

### ANALYSIS

Summary judgment.
Telephonic testimony.

**Summary judgment.**

In a dispute between insurance companies, it was proper under Miss. R. Civ. P. 43(e) to permit oral testimony on liability at the summary judgment stage. Indem. Ins. Co. of N. Am. v. Guidant Mut. Ins. Co., 99 So. 3d 142, 2012 Miss. LEXIS 487 (Miss. 2012).

**Telephonic testimony.**

The chancellor did not abuse his discretion in disallowing telephonic testimony where the petitioner testified that his mother, who lived in Arizona, was in poor health due to diabetes, hypertension, and a nervous condition, but produced no other documentation or testimony supporting his motion. Smith v. Hunter (In re Estate of Hunter), 736 So. 2d 440, 1999 Miss. App. LEXIS 113 (Miss. Ct. App. 1999).

## Rule 44. Proof of documents.

(a) *Authentication.* —

(1) *Domestic.* — An official record kept within the United States or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by a person purporting to be the officer having the legal custody of the record, or his deputy. If the official record is kept outside the State of Mississippi, the copy shall be accompanied by a certificate under oath of such person that he is the legal custodian of such record and that the record is kept pursuant to state law.

(2) *Foreign.* — A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof, or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification.

(b) *Lack of record.* — A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

(c) This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.

**HISTORY: Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

### ADVISORY COMMITTEE NOTE

Even though a document has been authenticated as required by this rule, it may still be excluded from evidence if, for example, it is irrelevant, or is hearsay, or is otherwise objectionable. For additional evidentiary rules concerning authentication, see M.R.E. 901-903.

The methods of authentication authorized by Rule 44 are additional and supplementary; they are not exclusive of other methods made available by Mississippi law. A party desiring to introduce an official record in evidence has the option of proceeding under Rule 44 or under any other applicable provision of law.

Rule 44(a)(1) deals with two types of official documents; those kept within the state and those kept without the state. A copy of the document need only be attested in the former case, certified under oath in the latter.

### JUDICIAL DECISIONS

**Applicability.**

Because the notice rule was not met property owners could not challenge the constitutionality of the Mississippi Right to Farm Act. Briggs v. Hughes, 316 So. 3d 193, 2021 Miss. LEXIS 116 (Miss. 2021).

Employer was not obligated to authenticate an affidavit it submitted to support its summary judgment motion because the rule did not apply to the circumstances involving the affidavit; the rule applies to authentication of "official" foreign and domestic records, such as the documentation necessary to prove that a person qualifies for enhanced sentencing based on prior convictions. Ogunbor v. May, 204 So. 3d 840, 2016 Miss. App. LEXIS 163 (Miss. Ct. App., cert. denied, 205 So. 3d 1083, 2016 Miss. LEXIS 501 (Miss. 2016), cert. denied, 2016 Miss. LEXIS 502 (Miss. Dec. 1, 2016).

## Rule 44.1. Determination of foreign law. [Omitted].

### ADVISORY COMMITTEE NOTE

Mississippi Code Annotated §13-1-149 (1972) provides that courts shall take judicial notice of all foreign law.

## Rule 45. Subpoena.

(a) *Form; issuance.* —

(1) Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony, or to produce and permit inspection and copying of designated books, documents, electronically stored information, or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified. The clerk shall issue a subpoena signed and sealed, but otherwise in blank, to a party requesting it, who shall fill it in before service. A command to produce or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may

be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(2) Subpoenas for attendance at a trial or hearing, for attendance at a deposition, and for production or inspection shall issue from the court in which the action is pending.

(3) In the case of discovery to be taken in foreign litigation, the subpoena shall be issued by a clerk of a court for the county in which the discovery is to be taken. The foreign subpoena shall be submitted to the clerk of court in the county in which discovery is sought to be conducted in this state. When a party submits a foreign subpoena to a clerk of court in this state, the clerk, in accordance with that court's procedure, shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed.

The subpoena under subsection (3) must incorporate the terms used in the foreign subpoena and it must contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and any party not represented by counsel.

A subpoena issued by a clerk of court under subsection (3) must otherwise be issued and served in compliance with the rules of this state. An application to the court for a protective order or to enforce, quash or modify a subpoena issued by a clerk of court under subsection (3) must comply with the rules of this state and be submitted to the issuing court in the county in which discovery is to be conducted.

(b) *Place of examination.* — A resident of the State of Mississippi may be required to attend a deposition, production or inspection only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of the court. A non-resident of this state subpoenaed within this state may be required to attend only in the county wherein he is served, or at such other convenient place as is fixed by an order of the court.

(c) *Service.* —

(1) A subpoena may be served by a sheriff, or by his deputy, or by any other person who is not a party and is not less than 18 years of age, and his return endorsed thereon shall be prima facie proof of service, or the person served may acknowledge service in writing on the subpoena. Service of the subpoena shall be executed upon the witness personally. Except when excused by the court upon a showing of indigence, the party causing the subpoena to issue shall tender to a non-party witness at the time of service the fee for one day's attendance plus mileage allowed by law. When the subpoena is issued on behalf of the State of Mississippi or an officer or agency thereof, fees and mileage need not be tendered in advance.

(2) Proof of service shall be made by filing with the clerk of the court from which the subpoena was issued a statement, certified by the person who made the service, setting forth the date and manner of service, the county in which it was served, the names of the persons served, and the name, address and telephone number of the person making the service.

(d) *Protection of persons subject to subpoenas.* —

(1) In General.

(A) On timely motion, the court from which a subpoena was issued shall quash or modify the subpoena if it (i) fails to allow reasonable time for compliance; (ii) requires disclosure of privileged or other protected matter and no exception or waiver applies, (iii) designates an improper place for examination, or (iv) subjects a person to undue burden or expense.

(B) If a subpoena (i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or (ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, the court may order appearance or production only upon specified conditions.

(2) Subpoenas for Production or Inspection.

(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents, electronically stored information, or tangible things, or to permit inspection of premises need not appear in person at the place of production or inspection unless commanded by the subpoena to appear for deposition, hearing or trial. Unless for good cause shown the court shortens the time, a subpoena for production or inspection shall allow not less than ten days for the person upon whom it is served to comply with the subpoena. A copy of all such subpoenas shall be served immediately upon each party in accordance with Rule 5. A subpoena commanding production or inspection will be subject to the provisions of Rule 26(d).

(B) The person to whom the subpoena is directed may, within ten days after the service thereof or on or before the time specified in the subpoena for compliance, if such time is less than ten days after service, serve upon the party serving the subpoena written objection to inspection or copying of any or all of the designated materials, or to inspection of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the material except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move at any time upon notice to the person served for an order to compel the production or inspection.

(C) The court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (i) quash or modify the subpoena if it is unreasonable or oppressive, or (ii) condition the denial of the motion upon the advance by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

(e) *Duties in responding to subpoena.* —

(1) Producing Documents or Electronically Stored Information.

(A) *Documents.* — A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* — If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* — The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* — The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery, motion for a protective order, or motion to quash, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(5). The court may specify conditions for the discovery, including those listed in Rule 26(b)(5).

(2) *Claiming Privilege or Protection.* —

(A) *Information Withheld.* — When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) *Information Produced.* — If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(f) *Sanctions.* — On motion of a party or of the person upon whom a subpoena for the production of books, papers, documents, electronically stored information, or tangible things is served and upon a showing that the subpoena power is being exercised in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the party or the person upon whom the subpoena is served, the court in which the action is pending shall order that the subpoena be quashed and may enter such further orders as justice may require to curb abuses of the powers granted under this rule. To this end, the court may impose an appropriate sanction.

(g) *Contempt.* — Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.

**HISTORY: Amended effective March 13, 1991; July 1, 1997; July 1, 1998; amended effective July 1, 2009 to provide a procedure for foreign subpoenas; amended effective July 1, 2013 to authorize a subpoena for electronically stored information; Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective March 13, 1991, Rule 45(c) was amended to require the party causing a subpoena to issue to tender to a nonparty witness the fee for one day's attendance plus mileage allowed by law. Rule 45(e) was amended by deleting the provision for tendering the fee for one day's attendance plus the mileage allowed by law to certain witnesses when subpoenaed. Rule 45(d) was amended to provide that when a deposition is to be taken on foreign litigation the subpoena shall be issued by the clerk for the county in which the deposition is to be taken. 574-576 So. 2d XXIV-XXV (West Miss. Cas. 1991).

Effective July 1, 1997 a new Rule 45 was adopted.

## ADVISORY COMMITTEE NOTE

A "foreign subpoena" means a subpoena issued under authority of a court of record of a foreign jurisdiction. "Foreign jurisdiction" means a state other than this state. Litigants in a foreign jurisdiction who desire to obtain a subpoena to depose a Mississippi resident, to obtain records within Mississippi, or to inspect premises within Mississippi should follow the procedure established in Mississippi Code Annotated section 11-59-1 et. seq. See the exclusion in M.R.A.P. 46(b)(11)(i) for Admission of Foreign Attorneys Pro Hac Vice.

Rule 45(c)(1) regarding advance payment to non-parties of statutory witness fees and mileage is complementary to Mississippi Code Annotated §§25-7-47 through 25-7-59 (1972).

Rule 45(d)(2) is intended to ensure that there be no confusion as to whether a person not a party in control, custody, or possession of discoverable evidence may be compelled to produce such evidence without being sworn as a witness and deposed. The force of a subpoena for production of documentary evidence generally reaches all documents under the control of the person ordered to produce, saving questions of privilege or unreasonableness.

## JUDICIAL DECISIONS

### ANALYSIS

Applicability.
Illustrative cases.

**Applicability.**

Correct standard for awarding sanctions for a vexatiously overbroad subpoena is that under M.R.C.P. Rule 45, not Rules 26 or 37. SLM v. Clinton Pub. Sch. Dist., 677 So. 2d 737, 1996 Miss. LEXIS 284 (Miss. 1996).

**Illustrative cases.**

Circuit court did not abuse its discretion by instructing the circuit clerk not to issue witness subpoenas because trial counsel failed to adhere to any of the procedures and instead sought to subpoena members of the jury without the circuit court's permission or oversight; the circuit court refuted the allegation that it had instructed the clerk to deny all of defendant's future subpoena request and made it clear that defendant had a right to subpoena nonjurors. Hall v. State, 295 So. 3d 544, 2019 Miss. App. LEXIS 610 (Miss. Ct. App. 2019).

In a products liability case, a trial court abused its discretion by imposing sanctions arbitrarily since the record reflected that an injured party and his expert witness complied with a subpoena duces tecum actually served by a ladder company. The attendance of a nonparty expert witness had to be obtained by a proper subpoena; a subpoena ad testificandum requiring the presence of the expert witness was not served. Laws v. Louisville Ladder, Inc., 146 So. 3d 380, 2014 Miss. App. LEXIS 454 (Miss. Ct. App. 2014).

Chancery court was required to find whether a subpoena requiring an attorney to turn over every single document in his possession relating to his representation of a decedent sought irrelevant or privileged information. No showing had been made that the documents subpoenaed had anything to do with the only issue ultimately before the chancery court. Flechas v. Pitts, 138 So. 3d 907, 2014 Miss. LEXIS 231 (Miss. 2014).

Chancellor was publicly reprimanded for misconduct in violation of, inter alia, Miss. Code Jud. Conduct Canon 1, 2A, 3B(2), 3C(1) because the chancellor had issued subpoenas to two members of county board of supervisors, and during a later meeting with the board of supervisors, the chancellor admitted that he had failed to comply with the law in doing so; further, the commission found by clear and convincing evidence that the chancellor had engaged in willful misconduct in office and conduct prejudicial to the administration of justice which brought the office into disrepute, under Miss. Const. art. VI, § 177A. The record did not indicate any aggravating factors. Miss. Comm'n on Judicial Performance v. Buffington, 55 So. 3d 167, 2011 Miss. LEXIS 100 (Miss. 2011).

Decision to impose sanctions under Miss. R. Civ. P. 45(f) and Miss. Code Ann. § 11-55-5(1), including an award of attorney's fees, against creditors was consistent with the decision that the garnishment was unreasonable as a result of the considerable evidence that creditors knew or should have known prior to filing for garnishment of the good efforts debtors made with regard to making the payment at issue. Deliman v. Anthony Clarke Thomas & Act Envtl., Inc., 16 So. 3d 721, 2009 Miss. App. LEXIS 79 (Miss. Ct. App.), cert. denied, 17 So. 3d 99, 2009 Miss. LEXIS 415 (Miss. 2009).

Non-parties to the litigation, upon whom a party had sought to compel the production of documents, correctly pointed out that service of a subpoena could only performed by personal service. There was no authority, statutory or otherwise, that would have allowed a Mississippi court to compel these nonresident, non-parties to produce documents. Syngenta Crop Prot., Inc. v. Monsanto Co., 908 So. 2d 121, 2005 Miss. LEXIS 466 (Miss. 2005).

Letters between the mother's and the father's attorneys indicated the dates on which the subpoena and notice thereof were served, the subpoena on a Friday, and the notice to the mother's attorney on the following Monday. Those letters did show that the father's attorney had failed to serve notice of the subpoena immediately under Miss. R. Civ. P. 45, but the father's attorney's failure to follow correct procedure did not rise to the level of abuse of process; the trial court properly granted summary judgment in favor of the father and his attorney as to the abuse of process claim. Ayles v. Allen, 907 So. 2d 300, 2005 Miss. LEXIS 361 (Miss. 2005).

Finding in favor of the patient in his medical malpractice action was improper pursuant to Miss. R. Civ. P. 45 because the judge's decision to quash the mother-in-law's subpoena was based on a fax from a doctor and an ex parte conversation, without notice to either party, without the benefit of observing witnesses, and without the doctor and clinic having the right to confront the witness or the doctors advocating her unavailability as a witness. Blake v. Clein, 903 So. 2d 710, 2005 Miss. LEXIS 235 (Miss. 2005).

Defendant failed to serve copies of the subpoenae to the State, which was error; as well, defendant had received the records before either the State or the circuit court knew that the subpoenae had been issued. Cox v. State, 849 So. 2d 1257, 2003 Miss. LEXIS 337 (Miss. 2003).

Trial court did not err in declining to require railroad to respond to subpoena to produce notes and drawings of its investigator regarding accident at crossing; decedent's representative failed to allow at least ten days for documents to be produced, and she also had same opportunity as railroad to observe crossing in an unaltered state subsequent to accident. Mitcham v. Illinois C. G. R. Co., 515 So. 2d 852, 1987 Miss. LEXIS 2779 (Miss. 1987).

## Rule 46. Exceptions unnecessary.

An exception at any stage or step of the case or matter is unnecessary to lay a foundation for review whenever a matter has been called to the attention of the court by objection, motion, or otherwise and the court has ruled thereon. However, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

**HISTORY: Comments repealed effective July 1, 2014.**

## JUDICIAL DECISIONS

**Dismissal with prejudice proper.**

Where the trial court dismissed appellant's medical-malpractice claim with prejudice for failure to prosecute, its finding of delay and contumacious conduct was supported by evidence that appellant allowed the case to languish for over a year, repeatedly failed to submit timely and sufficient responses to discovery, submitted untimely discovery requests, and did not disclose the basis for her claim until over two years after the responses were requested. Cornelius v. Benefield, 168 So. 3d 1028, 2013 Miss. App. LEXIS 558 (Miss. Ct. App. 2013), cert. denied, 140 So. 3d 940, 2014 Miss. LEXIS 293 (Miss. 2014).

## Rule 47. Jurors.

(a) *Examination of jurors.* — Any person called as a juror for the trial of any cause shall be examined under oath or upon affirmation as to his qualifications. The court may permit the parties or their attorneys to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties of their attorneys to supplement the examination by further inquiry.

(b) *Selection of jurors; jury service.* — Jurors shall be drawn and selected for jury service as provided by statute.

(c) *Challenges.* — In actions tried before a 12-person jury, each side may exercise four peremptory challenges. In actions tried before a 6-person jury, each side may exercise two peremptory challenges. Where one or both sides are composed of muliple parties, the court may allow challenges to be exercised separately or jointly, and may allow additional challenges; provided, however, in all actions the number of challenges allowed for each side shall be identical. Parties may challenge any juror for cause.

(d) *Alternate jurors.* — The trial judge may, in his discretion, direct that one or two jurors in addition to the regular panel be called and empaneled to sit as alternate jurors. Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges for cause, shall take the same oath and shall have the same functions, powers, facilities, and privileges as the regular jurors. Each party shall be allowed one peremptory challenge to alternate jurors in addition to those provided by subdivision (c) of this rule. The additional peremptory challenges provided for herein may be used against an alternate juror only, and other peremptory challenges, provided by subdivision (c) of this rule, may not be used against an alternate juror.

**HISTORY: Amended effective June 24, 1992; Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective June 24, 1992, Rule 47 was amended to provide that the court may allocate peremptory challenges to a side, rather than to a party, and, in the case of multiple parties on a side, may allow them to be exercised jointly or separately, and may allow additional peremptory challenges. 598-602 So. 2d XXIII (West Miss. Cas. 1992).

## ADVISORY COMMITTEE NOTE

Rule 47(c) provides that each side may exercise peremptory challenges to prospective jurors. Under the liberal provisions of these rules for joinder of claims and parties, problems may arise where there are multiple parties comprising a side. In such cases, it is implicit that the court may apportion the challenges among the parties comprising that side when they cannot agree on the apportionment themselves.

For additional guidelines concerning the method by which peremptory challenges shall be exercised, see the Uniform Rules of Circuit and County Court Practice.

## JUDICIAL DECISIONS

### ANALYSIS

Alternates.
Peremptory challenges.
Illustrative cases.

**Alternates.**

Alternate jurors must be discharged as soon as the jury retires to deliberate. Department of Human Servs. v. Moore, 632 So. 2d 929, 1994 Miss. LEXIS 110 (Miss. 1994).

**Peremptory challenges.**

In a landowner's action against a lumber company for trespass and wrongful cutting of timber, the trial judge offered no reason why the fees of the landowner's attorneys were not reasonable, except that they did not prevail on all their claims; rather, the trial court awarded fees in proportion to the damages awarded. Such an arbitrary method of calculation was an abuse of discretion, and the appellate court reversed and remanded the matter. Smith v. Parkerson Lumber, Inc., 2004 Miss. App. LEXIS 326 (Miss. Ct. App. Apr. 20, 2004), op. withdrawn, sub. op., 888 So. 2d 1197, 2004 Miss. App. LEXIS 1149 (Miss. Ct. App. 2004).

**Illustrative cases.**

Trial court in an eminent domain proceeding did not abuse its discretion when it declined to grant some of the comdemnor agency's challenges for cause, so that the agency eventually used up its peremptory challenges on some of those panel members; it was clear that the trial court extensively questioned those jurors before determining that they could be fair and impartial. Miss. Transp. Comm'n v. Highland Dev., LLC, 836 So. 2d 731, 2002 Miss. LEXIS 397 (Miss. 2002).

Defendant was not entitled to eight peremptory challenges on theory that two cross-claimants, each of whom had been allowed four peremptory challenges, were in concert with each other; trial court did not abuse its discretion in determining question of adversity between parties. Mutual Life Ins. Co. v. Estate of Wesson, 517 So. 2d 521, 1987 Miss. LEXIS 2901 (Miss. 1987), cert. denied, 486 U.S. 1043, 108 S. Ct. 2035, 100 L. Ed. 2d 620, 1988 U.S. LEXIS 2521 (U.S. 1988), overruled, General Am. Life Ins. Co. v. McCraw, 963 So. 2d 1111, 2007 Miss. LEXIS 325 (Miss. 2007).

## RESEARCH REFERENCES

**ALR.**

Judicial Removal for Cause and Peremptory Strike Validity Under Against Jurors Based upon Viewing Police Procedural Programs, Live Television Trials, Reality Legal Television, or Other Crime and Legal Based Television Programs. 84 A.L.R.6th 229.

## Rule 48. Juries and jury verdicts.

(a) *Circuit and chancery courts.* — Jurors in circuit and chancery court actions shall consist of twelve persons, plus alternates as provided by Rule 47(d). A verdict or finding of nine or more of the jurors shall be taken as the verdict or finding of the jury.

(b) *County court.* — Juries in county court actions shall consist of six persons, plus alternates as provided by Rule 47(d). A verdict or finding of five or more of the jurors shall be taken as the verdict or finding of the jury.

**HISTORY: Comments repealed effective July 1, 2014.**

### JUDICIAL DECISIONS

**Applicability.**

Six person juror requirement in M.R.C.P. Rule 48(b) applied to paternity proceeding transferred from chancery court to county court following defendant's demand for jury trial, since nothing in statute governing such proceedings suggested the number of jurors that may be required. Clark v. Whiten, 508 So. 2d 1105, 1987 Miss. LEXIS 2565 (Miss. 1987).

## Rule 49. General verdicts and special verdicts.

(a) *General verdicts.* — Except as otherwise provided in this rule, jury determination shall be by general verdict. The remaining provisions of this rule should not be applied in simple cases where the general verdict will serve the ends of justice.

(b) *Special verdict.* — The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(c) *General verdict accompanied by answers to interrogatories.* — The court, in its discretion, may submit to the jury, together with instructions for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered consistent with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

(d) *Court to provide attorneys with questions.* — In no event shall the procedures of subdivisions (b) or (c) of this rule be utilized unless the court, within a reasonable time before final arguments are made to the jury, provides the attorneys for all parties a copy of the written questions to be submitted to the jury.

**HISTORY: Amended effective March 1, 1989; Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective March 1, 1989, Rule 49 was amended to provide for a General Verdict Accompanied by Answers to Interrogatories in jury trials. 536-538 So. 2d XXVI-XXVII (West Miss. Cas. 1989).

## ADVISORY COMMITTEE NOTE

Rule 49 authorizes three types of verdicts-a general verdict, a special verdict, and a general verdict accompanied by answers to interrogatories. Trial judges have broad discretion to use special verdicts or general verdicts accompanied by answers to interrogatories. *W.J. Runyon & Son, Inc. v. Davis,* 605 So. 2d 38, 49 (Miss. 1992).

A general verdict is a single determination that disposes of the entire case, whereas a special verdict requires the jury to decide specific factual issues. Special verdicts are appropriate in complicated cases where their use might assist in focusing the jury's attention on the specific relevant factual issues or cases in which jury bias or prejudice might arise. *Thompson v. Dung Thi Hoang Nguyen,* 86 So. 3d 232, 240 (Miss. 2012). If the special verdict submitted to the jury omits a fact issue raised by the pleadings or evidence, the parties will be deemed to have waived their right to jury trial on such issue unless jury trial on such issue is demanded before the case is submitted to the jury. In the absence of such a demand, the trial court may make the requisite factual findings.

A court may also submit a general verdict with written interrogatories about specific factual issues to the jury. If the general verdict and interrogatory answers are consistent, the court shall enter judgment reflecting the verdict and answers. If the interrogatory answers are internally consistent but one or more answers is inconsistent with the general verdict, the court may enter judgment based upon the answers despite their inconsistency with the general verdict, instruct the jury to further consider its verdict and answers, or order a new trial. When one of the interrogatory answers is inconsistent with another answer and also inconsistent with the general verdict, the court shall instruct the jury to further consider its verdict and answers or order a new trial.

A special verdict or general verdict with interrogatories directing the jury to separate economic and non-economic damages is necessary if a defendant is going to seek application of statutory caps on non-economic damages. *See, e.g., Intown Lessee Assocs., LLC v. Howard,* 67 So. 3d 711, 723-24 (Miss. 2011). Similarly, a special verdict or a general verdict with interrogatories may be useful in a case in which the law authorizes allocation of fault among the parties determined to be at fault. A special verdict or a general verdict with answers to interrogatories may also be useful in cases involving novel or uncertain law. If the trial court is reversed on appeal, the special verdict or interrogatory answers may make retrial unnecessary if they contain sufficient factual findings on the relevant issues.

## JUDICIAL DECISIONS

### ANALYSIS

In general.
Interrogatories.
Jury instructions.
Omitted issues.
Standards.

**In general.**

In a negligence case (slip and fall), the trial judge abused his discretion in twice orally reinstructing the jury. That was not to say that a trial judge could never instruct a jury that the verdict was not in proper form; however, the trial judge stretched his comments beyond the bounds of merely seeking to have the jury clarify the verdict, and the conflicting special verdicts, coupled with the series of intervening erroneous oral instructions constituted reversible error, requiring a new trial. HWCC-Tunica, Inc. v. Jenkins, 908 So. 2d 150, 2004 Miss. App. LEXIS 878 (Miss. Ct. App. 2004), rev'd, 907 So. 2d 941, 2005 Miss. LEXIS 368 (Miss. 2005).

To avoid problem of appellate court being unable to determine on which of two alternate grounds a verdict was based, jury should be instructed to return a separate verdict on each issue. Larkin v. Perry, 427 So. 2d 138, 1983 Miss. LEXIS 2446 (Miss. 1983).

**Interrogatories.**

Where neither side requested any special interrogatories on the issue of damages as to the particular claims, and the appellant failed to object to the verdict forms submitted to the jury, the trial court acted within its discretion in not submitting a special verdict or a general verdict accompanied by answers to interrogatories, and the appellant failed to preserve the issue for review. Missala Marine Servs. v. Odom, 861 So. 2d 290, 2003 Miss. LEXIS 284 (Miss. 2003).

A verdict satisfied the requirements of subsection (c) of this rule as the jury's answers to the interrogatories were not inconsistent with the jury's general verdict. Sentinel Indus. Contr. Corp. v. Kimmins Indus. Serv. Corp., 743 So. 2d 954, 1999 Miss. LEXIS 235 (Miss. 1999).

Trial court did not abuse its discretion in refusing to submit personal injury case to jury on special written interrogatories, given that evidence of defendant's negligence was not isolated from that of codefendant with whom plaintiff settled before trial. W.J. Runyon & Son v. Davis, 605 So. 2d 38, 1992 Miss. LEXIS 423 (Miss. 1992).

**Jury instructions.**

In the stopped driver's action against another driver after she was struck from behind, considering the facts and reading the instructions as a whole, the trial court erred by refusing a peremptory jury instruction regarding liability and by refusing a jury instruction explaining how to calculate damages, Miss. R. Civ. P. 49(b). Furthermore, the jury continuously posing questions to the court during deliberation suggested that the jurors were confused by the instructions. Thompson v. Nguyen, 86 So. 3d 251, 2011 Miss. App. LEXIS 44 (Miss. Ct. App. 2011), rev'd, 86 So. 3d 232, 2012 Miss. LEXIS 195 (Miss. 2012).

**Omitted issues.**

Appropriate method for preserving claim of error concerning omitted issue in special verdict instruction is to either make clear objection for record, stating basis for objection, or propose a special interrogatory which includes omitted issue, but a party is not required to do both. Jones v. Westinghouse Elec. Corp., 694 So. 2d 1249, 1997 Miss. LEXIS 241 (Miss. 1997).

**Standards.**

Case was reversed and remanded for new trial on issue of damages, due to obvious confusion inherent in jury's response to instructions on special verdicts. First Bank of Southwest Mississippi v. Bidwell, 501 So. 2d 363, 1987 Miss. LEXIS 2243 (Miss. 1987).

### Rule 50. Motions for a directed verdict and for judgment notwithstanding the verdict.

(a) *Motion for directed verdict: when made; effect.* — A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted without having reserved the right to do so and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) *Motion for judgment notwithstanding the verdict.* — Not later than ten days after entry of judgment in accordance with a verdict, a party may file a motion to have the verdict and any judgment entered thereon set aside; or if a verdict was not returned, a party, within ten days after the jury has been discharged, may file a motion for judgment. If no verdict was returned the court may direct the entry of judgment or may order a new trial.

(c) *Conditional rulings on grant of motion.* —

(1) If the motion for judgment notwithstanding the verdict provided for in subdivision (b) of this rule is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for a judgment notwithstanding the verdict may file a motion for a new trial pursuant to Rule 59 not later than ten days after entry of the judgment notwithstanding the verdict.

(d) *Denial of motion.* — If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on the motion may, as appellee, assert grounds entitling him to a new trial on the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment nothing in this rule precludes it from determining that the appellee is entitled to a new trial or from directing the trial court to determine whether a new trial shall be granted.

**HISTORY: Amended effective July 1, 1994; July 1, 1997; Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 1997, Rule 50(b) was amended to clarify that Rule 50(b) motions must be filed not later than ten days after entry of judgment. 689-692 So. 2d XLIX (West Miss. Cas. 1997).

Effective July 1, 1994, Rule 50(b) was

amended so that a motion for directed verdict is not a prerequisite to file a motion for judgment notwithstanding the verdict. 632-635 So.2d XXX-XXXI (West Miss.Cases 1994).

[Adopted August 21, 1996; amended effective July 1, 1997.]

## ADVISORY COMMITTEE NOTE

Rule 50 applies only in cases tried to a jury with power to return a binding verdict. Rule 50(a) enables the court to determine whether there is any question of fact to be submitted to the jury and whether any verdict other than the one directed would be erroneous as a matter of law; it is conceived as a device to save the time and trouble involved in a lengthy jury determination.

Rule 50(b) differs from its federal rule counterpart in that a motion for a directed verdict is no longer a prerequisite to file a motion for a judgment notwithstanding the verdict. *New Hampshire Ins. Co. v. Sid Smith & Associates, Inc.,* 610 So. 2d 340 (Miss. 1992).

A motion for judgment notwithstanding the verdict made pursuant to M.R.C.P. 50(b) must be filed within 10 days after entry of the judgment. The trial court has no authority or discretion to extend the 10-day time period. M.R.C.P. 6(b). A motion for a judgment notwithstanding the verdict is not appropriate for cases tried by a judge sitting without a jury. See M.R.C.P. 59(e).

## JUDICIAL DECISIONS

### ANALYSIS

In general.
Applicability.
Bench trials.
Conditional rulings.
Damages.
Directed verdict improperly granted.
Judgment notwithstanding the verdict.
Motions.
Reconsideration.
Requirements.
Review.
Waiver.
Illustrative cases.

**In general.**

Finding that an insured had not provided an explanation for the cause of the damage to the right side of his motorcycle from a left side slide accident, the trial court's grant of the insurer's motion for judgment notwithstanding the verdict was proper. King v. Progressive Gulf Ins. Co., 913 So. 2d 1065, 2005 Miss. App. LEXIS 748 (Miss. Ct. App. 2005).

Trial court did not err in denying plaintiffs' motion for judgment notwithstanding the verdict because when looking at all of the evidence, even that which plaintiffs argued was objectionable, the appellate court could not say that the jury could have only properly found for plaintiffs. As conflicting evidence existed as to whether the doctors' malpractice or CPR caused a tear in the anastomosis seam, which could cause fair minded jurors to reach different conclusions, granting the motion would have been improper. Poole v. Avara, 908 So. 2d 716, 2005 Miss. LEXIS 486 (Miss. 2005).

Trial court did not err in granting a directed verdict in favor of the casino on the patron's slip and fall complaint where the patron failed to present credible evidence to establish the necessary elements of her right to recover; the patron failed to produce credible evidence of actual or constructive notice on the part of the casino; the patron produced no evidence to show how the substance came to be in and around the jacuzzi, or whether the casino had actual or constructive notice of any not readily apparent condition of slipperiness in and around the jacuzzi. Elgandy v. Boyd Miss., Inc., 909 So. 2d 1202, 2005 Miss. App. LEXIS 71 (Miss. Ct. App. 2005).

After carefully reviewing the testimony of two experts in the light most favorable to the patient, it was clear that no question of fact existed concerning whether an orchiectomy (removal of a testicle), was a known risk of undergoing a vasectomy. There was no testimony to contradict the assertions made by the two expert physicians that removing a testicle was not a known risk faced by patients who chose to have a vasectomy; because the patient failed to present evidence that his experience was a risk that was legitimately known to exist, he did not show that information given to him by the operating physician was inadequate, and therefore, a directed verdict for the latter physician was not improper. Whittington v. Mason, 906 So. 2d 10, 2004 Miss. App. LEXIS 941 (Miss. Ct. App. 2004), aff'd, 905 So. 2d 1261, 2005 Miss. LEXIS 791 (Miss. 2005).

Language, "unless the appellate court has otherwise ordered," in Miss. R. Civ. P. 50(c) has not altered the interlocutory nature of a decision by the trial court to grant a new trial motion based on its decision that the verdict as to liability is against the weight of the evidence. Hearn v. Brown, 876 So. 2d 380, 2003 Miss. App. LEXIS 875 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66, 2004 Miss. LEXIS 837 (Miss. 2004).

Directed verdict should have been granted in favor of the corporation where the trial court should have taken the case from the jury because at no point in the trial was even a scintilla of evidence presented to support the existence of a renegotiated contract; the manufacturer was provided the opportunity under law to amend the pleadings and present evidence to show a contract existed, but it failed to do so. Murray Envelope Corp. v. Atlas Envelope Corp., 851 So. 2d 426, 2003 Miss. App. LEXIS 667 (Miss. Ct. App. 2003).

Defendant's motions for a directed verdict, for judgment notwithstanding the verdict, or for new trial, operated as challenges to the weight and sufficiency of the evidence supporting the verdict. Because the evidence in defendant's wire fraud trial was sufficient to support the jury's finding, defendant's motions were properly denied. McGee v. State, 853 So. 2d 125, 2003 Miss. App. LEXIS 159 (Miss. Ct. App.), cert. denied, 852 So. 2d 577, 2003 Miss. App. LEXIS 834 (Miss. Ct. App. 2003).

A motion for directed verdict does not apply to cases tried without a jury nor to those tried to the court with an advisory jury. Breland v. Gulfside Casino Pshp., 736 So. 2d 446, 1999 Miss. App. LEXIS 128 (Miss. Ct. App. 1999).

The standards employed for a summary judgment and directed verdict are the same, just employed at different times during a proceeding. Breland v. Gulfside Casino Pshp., 736 So. 2d 446, 1999 Miss. App. LEXIS 128 (Miss. Ct. App. 1999).

Motions for new trial are addressed to sound discretion of trial court, and require a lesser showing before they can be sustained than does the motion for j.n.o.v. Investors Property Management, Ltd. v. Watkins, Pitts, Hill & Associates, 511 So. 2d 1379, 1987 Miss. LEXIS 2699 (Miss. 1987).

**Applicability.**

In cases tried before a jury, a motion for directed verdict is allowed at the close of the plaintiff's case-in-chief. W.R. Berkley Corp. v. Rea's Country Lane Constr., 140 So. 3d 437, 2013 Miss. App. LEXIS 464 (Miss. Ct. App. 2013), cert. denied, 139 So. 3d 74, 2014 Miss. LEXIS 234 (Miss. 2014).

Motion for a directed verdict under Miss. R. Civ. P. 50 does not apply to cases tried without a jury. Crowell v. Butts, 153 So. 3d 719, 2013 Miss. App. LEXIS 866 (Miss. Ct. App. 2013), cert. denied, 145 So. 3d 674, 2014 Miss. LEXIS 395 (Miss. 2014), aff'd in part and rev'd in part, 153 So. 3d 684, 2014 Miss. LEXIS 530 (Miss. 2014).

Trial court did not err in denying the owners' motion for a directed verdict where the evidence contradicted not only the fact that the decedent was not allowed in the office, but also the fact that the decedent had been demoted from invitee to licensee; therefore, the issue as to the decedent's status was disputed and as a result, it was a question of fact to be determined by the jury. Gibson v. Wright, 870 So. 2d 1250, 2004 Miss. App. LEXIS 323 (Miss. Ct. App. 2004).

Although circuit court's order referred to reduction in damages as a "remittitur" and as being "in lieu of a new trial," correct reading of order was that it was a judgment notwithstanding the verdict. Investors Property Management, Ltd. v. Watkins, Pitts, Hill & Associates, 511 So. 2d 1379, 1987 Miss. LEXIS 2699 (Miss. 1987).

**Bench trials.**

On appeal in favor of the son in the daughter's action seeking to set aside a conveyance of land to the son, the motion made in the case was improperly denominated as a motion for a directed verdict under Miss. R. Civ. P. 50(a). In a bench trial, the proper motion to make at the close of the case-in-chief was a motion for involuntary dismissal under Miss. R. Civ. P. 41(b). Lynch v. Summerlin (In re Summerlin), 989 So. 2d 466, 2008 Miss. App. LEXIS 498 (Miss. Ct. App. 2008).

**Conditional rulings.**

In a slip and fall case where the trial court granted a JNOV and conditionally ordered a new trial, the appellate court lacked jurisdiction to disturb the trial court's order granting a new trial because it was an interlocutory determination that was not the proper subject of an appeal. Coleman v. Jitney Jungle Stores of Am., Inc., 894 So. 2d 610, 2004 Miss. App. LEXIS 1054 (Miss. Ct. App. 2004).

Subdivision (c) of this rule expressly provides for an appeal where a judgment notwithstanding the verdict has been entered and a new trial conditionally granted. Spradlin v. Smith, 494 So. 2d 354, 1986 Miss. LEXIS 2642 (Miss. 1986).

**Damages.**

Plaintiffs' evidence was adequate such that a hypothetical reasonable juror could have found damages for plaintiffs at some amount above nominal damages, and therefore circuit court erred in granting defendants' motion for directed verdict at conclusion of plaintiffs' case-in-chief. Wall v. Swilley, 562 So. 2d 1252, 1990 Miss. LEXIS 231 (Miss. 1990).

**Directed verdict improperly granted.**

Motion for a directed verdict was improperly granted in a medical malpractice case because a jury could have found for a patient where an expert testified that the patient should have received targeted post-surgical physical therapy if a fixed abduction contracture existed on the date of the patient's last medical visit following a hip replacement; moreover, the patient demonstrated that a substantial leg length disparity still existed at the time of trial. Cantrell v. Green, 987 So. 2d 1002, 2007 Miss. App. LEXIS 587 (Miss. Ct. App. 2007), cert. dismissed, 2008 Miss. LEXIS 373 (Miss. July 31, 2008).

Whether ambulance service workers knew or should have known that a hospital was not capable of managing the daughter's condition and whether their alleged negligence, if any, in taking her to that hospital was only a remote and thus not proximate cause of her death, was question to be determined by the jury; the directed verdict in favor of the workers was not proper, as the issue of causation was a jury question. Entrican v. Ming, 962 So. 2d 28, 2007 Miss. LEXIS 431 (Miss. 2007).

Circuit court erred in granting a directed verdict pursuant to Miss. R. Civ. P. 50(a) in favor of a manufacturer in a driver's products liability suit; the driver introduced sufficient evidence to allow a jury to find that the manufacturer was liable under Miss. Code Ann. § 11-1-63(a)(i)(4) for failure of the driver's air bag to deploy in a collision where the owner's manual and the salesman from whom the driver purchased the car stated that the air bag would deploy if the collision was hard enough. Forbes v. GMC, 935 So. 2d 869, 2006 Miss. LEXIS 285 (Miss. 2006).

Trial court erred granting an insurer's motion for directed verdict because issues as to whether the insurer breached a duty of confidentiality and whether negligent infliction of emotional distress occurred when the insurer allegedly used a pejorative term in describing an insured to a third party were issues for the jury to decide. Robley v. Blue Cross/Blue Shield, 935 So. 2d 990, 2006 Miss. LEXIS 407 (Miss. 2006).

Where an insured claimed damages for intentional and negligent infliction of emotional distress and for breach of contract for the release of her confidential medical information from her medical insurer for its failure to maintain its duty of confidentiality, the trial court erred in granting a directed verdict to the insurer; the subscriber's agreement created a fiduciary relationship and the issue of the propriety of the disclosure was simply not suitable for directed verdict because the testimony at trial was mixed. Robley v. Blue Cross/Blue Shield, 935 So. 2d 1021, 2005 Miss. App. LEXIS 414 (Miss. Ct. App. 2005), aff'd in part and rev'd in part, 935 So. 2d 990, 2006 Miss. LEXIS 407 (Miss. 2006).

Where an insured claimed damages for intentional and negligent infliction of emotional distress and for breach of contract for the release of her confidential medical information from her medical insurer for its failure to maintain its duty of confidentiality, the trial court erred in granting a directed verdict to the insurer; sufficient evidence existed at trial of a causal connection between the release of the insured's confidential information and her alleged injuries to allow her cause to survive the insurer's motion for directed verdict. Robley v. Blue Cross/Blue Shield, 935 So. 2d 1021, 2005 Miss. App. LEXIS 414 (Miss. Ct. App. 2005), aff'd in part and rev'd in part, 935 So. 2d 990, 2006 Miss. LEXIS 407 (Miss. 2006).

**Judgment notwithstanding the verdict.**

Motion for a judgment notwithstanding the verdict is made post-judgment, after the trier of fact has considered all the evidence – both the plaintiff's and the defendant's. The trial judge considers the evidence in the light most favorable to the verdict and determines whether substantial evidence supports the verdict. W.R. Berkley Corp. v. Rea's Country Lane Constr., 140 So. 3d 437, 2013 Miss. App. LEXIS 464 (Miss. Ct. App. 2013), cert. denied, 139 So. 3d 74, 2014 Miss. LEXIS 234 (Miss. 2014).

Circuit court did not err when it denied defendant's motion for a judgment notwithstanding the verdict under Miss. R. Civ. P. 50 because the evidence presented at trial was sufficient to allow a jury to conclude that: (1) the principal murdered the victim; (2) defendant knew that the principal had committed the murder; and (3) defendant knowingly assisted the principal in his attempt to evade the law. There was nothing in the record that would lead the court to question the jury's judgment that defendant was guilty of being an accessory after the fact to murder. Miller v. State, 18 So. 3d 898, 2009 Miss. App. LEXIS 675 (Miss. Ct. App. 2009).

Plaintiff's motion for judgment notwithstanding the verdict (JNOV) was properly denied because the testimony of the driver and defendants' expert was legally sufficient to support the verdict and it was for the jury to determine the weight and credibility of witnesses. Solanki v. Ervin, 21 So. 3d 552, 2009 Miss. LEXIS 420 (Miss. 2009).

Housing group's motion for judgment notwithstanding the verdict was properly denied where the appellate court could not, as a matter of law, determine that the entire liability was attributable to the errors of the architect; thus, it reversed and remanded for a new trial to determine what portion, if any, of the architectural firm's liability may be imposed to the architect individually. Lambert Cmty. Hous. Group, L.P. v. Wenzel, 987 So. 2d 468, 2008 Miss. App. LEXIS 383 (Miss. Ct. App. 2008).

Trial court did not err in denying the landowners' motion for JNOV or new trial where the jury was free to accept or reject any or all of the testimony and evidence presented by Mississippi Transportation Commission (MTC) and the landowners; the jury accepted the testimony and evidence that supported MTC and rendered a verdict in its favor. Adcock v. Miss. Transp. Comm'n, 981 So. 2d 942, 2008 Miss. LEXIS 145 (Miss. 2008).

Circuit court correctly denied the patient's motion for judgment notwithstanding the verdict, or in the alternative, a new trial, where the record reflected sufficient evidence to sustain the jury verdict, a verdict that was not against the overwhelming weight of the evidence. Johnson v. St. Dominics - Jackson Mem'l Hosp., 967 So. 2d 20, 2007 Miss. LEXIS 592 (Miss. 2007).

Trial court erred in failing to grant a judgment notwithstanding the verdict for the builder individually where the homeowner failed to meet the established standards for piercing the corporate veil; there was no proof that the builder was using a shell corporation as a shield from personal liability. Rosson v. McFarland, 962 So. 2d 1279, 2007 Miss. LEXIS 483 (Miss. 2007).

Inadmissible evidence cannot contribute to a legally sufficient evidentiary basis for a verdict, and therefore in a case involving breach of contract, computer generated invoices did not meet the standard for admission under Miss. R. Evid. 803(6) where there was no explanation of how they were created or testimony that the reprints were created at or near the time that the charges were incurred for the sale or lease of large equipment; as such, the trial court did not err by removing this evidence when it considered a motion for judgment notwithstanding the verdict. H & E Equip. Servs., LLC v. Floyd, 959 So. 2d 578, 2007 Miss. App. LEXIS 428 (Miss. Ct. App. 2007).

In a breach of contract case, a chancellor did not err by refusing to grant a new trial under Miss. R. Civ. P. 59(a)(2) because the decision was supported by the weight of the evidence where a renter testified that he failed to maintain insurance on property, as agreed upon by the parties to a rental contract; the chancellor was entitled to accept the version of events that he found most credible in determining whether or not the renter attempted to make a timely balloon payment under the terms of the contract, and moreover a motion for judgment notwithstanding the verdict was also properly denied since the evidence was sufficient to support the judgment. Kendrix v. Huckaby, 955 So. 2d 950, 2007 Miss. App. LEXIS 278 (Miss. Ct. App. 2007).

Trial court did not err by denying the boyfriend's motion for judgment notwithstanding the verdict in the husband's alienation of affection action because a reasonable juror could conclude that all elements of the tort were met; the evidence showed that: (1) the husband was granted a divorce on the grounds of adultery; (2) after the daughter of the wife and the boyfriend was born, the husband began finding large amounts of cash throughout the house; (3) the wife told a coworker that the boyfriend had given her money to buy a car; (4) the coworker testified that the wife told her that if she quit her job the boyfriend would take their daughter away from her; and (5) the husband testified that his marriage failed because his wife could not resist all of the boyfriend's money and absent the boyfriend his marriage would have remained intact. Fitch v. Valentine, 959 So. 2d 1012, 2007 Miss. LEXIS 227 (Miss. 2007), cert. denied, 552 U.S. 1100, 128 S. Ct. 911, 169 L. Ed. 2d 730, 2008 U.S. LEXIS 127 (U.S. 2008).

In an attorney disciplinary matter, a judgment notwithstanding the verdict, or in the alternative a new trial, was properly denied because the attorney was given the opportunity to cross-examine the witnesses when a private reprimand was vacated in favor of a formal hearing, a telephone conference dealt only with a client's failure to appear, prior sanctions against the attorney were properly considered, the evidence was sufficient to support a finding that the attorney violated several ethical rules, and there were no discovery violations shown. Shah v. Miss. Bar, 962 So. 2d 514, 2007 Miss. LEXIS 5 (Miss. 2007).

Defendant's motion for judgment notwithstanding the verdict was properly denied where the evidence was sufficient to convict defendant where the evidence presented against defendant at trial included direct evidence by way of an audio-visual recording and testimony that defendant received money and handed the undercover officer cocaine in exchange for that money. Hudderson v. State, 941 So. 2d 221, 2006 Miss. App. LEXIS 803 (Miss. Ct. App. 2006).

Trial court erred in granting the purchasers' motion for judgment notwithstanding the verdict because the evidence did not support the granting of the motion as it was necessary to determine the proper amount of compensation due to both the purchasers for damages incurred due to fraudulent misrepresentation and the seller, for amounts due to him under promissory note. Garris v. Smith's G&G, LLC, 941 So. 2d 228, 2006 Miss. App. LEXIS 806 (Miss. Ct. App. 2006).

Where a car collision was caused when the driver of a commercial vehicle swerved to avoid hitting an unknown driver, the jury rendered a verdict for defendant driver and his employer in plaintiff's personal injury suit; by setting aside the jury verdict, granting plaintiff's motion for a new trial, and directed that the new jury be peremptorily instructed that defendant driver was negligent as a matter of law, the trial court essentially granted the plaintiff a J.N.O.V. White v. Stewman, 932 So. 2d 27, 2006 Miss. LEXIS 315 (Miss. 2006).

State supreme court affirmed the grant of a judgment notwithstanding the verdict pursuant to Miss. R. Civ. P. 50 because the utility company was only held to a reasonable standard of care when the sagging power line involved in the accident was known to be a dead wire and not a live one. McFarland v. Entergy Miss., Inc., 919 So. 2d 894, 2005 Miss. LEXIS 837 (Miss. 2005).

Seller was entitled to a JNOV concerning all of the invoices associated with signed delivery tickets, delivery tickets with printed names, and delivery tickets for directly shipped items. The evidence pointed so overwhelmingly in favor of the seller that reasonable jurors could not have arrived at a finding that the purchaser was not indebted to the seller. Natchez Elec. & Supply Co. v. Johnson, 968 So. 2d 444, 2006 Miss. App. LEXIS 118 (Miss. Ct. App. 2006), rev'd, 2007 Miss. LEXIS 20 (Miss. Jan. 18, 2007).

Appellate court affirmed the trial court's verdict and the denial of plaintiffs' motion for judgment notwithstanding the verdict; under the doctrine of res ipsa loquitor, the jury was not bound to make an inference of negligence. Since the employee testified to the procedures he took before the trailer broke free, the jury was free to find defendants were not negligent, and the evidence was not overwhelmingly in favor of plaintiffs. Townsend v. Skelton, 911 So. 2d 639, 2005 Miss. App. LEXIS 655 (Miss. Ct. App. 2005).

Jury verdict defied all logic, as the evidence presented at trial established that the driver was negligent as a matter of law for failing to maintain a proper lookout and to yield the right-of-way by executing a turn across the insured's lane of travel. A verdict should have been returned in favor of the insured because the violation of said statutory duties by the driver was the unequivocal proximate cause of the insured's injury; even if the driver was not negligent per se, the facts presented at trial unconditionally demonstrated that the collision was the result of her negligence and the trial court committed reversible error in failing to apply Miss. R. Civ. P. 50, and by denying the insured's motion for judgment notwithstanding the verdict. State Farm Auto Ins. Cos. v. Davis, 887 So. 2d 192, 2004 Miss. App. LEXIS 1065 (Miss. Ct. App. 2004).

Where during a difficult birth, the child incurred a condition called shoulder dystocia, and later suffered from Erb's Palsy, the physician's testimony, as well as his expert's testimony was that the physician was not negligent. Moreover, portions of the child's testimony suggested that the physician was not negligent in electing not to perform a cesarean section; accordingly, a reasonable hypothetical juror heard sufficient evidence to determine that the physician was not negligent and the trial court did not err by denying the child's motions for new trial or for judgment notwithstanding the verdict. Brumfield v. Langston, 906 So. 2d 48, 2004 Miss. App. LEXIS 1106 (Miss. Ct. App. 2004).

Driver testified that the tire was low after the trailer was loaded with cattle, but that he did not know whether it had a leak. He further testified that the trailer was "tracking" properly while being towed, that nothing was out of the ordinary until the accident occurred, and that he did not lose control of his truck at the time of the accident wherein two wheels came off the trailer. striking the injured person's car; while reasonable and fair minded jurors may have reached a different conclusion, there was sufficient evidence introduced at trial to reasonably conclude that the driver was not negligent, and the trial court did not err in denying the injured person's motion for judgment notwithstanding the verdict. Ferguson v. Snell, 905 So. 2d 516, 2004 Miss. LEXIS 1488 (Miss. 2004).

Trial court did not err in refusing to grant a judgment notwithstanding the verdict in a case involving the destruction of trees because it was within the province of the jury to believe the testimony of witnesses regarding who was responsible for the cutting; the evidence showed that a person not associated with a lumber company actually cut down some of the owner's trees. Smith v. Parkerson Lumber, Inc., 888 So. 2d 1197, 2004 Miss. App. LEXIS 1149 (Miss. Ct. App. 2004).

Due to disputed facts as to whether a nursing home was negligent and whether the elderly resident had suffered damages, a trial court did not err in refusing to issue a peremptory instruction directing a verdict in favor of the resident. Dupree v. Plantation Pointe, L.P., 892 So. 2d 228, 2004 Miss. LEXIS 1460 (Miss. 2004).

When the evidence presented by the State was taken together with all reasonable inferences, there was more than sufficient credible evidence in support of the court's denial of defendant's motions for judgment notwithstanding the verdict (JNOV) and a new trial; confidential informant identified defendant as the person who sold marijuana to a special agent. In addition, the special agent who purchased the marijuana also identified defendant as the individual who sold the marijuana to him. Anderson v. State, 904 So. 2d 973, 2004 Miss. LEXIS 1378 (Miss. 2004).

Defendant's conviction for possession of cocaine with intent to distribute and the denial of his motion for judgment notwithstanding the verdict were proper where his proposal of scenarios that the jury could have considered, but did not, in rendering a guilty verdict did not create any reason to overturn the jury's verdict. Williams v. State, 892 So. 2d 272, 2004 Miss. App. LEXIS 1002 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273, 2005 Miss. LEXIS 288 (Miss. 2005).

Due to the conflicting facts presented at trial, the outcome of the case hinged on the jury's determination of which rendition of facts the jury believed occurred, and based on the injured person's own testimony regarding his approach to the tractor trailer which was negotiating a turn (and which the injured person skidded into from behind), and the testimony of the accident reconstructionist regarding the speeds and distances involved, the injured person's motion for judgment notwithstanding the verdict was properly denied. McKenzie v. Supervalu, Inc., 883 So. 2d 1188, 2004 Miss. App. LEXIS 955 (Miss. Ct. App. 2004).

After having a car repossessed, the injured party's complaint for damages was based on a claim of emotional distress which consisted primarily of loss of sleep, but the injured party neither sought nor received any medical treatment or professional counseling regarding her alleged emotional distress. Thus, the trial court did not err in finding that the injured party's evidence was insufficient to support a claim for emotional distress for ordinary negligence, and it properly granted the finance company's motion for a judgment notwithstanding the verdict. Wilson v. GMAC, 883 So. 2d 56, 2004 Miss. LEXIS 970 (Miss. 2004).

There was no evidence that the finance company or the repossessor did anything that would be seen as extreme or outrageous and except for the injured party's complaint that she lost sleep, was upset, and had bad dreams; thus, there was no evidence that would support a judgment for emotional distress. Therefore, the trial court correctly determined that the injured party was not entitled to damages for emotional distress for outrageous conduct, and it properly granted the finance company's and the repossessor's motion for a judgment notwithstanding the verdict. Wilson v. GMAC, 883 So. 2d 56, 2004 Miss. LEXIS 970 (Miss. 2004).

Trial court did not err in finding that recovery for breach of contract was not in order because the injured party was already put back in the position she was originally in before any breach of contract and because (1) the injured party got a complete refund of the extension agreement payment which she accepted; (2) she did not intend to retain the car that was repossessed; (3) she surrendered attempts to re-claim the car once it was repossessed; (4) for a while she had use of the car without making any payments on the obligation; and (5) the amount brought by the sale of the car was substantially less than the obligation still owed on the car. Thus, the trial court did not err in granting the finance company's motion for a judgment notwithstanding the verdict on the breach of contract claim. Wilson v. GMAC, 883 So. 2d 56, 2004 Miss. LEXIS 970 (Miss. 2004).

Trial court did not err in finding that the injured party was not entitled to recover any damages for conversion of the car by the finance company because (1) the evidence reflected the fact that the injured party abandoned the car because the injured party and her attorney told the finance company that the injured party did not want to keep the car; (2) the injured party accepted and cashed the full refund of what she paid for the extension agreement, receiving back what she had paid to the finance company; (3) despite making no payments on the account, the injured party had use of the car until it was repossessed; and (4) the car sold for considerably less than the secured obligation owed on the car. Thus, the trial court did not err in granting the finance company's motion for a judgment notwithstanding the verdict on the conversion claim. Wilson v. GMAC, 883 So. 2d 56, 2004 Miss. LEXIS 970 (Miss. 2004).

Trial court did not err in finding that the repossessor did not commit a breach of the peace because (1) the repossession agent testified that the injured party told him that he could have the car; (2) he testified that the injured party gave him the keys to the car; (3) he testified that he did not curse at the injured party or her sister; (4) there was no physical altercation involved in the repossession; and (5) the injured party testified that she was not touched by either of the repossession agents and that she relinquished the car's keys to the repossession agents. Thus, the trial court properly granted the repossessor's motion for a judgment notwithstanding the verdict on the breach of the peace claim. Wilson v. GMAC, 883 So. 2d 56, 2004 Miss. LEXIS 970 (Miss. 2004).

In the former employees' malicious prosecution action against the corporation after a federal court had dismissed the corporation's defamation action, although the trial court denied the corporation's motion for judgment notwithstanding the verdict, the Mississippi Supreme Court, after reviewing all the evidence in the record regarding the question of malice, determined that only one conclusion could have reasonably been drawn from the evidence. It was so overwhelmingly in favor of the corporation, which had brought the underlying action to clear its name as to damaging statements by the former managers, that reasonable persons could not have arrived at a contrary verdict; thus, the judgment of the trial court was reversed, and judgment was rendered in favor of the corporation. Condere Corp. v. Moon, 880 So. 2d 1038, 2004 Miss. LEXIS 782 (Miss. 2004).

In a negligence action, the trial testimony clearly established that the accident occurred when the parties tried to avoid colliding with the so-called "phantom car," for which the driver was never identified, which had abruptly stopped in front of the injured person's vehicle and was then struck from behind by a defendant driver who was also forced to take evasive action. Thus, after a county court jury found defendant driver was not at fault, on appeal, the circuit court correctly reversed the county court's order granting the injured person's motion for a judgment notwithstanding the verdict and sua sponte award of damages; the circuit court also properly retained jurisdiction and granted a new trial in the circuit court. Baham v. Sullivan, 2004 Miss. App. LEXIS 714 (Miss. Ct. App. July 27, 2004), op. withdrawn, sub. op., 924 So. 2d 580, 2005 Miss. App. LEXIS 1032 (Miss. Ct. App. 2005).

In a wrongful death action, in the wife's strict liability claim against the tobacco company, because there was evidence that there existed no safe cigarette and that the tobacco company constantly did research to provide the safest, consumer-desirable cigarette possible, that the wife was not aware that her husband had ever tried to quit smoking and, therefore, would have avoided any danger from the product, and that the wife put on evidence only to support the unreasonably dangerous aspect of the case and failed to provide evidence of any type of defect, the trial court did not err in refusing to grant a judgment notwithstanding the verdict or, in the alternative, a new trial. Nunnally v. R.J. Reynolds Tobacco Co., 869 So. 2d 373, 2004 Miss. LEXIS 283 (Miss. 2004).

Trial court did not err in denying the mother's motion for directed verdict as to the issue of negligence where it was undisputed that both the mother and employee violated the applicable traffic laws on the day of the accident; however, the negligence and reasonableness of the employee's actions was a question for the jury, who found that a reasonable person in the mother's position would recognize the need to slow her vehicle as she approached the intersection. Clark v. Clark, 863 So. 2d 1027, 2004 Miss. App. LEXIS 38 (Miss. Ct. App. 2004).

Because conflicting facts were presented by the driver and the injury victim as to the automobile accident that caused the injury victim's damages, the entire case hinged on the jury's determinations, therefore, the trial court did not err in denying the injury victim's motion for judgment notwithstanding the verdict. Hopkins v. Schaeffer, 840 So. 2d 737, 2003 Miss. App. LEXIS 212 (Miss. Ct. App. 2003).

Where an insurer sought indemnity against a company for a personal injury claim the insurer had paid on behalf of its insured, who was sued as a result of an automobile accident in which the company's employee was involved, the trial court erred in denying the company's motion for a directed verdict as the insurer had no legal obligation to pay the plaintiffs who sued the employee and the company. T & S Express, Inc. v. Liberty Mut. Ins. Co., 847 So. 2d 270, 2003 Miss. App. LEXIS 228 (Miss. Ct. App. 2003).

Trial court properly denied the patient's motion for judgment notwithstanding the verdict because there existed a conflict in the evidence as to whether the physician had exercised reasonable care, and where such conflict existed, a peremptory instruction was not appropriate. Daughtry v. Kuiper, 852 So. 2d 675, 2003 Miss. App. LEXIS 372 (Miss. Ct. App. 2003).

If facts and inferences properly considered point so overwhelmingly in favor of movant that reasonable men could not have arrived at a contrary verdict, granting motion is required, but if there is substantial evidence opposed to motion, evidence of such quality and weight that reasonable and fairminded men in exercise of impartial judgment might reach different conclusions, then motion should be denied and jury's verdict allowed to stand. Coca Cola Bottling Co. v. Reeves, 486 So. 2d 374, 1986 Miss. LEXIS 3108 (Miss. 1986).

**Motions.**

Directed verdicts against both defendants were properly entered by trial judge, even though motions for directed verdicts did not appear in record, since it was clear from record that lower court and attorneys were under impression that motions for directed verdicts had been made but not recorded by court reporter. South Cent. Bell Tel. Co. v. Parker, 491 So. 2d 212, 1986 Miss. LEXIS 2498 (Miss. 1986).

**Reconsideration.**

A trial court cannot itself entertain its own reconsideration under subsection (b). Luke Edwards & Reach, Inc. v. Roberts, 771 So. 2d 378, 2000 Miss. App. LEXIS 522 (Miss. Ct. App. 2000).

**Requirements.**

Granting of a directed verdict in favor of a telecommunications company in a driver's negligence action was appropriate because the driver failed to prove that a sagging wire was more likely than not caused by a negligent act of the telecommunications company. The driver failed to meet the second element of res ipsa loquitur and without the application of that doctrine, there was no evidence of the telecommunications company's negligence for a jury to consider. Gray v. BellSouth Telcom., Inc., 11 So. 3d 1269, 2009 Miss. App. LEXIS 364 (Miss. Ct. App. 2009).

Directed verdict on the issue of the negligence of a driver was properly granted by the trial court, where unrebutted testimony established that the driver was negligent in crossing in front of an oncoming motorist when the collision occurred; when reviewing requests for peremptory instructions, courts considered the evidence in the light most favorable to the non-moving party, giving that party the benefit of all favorable inferences that could reasonably be drawn from the evidence, and Mississippi rules and case law allowed for questions to be removed from the jury's consideration when there existed no factual question for the jury to resolve under Miss. R. Civ. P. 50(a). Entergy Miss., Inc. v. Bolden, 854 So. 2d 1051, 2003 Miss. LEXIS 473 (Miss. 2003).

Action against physician for unauthorized removal of intrauterine device presented a classic jury question of credibility, since both parties testified to events which could not be reconciled, and therefore entry of directed verdict was improper. Fox v. Smith, 594 So. 2d 596, 1992 Miss. LEXIS 48 (Miss. 1992).

When a motion for directed verdict or j.n.o.v. is made, court must consider all evidence in light most favorable to the nonmoving party; in considering evidence and all reasonable inferences, court must determine whether the evidence is so overwhelmingly against nonmoving party that no reasonable juror could have found in their favor. Illinois C. R. Co. v. White, 610 So. 2d 308, 1992 Miss. LEXIS 584 (Miss. 1992).

A lesser showing is required for new trial than that necessary to grant a motion for j.n.o.v.; reason behind this rule is that a motion for j.n.o.v. challenges legal sufficiency of evidence to support the verdict, whereas motion for new trial challenges weight of the evidence. James v. Mabus, 574 So. 2d 596, 1990 Miss. LEXIS 794 (Miss. 1990).

When a party moves for directed verdict at close of evidence, circuit court must consider evidence before it at that time in light most favorable to non-moving party, giving that party the benefit of all favorable inferences that may reasonably be drawn therefrom; supreme court takes a like view of evidence when considering, on appeal, whether circuit court erred in directing a verdict. Gray v. Edgewater Landing, Inc., 541 So. 2d 1044, 1989 Miss. LEXIS 192 (Miss. 1989).

Where a motion for j.n.o.v. has been made, trial court must consider all evidence in light most favorable to non-movant, who must also be given benefit of all favorable inferences that may be reasonably drawn from evidence; if facts and inferences so considered point so overwhelmingly in favor of movant that reasonable men could not have arrived at a contrary verdict, granting the verdict is required, but if there is substantial evidence opposed to motion, i.e., evidence of such quality and weight that reasonable and fair-minded men in exercise of impartial judgment might reach different conclusions, motion should be denied and jury's verdict allowed to stand. Maxwell v. Illinois C. G. Railroad, 513 So. 2d 901, 1987 Miss. LEXIS 2793 (Miss. 1987).

Where motion for judgment notwithstanding the verdict has been made, trial court must consider all evidence– not just evidence which supports non-movant's case– in light most favorable to party opposed to motion; credible evidence tending to support non-movant's case must be presumed true, and non-movant must also be given benefit of all favorable inferences that may reasonably be drawn from the evidence. Coca Cola Bottling Co. v. Reeves, 486 So. 2d 374, 1986 Miss. LEXIS 3108 (Miss. 1986).

**Review.**

Miss. R. Civ. P. 50(c) gives the Supreme Court of Mississippi the authority to review the grant of a new trial. White v. Stewman, 932 So. 2d 27, 2006 Miss. LEXIS 315 (Miss. 2006).

Court reviewing denial of motion for judgment notwithstanding the verdict must consider evidence in light most favorable to non-moving party, giving that party benefit of all favorable inferences that may be reasonably drawn from evidence, and if facts so considered point so overwhelmingly in favor of moving party that reasonable men could not have arrived at a contrary verdict, court is required to reverse and render; however, if there is substantial evidence in support of verdict, that is, evidence of such quality and weight that reasonable and fair minded jurors in exercise of impartial judgment might have reached different conclusions, affirmance is required. McMillan v. King, 557 So. 2d 519, 1990 Miss. LEXIS 42 (Miss. 1990).

Trial judge's determination whether jury issue has been presented should be given great respect on appeal, although neither jury verdicts nor trial court denials of judgments notwithstanding the verdict may change impossibilities into fact nor convert possibilities into probabilities. Coca Cola Bottling Co. v. Reeves, 486 So. 2d 374, 1986 Miss. LEXIS 3108 (Miss. 1986).

**Waiver.**

Where individuals failed to file a motion for a judgment notwithstanding the verdict, they were procedurally barred from challenging the sufficiency of the weight of the evidence relied upon for the jury verdict on appeal. Thus, the jury verdict for the driver was affirmed. Lamartiniere v. Jones, 915 So. 2d 1112, 2005 Miss. App. LEXIS 998 (Miss. Ct. App. 2005).

Where defendant convicted of aggravated assault claimed that the evidence presented at trial was legally insufficient to support his conviction, the appellate court was procedurally barred from considering this issue. Defendant never filed a JNOV motion. Wilks v. State, 909 So. 2d 1252, 2005 Miss. App. LEXIS 108 (Miss. Ct. App. 2005).

Any error by trial court in denying defendant's motion for directed verdict upon close of plaintiff's case was waived when defendant introduced evidence in its own behalf. James W. Sessums Timber Co. v. McDaniel, 635 So. 2d 875, 1994 Miss. LEXIS 199 (Miss. 1994).

Any error in failing to grant directed verdict at end of plaintiff's case was waived when defendant introduced evidence in its own behalf. PACCAR Financial Corp. v. Howard, 615 So. 2d 583, 1993 Miss. LEXIS 85 (Miss. 1993).

**Illustrative cases.**

Chancellor did not err in granting parents a directed verdict because a grandmother failed to meet her burden of showing she had established a viable relationship with her grandchild; counsel for the grandmother admitted that they could not establish a viable relationship because a viable relationship was defined as six months, and it was impossible to comply. Vermillion v. Perkett, 281 So. 3d 925, 2019 Miss. App. LEXIS 101 (Miss. Ct. App.), cert. denied, — So. 3d —, 2019 Miss. LEXIS 317 (Miss. 2019).

There was no authority for the special chancellor's decision to set aside divorce decree because neither party asked the special chancellor to set aside the divorce decree but were before the court on a contempt petition; the former husband made a motion for a directed verdict, and the only relief allowed was for the chancellor to either grant the motion and dismiss the former wife's contempt petition or deny the motion and allow the contempt claim to proceed. Jones v. Jones, 239 So. 3d 1091, 2018 Miss. App. LEXIS 106 (Miss. Ct. App. 2018).

Although plaintiff asserted that defendant corporation had control over the inventory and weight of a trailer, the trailer was empty at the time of a motor vehicle accident, and defendant did not appear to have any control in the matter. Because plaintiff failed to establish any agency relationship between defendant and its two co-defendants, the trial court properly directed a verdict in favor of defendant. Cent. Indus. v. McFarlane, 159 So. 3d 610, 2015 Miss. App. LEXIS 86 (Miss. Ct. App. 2015).

Trial court's error in denying the stopped driver's request for a directed verdict on the issue of liability was not harmless. There was a substantial discrepancy between the amount of damages proven by the stopped driver and the amount of damages awarded by the jury; the stopped driver was entitled to all past, present, and future medical damages and compensation for pain and suffering proximately caused by the other driver's negligence and although the stopped driver submitted medical bills equal to $234,316.49, the jury only awarded $9,131. Thompson v. Nguyen, 86 So. 3d 251, 2011 Miss. App. LEXIS 44 (Miss. Ct. App. 2011), rev'd, 86 So. 3d 232, 2012 Miss. LEXIS 195 (Miss. 2012).

Where a patient sought emergency medical care after his windshield shattered and glass sprayed into his face and eyes, where the treating doctors allegedly misdiagnosed his condition and delayed the patient's receipt of proper care, and where the patient was transferred to another hospital where he underwent surgery and suffered a retinal detachment during the procedure, which left him almost blind in one eye, the trial court did not err in granting a directed verdict in favor of the treating doctors in the patient's medical malpractice case because, although the patient's expert witness established the applicable standard of care and an alleged breach thereof, he failed to express with a reasonable degree of medical certainty that the doctors' alleged misdiagnosis and the resulting delay in proper treatment caused or contributed to the patient's vision loss. The expert testified that retinal detachment was a known complication of the surgery and was unable to say whether it was the glass in the patient's eye, blunt force trauma, the surgery, or the alleged improper care that caused the retinal detachment. Ryals v. Bertucci, 26 So. 3d 1090, 2009 Miss. App. LEXIS 384 (Miss. Ct. App. 2009), cert. denied, 27 So. 3d 404, 2010 Miss. LEXIS 53 (Miss. 2010).

Motions for a directed verdict and judgment notwithstanding the verdict, under Miss. R. Civ. P. 50(a), (b), were properly denied in a medical malpractice suit against a physician and medical clinic because the physician did not meet his duty of care by requesting lab results to rule out a life-threatening infection, and his failure to follow up with the lab proximately caused the patient's persistent vegetative state and eventual death. Estate of Jones v. Phillips, 992 So. 2d 1131, 2008 Miss. LEXIS 420 (Miss. 2008).

In a products liability action, several manufacturers were entitled to a judgment notwithstanding the verdict because the trial court determined that it had erroneously admitted the testimony of a consumer's expert witness on the issue of causation, as the studies upon which the expert relied did not support his opinion that benzene exposure caused small-cell lymphocytic lymphoma, and because the consumer offered no other evidence to establish causation. Watts v. Radiator Specialty Co., 990 So. 2d 143, 2008 Miss. LEXIS 306 (Miss. 2008).

Where a decedent suffering from Alzheimer's, dementia, and other problems signed a will naming the decedent's recently-married widow as the sole beneficiary, sufficient evidence supported a jury's verdict against the widow and it was not error to deny the widow's post trial motion because a confidential relationship existed and a presumption of undue influence arose which the widow failed to rebut since the decedent was dependent on the widow and the attorney did not question the decedent as to the decedent's understanding that the decedent was leaving the decedent's daughters nothing. Pope v. White (In re Estate of Pope), 5 So. 3d 427, 2008 Miss. App. LEXIS 316 (Miss. Ct. App. 2008), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 132 (Miss. 2009).

In a breach of contract case between a rehabilitative services company, a nursing home, and their two owners, a covenant not to hire employees was ambiguous in nature because it was impossible to tell if the covenant embraced all past, present, or future employees; therefore, a directed verdict was properly granted on this issue because the agreement constituted an unreasonable restraint on trade. Cain v. Cain, 967 So. 2d 654, 2007 Miss. App. LEXIS 445 (Miss. Ct. App. 2007).

In a breach of contract case between a rehabilitative services company, a nursing home, and their two owners, a directed verdict was properly granted on the issue of punitive damages since they were not warranted in an ordinary breach of contract case. Cain v. Cain, 967 So. 2d 654, 2007 Miss. App. LEXIS 445 (Miss. Ct. App. 2007).

Directed verdict in favor of the medical providers in the patient's medical malpractice action was inappropriate because the patient's proffered expert was a neurologist who had never performed middle ear surgery, which was the type of surgery performed on the patient; thus, that proffered expert was unable to offer an opinion on the appropriate standard of care that was owed to the patient. Troupe v. McAuley, 955 So. 2d 848, 2007 Miss. LEXIS 348 (Miss. 2007).

Where an employee was mounting a moving locomotive when a foot slipped due to mud, causing the employee to fall and sustain serious leg injuries, the railroad was liable to the employee for damages under the Federal Employer's Liability Act, 45 U.S.C. § 51; the trial court was correct in denying the railroad's motion for a directed verdict where the evidence showed the railroad was warned of the slippery conditions, but did nothing to remedy the potential hazard. Canadian Nat'l/Ill. Cent. R.R. v. Hall, 953 So. 2d 1084, 2007 Miss. LEXIS 208 (Miss. 2007).

Trial court erred in finding that the son presented insufficient evidence that his father died as a result of the collision, and therefore erred in granting defendants' motion for a directed verdict on that ground because the accident report contained an indication that the father was killed in the accident. Birrages v. Ill. Cent. R.R., 950 So. 2d 188, 2006 Miss. App. LEXIS 710 (Miss. Ct. App. 2006).

Because the plaintiff offered no authority for his argument that a trial judge has no authority to raise the lack of proof of an essential element as justification for granting a motion for directed verdict, his argument was procedurally barred. Birrages v. Ill. Cent. R.R., 950 So. 2d 188, 2006 Miss. App. LEXIS 710 (Miss. Ct. App. 2006).

Trial court did not err in granting defendants' motion for a directed verdict because the son did not present a prima facie case of negligence as to his failure to maintain a proper lookout claim in his wrongful death claim for the death of his father in a collision with a train; the son's expert did not offer any testimony that indicated just how the engineer's and the conductor's breach of their duty to maintain a proper lookout was the proximate cause of the father's death, and he admitted that they could not have done anything to prevent the collision in the split-second to two seconds that the father pulled out in front of the train. Birrages v. Ill. Cent. R.R., 950 So. 2d 188, 2006 Miss. App. LEXIS 710 (Miss. Ct. App. 2006).

In a tort action arising from an incident in a retail store, a family's motion for judgment nothwithstanding the verdict or a motion for a new trial were properly denied as there were two versions of events; the evidence was not overwhelming in favor of the family where the store offered evidence that one member was removed due to loud and disruptive behavior and an attempt to conceal merchandise. Anderson v. McRae's, Inc., 931 So. 2d 674, 2006 Miss. App. LEXIS 464 (Miss. Ct. App. 2006).

Where a car collision was caused when the driver of a commercial vehicle swerved to avoid hitting an unknown driver, reasonable minds could have differed as to liability; the jury's verdict for defendant driver and his employer was supported by substantial evidence, and therefore the trial court erred by setting aside the verdict and granting the plaintiff a new trial under Miss. R. Civ. P. 50(c). Anderson v. McRae's, Inc., 931 So. 2d 674, 2006 Miss. App. LEXIS 464 (Miss. Ct. App. 2006).

In a case in which a bank sued a borrower for deficiency on a promissory note that was secured by the borrower's car, the trial court properly granted the bank's motion for a directed verdict; the trial court was correct in concluding that the note had not been paid off because of the borrower's failure to provide insurance coverage for the car. McDaniel v. Citizens Bank, 937 So. 2d 26, 2006 Miss. App. LEXIS 117 (Miss. Ct. App.), cert. denied, 936 So. 2d 367, 2006 Miss. LEXIS 480 (Miss. 2006).

Directed verdict was properly entered in favor of a driver in a wrongful death case because speeding was insufficient to show liability since it was not the cause of an accident with a lawnmower, there was no duty to blow a horn under Miss. Code Ann. § 63-7-65(1) for a sudden action, and she used due care in passing and giving the lawnmower space. Lias v. Flowers, 955 So. 2d 337, 2006 Miss. App. LEXIS 608 (Miss. Ct. App. 2006), writ denied, 956 So. 2d 228, 2007 Miss. LEXIS 212 (Miss. 2007).

In an action under the Age Discrimination in Employment Act of 1967, 29 U.S.C.S. §§ 621-634, there was substantial evidence from which the jury could have inferred that the employer (a beer distributor), wanted to fire the employee due to his age. Same was based on memos of the chief executive which basically derided older employees as a burden, the conflict apparent by the employee's otherwise most recent job rating which was excellent, and the fact that several other employees had mistakenly delivered out-of-date beer but they were not fired. In sum, there was sufficient evidence for the jury to find that the employer's non-discriminatory reasons for firing the former employee for alleged poor performance were pretextual and the employer's motion for judgment notwithstanding the verdict was properly denied. Cash Distrib. Co. v. Neely, 947 So. 2d 317, 2006 Miss. App. LEXIS 6 (Miss. Ct. App. 2006), aff'd, 947 So. 2d 286, 2007 Miss. LEXIS 23 (Miss. 2007).

Directed verdict in favor of the corporation in the driver's products liability action pursuant to the Mississippi Products Liability Act, Miss. Code Ann. § 11-1-63, was proper under Miss. R. Civ. P. 50(a), because there was no evidence that the driver or her husband relied on any express warranty or other factual representation about the air bag in question before the accident. Forbes v. GMC, 929 So. 2d 958, 2005 Miss. App. LEXIS 716 (Miss. Ct. App. 2005), aff'd in part and rev'd in part, 935 So. 2d 869, 2006 Miss. LEXIS 285 (Miss. 2006).

Directed verdict in favor of an insurer was affirmed as the individual failed to prove by clear and convincing evidence that the insurer committed fraud because the individual rejected the insurer's first offer to pay for some medical expenses, and the individual did not prove that the insurer had made a promise to pay some medical expenses. Moreover, the individual failed to establish the existence of a fiduciary relationship that would hold the insurer to a higher duty of care. Mooneyham v. Progressive Gulf Ins. Co., 910 So. 2d 1223, 2005 Miss. App. LEXIS 605 (Miss. Ct. App. 2005).

Directed verdict was improperly granted to a driver in a personal injury case because the incorrect standard of review was used on appeal; an insurer presented evidence showing that a driver was involved in the accident, and medical expenses should not have been excluded since there was no requirement that reasonableness be shown prior to admission; however, a directed verdict filed by the insurer was properly denied because the driver should have been permitted to rebut the evidence presented. Alfa Mut. Ins. Co. v. Cascio, 909 So. 2d 174, 2005 Miss. App. LEXIS 588 (Miss. Ct. App. 2005).

Trial court erred in entering judgment for a limited partner in an action for negligent misrepresentation, fraud, and breach of contract against his former partners; the limited partner failed to prove that his former partners had made a fraudulent statement, intending to induce him to sell his interest in the partnership, and the former partners' promise to bid on his property at a foreclosure sale could not form the basis for negligent misrepresentation, because it involved future conduct. There was no breach of contract, because the foreclosure sale did not occur within the time specified by the contract; the trial court erred by denying the former partners' motion for judgment notwithstanding the verdict. Moran v. Fairley, 908 So. 2d 805, 2005 Miss. App. LEXIS 312 (Miss. Ct. App.), sub. op., 919 So. 2d 969, 2005 Miss. App. LEXIS 1044 (Miss. Ct. App. 2005).

Directed verdict for defendant under Miss. R. Civ. P. 50(a) was proper in a products liability action under Miss. Code Ann. § 11-1-63 where a wife was injured in an automobile accident and there was evidence that her air bag did not deploy because the only express warranty made was that the automobile had air bags, there was no evidence that plaintiffs justifiably relied on statements in the owners' manual, and plaintiffs offered no expert testimony to show that the impact was hard enough that the air bag should have deployed. Forbes v. GMC, 2005 Miss. App. LEXIS 95 (Miss. Ct. App. Feb. 1, 2005), op. withdrawn, sub. op., modified, 929 So. 2d 958, 2005 Miss. App. LEXIS 716 (Miss. Ct. App. 2005).

In a trip and fall case where the injured person asserted that Christmas garland on a handrail prevented her from breaking her fall on a staircase, no reasonable hypothetical juror could have found negligence on the part of the casino for hanging said garland on the staircase in an unobtrusive manner, and in fact, the injured person's own witnesses testified that they used the handrail with no significant problem. Accordingly, the trial judge was not in error for directing a verdict in favor of the casino. Tucker v. Riverboat Corp., 905 So. 2d 741, 2004 Miss. App. LEXIS 1087 (Miss. Ct. App. 2004).

Where the jury returned a verdict for the customer who had injured her shoulder when she slipped and fell in the store, the trial court erred in granting a JNOV. The store manager testified that the store had knowledge of a leaky freezer that created the dangerous condition causing the customer's injuries, but failed to remedy the problem in more than a year. Coleman v. Jitney Jungle Stores of Am., Inc., 894 So. 2d 610, 2004 Miss. App. LEXIS 1054 (Miss. Ct. App. 2004).

District court should have granted the motion for judgment notwithstanding the verdict of defendants, a state university and professors, regarding the applicability of the Mississippi Tort Claims Act in a doctoral student's action alleging that defendants' conduct prevented her from receiving her doctoral degree because although the student claimed that the action was in contract, clearly tort claims were before the jury, and the statute of limitations had run. Univ. of S. Miss. v. Williams, 891 So. 2d 160, 2004 Miss. LEXIS 1357 (Miss. 2004).

District court should have granted the motion for judgment notwithstanding the verdict of defendants, a state university and professors, in a doctoral student's 42 U.S.C.S. § 1983 claim, because when the verdict was rendered, there were not individual defendants in the case–only the university and the professors in their official capacity and therefore defendants were immune. Univ. of S. Miss. v. Williams, 891 So. 2d 160, 2004 Miss. LEXIS 1357 (Miss. 2004).

Considering the evidence in the light most favorable to the injured person, it was clear that reasonable jurors could have found the casino was negligent, either because the lighting in the area was poor, the steps presented a slippery surface, or were too narrow to negotiate safely. The facts and testimony were not so one-sided as to require that a reasonable jury reach a contrary decision, the the trial court properly denied the casino its motion for judgment notwithstanding the verdict. HWCC-Tunica, Inc. v. Jenkins, 908 So. 2d 150, 2004 Miss. App. LEXIS 878 (Miss. Ct. App. 2004), rev'd, 907 So. 2d 941, 2005 Miss. LEXIS 368 (Miss. 2005).

What was readily apparent from the record excerpt was that the patient's own expert agreed that based on the physician's diagnosis at the time the physician saw the patient in the emergency room, there was no indication that the patient needed to be transferred to a surgeon or a burn center, and the treatment the physician rendered was appropriate and within the standard of care, thus, the trial court properly granted the physician's motion for a directed verdict. Medicomp, Inc. v. Marshall, 878 So. 2d 193, 2004 Miss. App. LEXIS 129 (Miss. Ct. App.), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 917 (Miss. 2004), cert. denied, 543 U.S. 1028, 125 S. Ct. 671, 160 L. Ed. 2d 508, 2004 U.S. LEXIS 8083 (U.S. 2004).

Conflicting evidence raised a genuine fact issue as to whether appellant was actually the president of appellee company and thus had fiduciary duties towards it; therefore, the trial court erred in granting appellees a directed verdict on this issue. Ross v. Nat'l Forms & Sys. Group, Inc., 2004 Miss. App. LEXIS 70 (Miss. Ct. App. Feb. 3, 2004), op. withdrawn, sub. op., 882 So. 2d 245, 2004 Miss. App. LEXIS 603 (Miss. Ct. App. 2004).

In a suit against a bar for furnishing alcohol to a minor who later caused an auto accident, the trial court erred by directing a verdict for the bar, as the evidence created a fact question as to whether the bar knew or should have known that the buyer of drinks (who presented a false Mississippi driver's license showing he was 21) was giving them to minors.

In a medical negligence case, as the patient was treated by defendant doctor not at the request of defendant hospital, but at the request of her primary care physician, the hospital was not vicariously liable for the doctor's alleged negligence and was properly granted a directed verdict. Kent v. Baptist Mem'l Hosp. - N. Miss., Inc., 853 So. 2d 873, 2003 Miss. App. LEXIS 790 (Miss. Ct. App. 2003).

Where the trial court granted defendant's motion for judgment notwithstanding the verdict (JNOV) and conditionally granted his motion for a new trial on liability, the JNOV was reversed, but the verdict in plaintiff's favor was not reinstated, as the appellate court lacked jurisdiction to rule on the interlocutory order granting a new trial. Hearn v. Brown, 876 So. 2d 380, 2003 Miss. App. LEXIS 875 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66, 2004 Miss. LEXIS 837 (Miss. 2004).

In a personal injury suit, as the jury could reasonably have inferred from plaintiff's testimony that defendant property owner had actual notice of the hidden, dangerous condition of the part of his roof through which plaintiff fell, but failed to timely warn him of the latent defect, the trial court erred in entering judgment notwithstanding the verdict in favor of the owner. Hearn v. Brown, 876 So. 2d 380, 2003 Miss. App. LEXIS 875 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66, 2004 Miss. LEXIS 837 (Miss. 2004).

Will contestants' motions for directed verdict should have been granted where those present during the will's execution found the decedent lucid, alert, oriented, and capable of identifying the natural objects of her bounty; there was no suggestion that the decedent was unaware of what she was doing or that her personal desires had been overwhelmed by someone else. McClendon v. McClendon (In re Estate of Pigg), 877 So. 2d 406, 2003 Miss. App. LEXIS 851 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66, 2004 Miss. LEXIS 875 (Miss. 2004).

Where an accident occurred at a grocery store parking lot intersection, the evidence indicated that a reasonable juror could easily have concluded that the driver's view was obstructed at the intersection, so that the driver chose to creep up to get a better look at oncoming traffic, and it was not factually impossible for a reasonable juror to have believed that the injured person failed to maintain a proper look out, and reasonable control of the injured person's vehicle, by continuing on in the injured person's lane at 35 miles per hour, without attempting to slow or stop, before colliding with the driver's vehicle, thus the trial court did not err in denying the injured person's motion for a directed verdict. Busick v. St. John, 856 So. 2d 304, 2003 Miss. LEXIS 491 (Miss. 2003).

In a suit against a bar for furnishing alcohol to a minor who later caused an auto accident, the trial court erred by directing a verdict for the bar, as the evidence created a fact question as to whether the bar knew or should have known that the buyer of drinks (who presented a false Mississippi driver's license showing he was 21) was giving them to minors. Moore v. K&J Enters., 856 So. 2d 621, 2003 Miss. App. LEXIS 594 (Miss. Ct. App. 2003), cert. dismissed, 2004 Miss. LEXIS 198 (Miss. Feb. 12, 2004).

Where a medical malpractice defendant's interrogatory response negligently identified an expert as a urologist rather than an expert in infectious diseases, but adequately described the proposed substance of the testimony, the trial court did not abuse its discretion in allowing the testimony, or in denying the patient's surviving relatives' motions for directed verdict, judgment notwithstanding the verdict, and a new trial. Buskirk v. Elliott, 856 So. 2d 255, 2003 Miss. LEXIS 354 (Miss. 2003).

Trial court applied the correct legal standard in directing verdicts on both the plaintiffs' negligence claims against the car manufacturer, following their minor daughter's death caused by an air bag that deployed, as the jury was properly instructed on the plaintiffs' claim of design defect under the the Mississippi Products Liability Act, Miss. Code Ann. § 11-1-63, and the additional negligence instructions would have been redundant. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564, 2003 Miss. App. LEXIS 752 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 2005 Miss. LEXIS 21 (Miss. Jan. 13, 2005), aff'd in part and rev'd in part, 904 So. 2d 1077, 2005 Miss. LEXIS 247 (Miss. 2005).

Customer's photograph, which was not shown to the jury, created a question of fact upon which reasonable minds could differ, therefore, the question should have been submitted to the jury and the trial court erred in granting the store a directed verdict. Ducksworth v. Wal-Mart Stores, Inc., 832 So. 2d 1260, 2002 Miss. App. LEXIS 851 (Miss. Ct. App. 2002).

The trial court erroneously directed a verdict for the defendant restaurant in an action by a patron who was injured when his chair collapsed where (1) there was evidence that all the chairs in the restaurant had been there for some time and that, on occasion, chairs were discovered to be in less-than-serviceable condition, (2) the restaurant owner and others testified to periodic inspections of all the chairs to attempt to detect those that might be in need of repair, but there was no evidence as to the regularity or the thoroughness with which these inspections were undertaken, and (3) there was evidence that the very chair in which the patron was sitting when the accident occurred had been the subject of previous repairs. Thomas v. Smith, 786 So. 2d 418, 2001 Miss. App. LEXIS 22 (Miss. Ct. App. 2001).

Overwhelming weight of evidence was totally contrary to verdict rendered for defendant in negligence action stemming from automobile accident, where there was no evidence of any negligence by plaintiff, and defendant's negligence was established as a matter of law. McKinzie v. Coon, 656 So. 2d 134, 1995 Miss. LEXIS 267 (Miss. 1995).

Trial court acted correctly when it denied defendant's motion for judgment notwithstanding the verdict; since causation and the fact of some damage were essentially conceded, circuit court had no authority to set aside the verdict. Jackson v. Ball, 562 So. 2d 1267, 1990 Miss. LEXIS 265 (Miss. 1990).

Where plaintiff admitted in documents he signed, and under cross-examination, that his contract with defendant had been fully performed, trial court erred in failing to direct a verdict for defendant. Brewer v. Williams, 542 So. 2d 1186, 1989 Miss. LEXIS 229 (Miss. 1989).

Any error from trial court's refusal to direct a verdict for plaintiff on liability was rendered harmless, since on evidence before it, the jury's damage award to plaintiff was not unreasonably low. Dunn v. Jack Walker's Audio Visual Center, 544 So. 2d 829, 1989 Miss. LEXIS 268 (Miss. 1989).

## Rule 51. Instructions to jury.

(a) *Procedural instructions.* — At the commencement of and during the course of a trial, the court may orally give the jury cautionary and other instructions of law relating to trial procedure, the duty and function of the jury, and may acquaint the jury generally with the nature of the case.

(b) *Substantive instructions.* — Each party to an action may submit six instructions on the substantive law of the case. However, the court may permit the submission of additional instructions as justice requires. The court may instruct the jury of its own initiative.

(1) *When submitted.* — Instructions proposed by parties shall be submitted to the court at the pre-trial hearing as provided by Rule 16. In the event a pre-trial hearing is not conducted, proposed instructions shall be delivered to the court and counsel for all parties not later than twenty-four hours prior to the time the action is scheduled to be tried.

(2) *Identification.* — The court's substantive instructions shall be numbered and prefixed with the letter C. Plaintiff's instructions shall be numbered and prefixed with the letter P. Defendant's instructions shall be numbered and prefixed with the letter D. In multi-party actions, Roman numerals shall be used to identify the proposed instructions of similarly aligned parties; the Roman numerals shall be placed after the alphabetical designation of P or D, as the case may be, and shall conform to the sequential listing of parties plaintiff or defendant as stated in the complaint.

Instructions shall not otherwise be identified with a party.

(3) *Objections.* — No party may assign as error the granting or the denying of an instruction unless he objects thereto at any time before the instructions are presented to the jury; opportunity shall be given to make the objection out of the hearing of the jury. All objections shall be stated into the record and shall state distinctly the matter to which objection is made and the grounds therefor.

(c) *Instructions to be written.* — Except as allowed by Rule 51(a), all instructions shall be in writing.

(d) *When read; available to counsel and jurors.* — Instructions shall be read by the court to the jury at the close of all the evidence and prior to oral argument; they shall be available to counsel for use during argument. Instructions shall be carried by the jury into the jury room when it retires to consider its verdict.

**HISTORY: Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

## ADVISORY COMMITTEE NOTE

It is the trial court's responsibility to properly instruct the jury. "[W]here under the evidence a party is entitled to have the jury instructed regarding a particular issue and where the party requests an instruction which for whatever reason is inadequate in form or content, the trial judge has the responsibility either to reform and correct the proffered instruction himself or to advise counsel on the record of the perceived deficiencies therein and to afford counsel a reasonable opportunity to prepare a new corrected instruction." *Mississippi Valley Silica Co., Inc. v. Eastman,* 92 So. 3d 666, 669 (Miss. 2012) (quoting *Byrd v. McGill,* 478 So. 2d 302, 303 (Miss. 1985)). See Rule 3.07 of the Uniform Circuit and County Court Rules for additional provisions governing jury instructions. See also Mississippi Model Jury Instructions of 2012 which were prepared by a commission appointed by the Mississippi Supreme Court. Although not formally adopted or approved by the Supreme Court of Mississippi, the "Plain Language Model Jury Instructions" have been placed on the Supreme Court website as an aid to trial judges and attorneys.

## JUDICIAL DECISIONS

### ANALYSIS

Deliberations.
Instructions.
Objections.

**Deliberations.**

Although the jury was not given written jury instructions when it retired to deliberate, a new trial was not required where (1) the failure to send the instructions to the jury room was accidental, (2) the written instructions were given to the jury prior to the verdict, and (3) all of the instructions were read to the jury before it retired to deliberate. McNeil v. Bourn, 721 So. 2d 663, 1998 Miss. App. LEXIS 1129 (Miss. Ct. App. 1998).

**Instructions.**

In a negligence case (slip and fall), the trial judge abused his discretion in twice orally reinstructing the jury. That was not to say that a trial judge could never instruct a jury that the verdict was not in proper form; however, the trial judge stretched his comments beyond the bounds of merely seeking to have the jury clarify the verdict, and the conflicting special verdicts, coupled with the series of intervening erroneous oral instructions constituted reversible error. HWCC-Tunica, Inc. v. Jenkins, 908 So. 2d 150, 2004 Miss. App. LEXIS 878 (Miss. Ct. App. 2004), rev'd, 907 So. 2d 941, 2005 Miss. LEXIS 368 (Miss. 2005).

Subsection (d) was substantially complied with, notwithstanding that the jury was not given the written instructions as required by the rule when its members retired to deliberate, where the jury did receive the written instructions prior to the jury verdict, all of the instructions which the trial court granted were read to the jury prior to its deliberations, the failure to send the instructions into the jury room was unintentional and accidental, and no prejudice was shown. McNeil v. Bourn, 721 So. 2d 663, 1998 Miss. App. LEXIS 1129 (Miss. Ct. App. 1998).

**Objections.**

Finding in favor of the bank in the customer's action for fraud was improper because two jury instructions likely confused and misled the jury as to the correct principle of law; additionally, the customer's objections were not waived because she objected to both instructions in a jury instruction conference held out of the jury's presence before the instructions were given. Savory v. First Union Nat'l Bank of Del., 954 So. 2d 930, 2007 Miss. LEXIS 126 (Miss. 2007).

Where defendant failed to object to a jury instruction that omitted an element listed in the indictment (the value of the tools) before the trial court, the objection was waived on appeal. Hill v. State, 929 So. 2d 338, 2005 Miss. App. LEXIS 988 (Miss. Ct. App. 2005).

Defendant could not take issue with sufficiency of jury instructions on appeal, where record revealed absolutely no objection to instructions given by trial judge, and none of the instructions submitted by defendant was refused. North River Homes, Inc. v. Bosarge, 594 So. 2d 1153, 1992 Miss. LEXIS 75 (Miss. 1992).

## Rule 52. Findings by the court.

(a) *Effect.* — In all actions tried upon the facts without a jury the court may, and shall upon the request of any party to the suit or when required by these rules, find the facts specially and state separately its conclusions of law thereon and judgment shall be entered accordingly.

(b) *Amendment.* — Upon motion of a party filed not later than ten days after entry of judgment or entry of findings and conclusions, or upon its own initiative during the same period, the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may accompany a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised regardless of whether the party raising the question has made in court an objection to such findings or has filed a motion to amend them or a motion for judgment or a motion for a new trial.

**HISTORY: Amended effective, July 1, 1997.**

### ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 1997, Rule 52(b) was amended to clarify that a motion to amend the trial court's findings must be filed not later that ten days after entry of judgment. 689 So. 2d XLIX (West Miss. Cas. 1997).

### ADVISORY COMMITTEE NOTE

Rule 52(a) requires a trial court, in cases tried without a jury, to make specific findings of fact and conclusions of law when such findings and conclusions are requested by a party or when such findings and conclusions are required by the Mississippi Rules of Civil Procedure. In the absence of a party's request for such findings and conclusions or a rule requiring such findings and conclusions, the trial court "may" make such findings and conclusions. *See Gulf Coast Research Laboratory v. Amaraneni,* 722 So. 2d 530, 534-35 (Miss. 1998). The principal purpose of the rule is to provide the appellate court with a record regarding what the trial court did-the facts it found and the law it applied, in part so that the appellate court can refrain from deciding issues of fact and issues that were not decided by the trial court. *Tricon Metals & Services, Inc. v. Topp,* 516 So. 2d 236, 239 (Miss. 1987). "In cases of any significant complexity the word 'may' in Rule 52(a) should be construed to read 'generally should.' In other words, in cases of any complexity, tried upon the facts without a jury, the Court generally should find the facts specially and state its conclusions of law thereon." Id. In contested complex cases, a trial court's "failure to make findings of ultimate fact and conclusions of law will generally be regarded as an abuse of discretion." Id. "[F]indings of fact by the chancellor, together with the legal conclusions drawn from those findings, are required [in cases involving the division of marital assets]." *Ferguson v. Ferguson,* 639 So. 2d 921, 929 (Miss. 1994).

General findings of fact and conclusions of law may technically comply with Rule 52's requirements despite a party's request for specific findings of fact and conclusions of law. *See Lowery v. Lowery, 657 So. 2d 817, 819 (Miss. 1995) (citing Century 21 Deep South Prop. v. Corson,* 612 So. 2d 359, 367 (Miss. 1992)). If a trial court fails to make even general findings of fact and conclusions of law when specific findings of fact and conclusions of law are requested by a party, remand to the trial court may be necessary unless the evidence is so overwhelming so as to make findings unnecessary. *See Lowery v. Lowery,* 657 So. 2d 817, 819 (Miss. 1995).

A trial court has discretion to adopt a party's proposed findings of fact and conclusions of law. *Rice Researchers, Inc. v. Hiter,* 512 So. 2d 1259, 1266 (Miss. 1987). A trial court's factual findings, even in cases where the trial court adopts verbatim a party's proposed findings of fact, will be reviewed for abuse of discretion. *Bluewater Logistics, LLC v. Williford,* 55 So. 3d 148, 157 (Miss. 2011).

See also the Uniform Chancery Court Rules regarding findings by the court.

## JUDICIAL DECISIONS

### ANALYSIS

In general.
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**In general.**

If a litigant is unsatisfied because an order did not recite a chancellor's findings regarding the denial of the litigant's requests for a citation of contempt and an injunction, the litigant could ask the chancellor to find the facts specially and state separately the chancellor's conclusions of law thereon within ten days following the entry of the final judgment. James v. James, 135 So. 3d 188, 2013 Miss. App. LEXIS 805 (Miss. Ct. App. 2013).

Miss R. Civ. P. 52 applies only to decisions made after some proceeding in which contested facts need to be evaluated; it does not apply to a summary judgment. Estes v. Bradley, 954 So. 2d 455, 2006 Miss. App. LEXIS 912 (Miss. Ct. App. 2006), overruled in part, Windham v. Latco of Miss., Inc., 972 So. 2d 608, 2008 Miss. LEXIS 44 (Miss. 2008).

Because the appellate court was unable to determine the basis of a chancellor's decision, as the record contained neither a transcript of the proceedings in the trial court, nor any factual or legal foundation for the chancellor's decision to modify a decree, the case was remanded to the trial court for the chancellor to create a record of his factual findings as well as the legal basis for his decision. Daley v. Daley, 909 So. 2d 106, 2005 Miss. App. LEXIS 558 (Miss. Ct. App. 2005).

Trial court's order requiring the county to assume some responsibility for the landowner's ditch and culvert, to fill in the ditch and service the culvert, was clear error where nothing in the record provided any factual support for the county's responsibility for creating the ditch, or after its creation by unknown persons, for the county's assuming any responsibility for it. Wash. County v. Graves, 875 So. 2d 1114, 2004 Miss. App. LEXIS 588 (Miss. Ct. App. 2004).

Chancellor did not abuse his discretion in failing to enter specific factual findings without a request to do so where the information gleaned from the record suggested that the issue was straightforward, not complex. Thompson v. Miss. Dep't of

Human Servs., 856 So. 2d 739, 2003 Miss. App. LEXIS 941 (Miss. Ct. App. 2003).

Where a circuit court issued a six– page opinion and order setting forth in detail its analysis of the case, and the opinion clearly related the evidence the circuit court found probative to each applicable issue, the order complied with Miss. R. Civ. P. 52, and the circuit court did not err in denying the plaintiff's request for particularized findings of fact and conclusions of law. T.K. v. Simpson County Sch. Dist., 846 So. 2d 312, 2003 Miss. App. LEXIS 470 (Miss. Ct. App. 2003).

Trial court's failure, after a bench trial, to enter findings of fact and conclusions of law, was not error, as the case was far from complex, and no party requested it to make such findings. Miss. DOT v. Trosclair, 851 So. 2d 408, 2003 Miss. App. LEXIS 666 (Miss. Ct. App. 2003).

Where a trial judge declined to make specific findings of fact on request of a party, but made general findings of fact and conclusions of law, he technically complied with the requirements of Miss. R. Civ. P. 52. Golleher v. Robertson, 830 So. 2d 694, 2002 Miss. App. LEXIS 615 (Miss. Ct. App. 2002).

Trial court was permitted to use its discretion when deciding whether to issue findings of fact and conclusions of law; when a party requested the trial court to do so, however, the trial court's duty became obligatory. Culbert v. State, 800 So. 2d 546, 2001 Miss. App. LEXIS 467 (Miss. Ct. App. 2001).

The rule does not require a trial court to specifically refer to a party's exhibits in a dispositive order of a petition for relief. Magee v. State, 759 So. 2d 464, 2000 Miss. App. LEXIS 106 (Miss. Ct. App. 2000).

Where a party fails to request special findings from the trial court under subsection (a), it waives any issue related to the absence of findings of fact. Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Co., 728 So. 2d 573, 1999 Miss. LEXIS 5 (Miss. 1999).

Subsection (a) does not require the court on its own initiative to set out the findings of fact relied on to support its judgment. Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Co., 728 So. 2d 573, 1999 Miss. LEXIS 5 (Miss. 1999).

Subsection (a) has been complied with if generalized findings of fact and conclusions of law have been made by the chancellor. TXG Intrastate Pipeline Co. v. Grossnickle, 716 So. 2d 991, 1997 Miss. LEXIS 512 (Miss. 1997).

Chancellor is not required to make a finding of fact and conclusion of law in absence of a timely made request. Bowser v. Tootle, 556 So. 2d 1373, 1990 Miss. LEXIS 46 (Miss. 1990).

**Construction.**

In cases of any complexity, tried upon the facts without a jury, trial court generally should find facts specially and state its conclusions of law thereon. Tricon Metals & Services, Inc. v. Topp, 516 So. 2d 236, 1987 Miss. LEXIS 2959 (Miss. 1987).

**Applicability.**

When a disabled sister sued her brother for misappropriating her funds, it was not error for a chancellor to grant her post-trial motion because Miss. R. Civ. P. 52(b) granted the chancellor the authority to amend the chancellor's findings and to enter an amended judgment thereon. Aldridge v. Aldridge, 168 So. 3d 1127, 2014 Miss. App. LEXIS 149 (Miss. Ct. App.), cert. denied, 152 So. 3d 1176, 2014 Miss. LEXIS 607 (Miss. 2014).

Chancellor erred in awarding a father custody of his children as the chancellor did not refer to the factors in the best interests of the children or identify what Albright factors were considered, which was important as several of the factors that might have been in the father's favor were altered within a month of the court's ruling when the father and the children moved to California; specific findings were mandated due to the nature of the case, and Miss. Unif. Ch. Ct. R. 4.01 and Miss. R. Civ. P. 52(a) did not apply. Parra v. Parra, 65 So. 3d 872, 2011 Miss. App. LEXIS 359 (Miss. Ct. App. 2011).

**Findings.**

Trial court complied with the rule by making generalized findings of fact and conclusions of law; the trial court issued a three-page ruling explaining the legal reasons for imposing sanctions, as well as the factual reasons for doing so, and the case was not complex, but simply involved reviewing filings to determine whether an attorney filed sealed information publicly in other venues. Smith v. Hickman, Goza & Spragins, PLLC, 265 So. 3d 139, 2019 Miss. LEXIS 22 (Miss. 2019).

Deacon of a church did not show that the chancellor was required to make findings of fact and conclusions of law because the deacon never asked the chancellor to make findings of facts and conclusions of law. Eskridge v. Peacock, 259 So. 3d 1278, 2018 Miss. App. LEXIS 602 (Miss. Ct. App. 2018).

Based on trial testimony and documentary evidence, the trial court properly found that a neighbor repeatedly trespassed onto an owner's land and caused severe damage by willfully doing things such as tearing down fences, burning hay, plowing crops, and damaging farm equipment. Although short, the court sufficiently articulated its findings. Estate of Burgess v. Trotter, 269 So. 3d 284, 2018 Miss. App. LEXIS 160 (Miss. Ct. App. 2018), cert. denied, 260 So. 3d 797, 2019 Miss. LEXIS 4 (Miss. 2019).

Chancery court did not err in failing to make findings of fact or conclusions of law because a wife did not request the chancellor to do so, and the facts were neither hotly contested, greatly in dispute, nor complex so as to require the chancery court to have done so without a request. Baggett v. Baggett, 246 So. 3d 887, 2017 Miss. App. LEXIS 631 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 883, 2018 Miss. LEXIS 297 (Miss. 2018).

The circuit court did not fail to make appropriate findings of fact because a dog owner never filed a request for specific findings of fact. Walker v. May, 166 So. 3d 613, 2015 Miss. App. LEXIS 349 (Miss. Ct. App. 2015).

Chancellor did make findings of fact that were clearly set forth in his order and bench ruling because the chancellor found that the material-change-in-circumstances requirement applied and had been met, and a careful reading of his bench ruling revealed facts upon which he based his finding. Irle v. Foster, 175 So. 3d 1232, 2015 Miss. LEXIS 501 (Miss. 2015).

Chancellor's decision to deny appellant's motion for relief from judgment under Miss. R. Civ. P. 60(b) did not result in the entry of a judgment; therefore, the chancellor was justified in summarily denying appellant's request for written findings of fact and conclusions of law pursuant to Miss. R. Civ. P. 52. Pride v. Pride, 154 So. 3d 70, 2014 Miss. App. LEXIS 715 (Miss. Ct. App. 2014).

Father could have filed a post-judgment motion for findings, but instead he sought reversal based on the lack of specific findings of fact as to why the increase in his child support obligation was in excess of the guidelines; because the chancellor provided no findings of facts as to why the award deviated from the guidelines, the factors that were considered in modifying the father's obligation could not be determined, and this mandated reversal and remand. Dailey v. McBeath, 151 So. 3d 1038, 2014 Miss. App. LEXIS 683 (Miss. Ct. App. 2014).

Chancellor's denial of a husband's motion for findings of fact and conclusions of law in a divorce proceeding was reversed where the husband had filed a Miss. R. Civ. P. 52 motion, the wife failed to file an appellee brief, and no overwhelming evidence supported the decision. Walker v. Walker, 210 So. 3d 996, 2014 Miss. App. LEXIS 740 (Miss. Ct. App. 2014).

Because a circuit court was sitting as an appellate court in reviewing an administrative committee's decision, the court was not required to issue findings of fact. Jones v. Alcorn State Univ., 120 So. 3d 448, 2013 Miss. App. LEXIS 534 (Miss. Ct. App. 2013).

In a dissolution matter, a chancery court erred with respect to a husband's Miss. R. Civ. P. 52(a) request because the court did not make specific findings of fact and conclusions of law regarding the Ferguson factors and the division of marital assets. McBride v. McBride, 110 So. 3d 356, 2013 Miss. App. LEXIS 142 (Miss. Ct. App. 2013).

Chancery court did not abuse its discretion by failing making findings of fact because a member did not request additional findings of fact under Miss. R. Civ. P. 52(a); although the chancery court had no requirement to make factual findings, its findings of fact were more than adequate to dispose of the member's counterclaims. Martindale v. Hortman Harlow Bassi Robinson & McDaniel PLLC, 119 So. 3d 338, 2012 Miss. App. LEXIS 603 (Miss. Ct. App. 2012), cert. denied, 119 So. 3d 328, 2013 Miss. LEXIS 398 (Miss. 2013).

Since a mother failed to raise to the chancellor her challenge to the reasonableness of the child-support guidelines, she was barred from challenging the chancellor's failure to make specific findings of fact on the reasonableness of the guidelines. Robinson v. Brown, 58 So. 3d 38, 2011 Miss. App. LEXIS 160 (Miss. Ct. App. 2011).

On a mother's counterclaim against a father for contempt concerning child support, medical insurance, and medical bills, a chancellor did not err by failing to provide specific findings of fact and conclusions of law under Miss. R. Civ. P. 52(a) because there was no record of any request by either counsel for specific findings of fact and conclusions of law. Farrior v. Kittrell, 12 So. 3d 20, 2009 Miss. App. LEXIS 189 (Miss. Ct. App. 2009).

Where a son sought to set aside a warranty deed that transferred property from the son's mother to a daughter, the case was properly dismissed for failure to prosecute because, inter alia, it was not an abuse of discretion to refuse to provide specific findings of fact and conclusions of law since it was discretionary and the bench opinion was sufficient to explain and support the adjudication of the matter. Cox v. Cox, 976 So. 2d 869, 2008 Miss. LEXIS 125 (Miss. 2008).

If appellant sellers were dissatisfied with a county court's lack of specific factual findings regarding the factors for awarding reasonable attorneys' fess, they were provided a mechanism for requiring that the court make such findings pursuant to Miss. R. Civ. P. 52(a), however, they did not make such a request, and the fees awarded were not so extreme as to be unreasonable. Cavagnaro v. Coldwell Banker Alfonso Realty, Inc., 995 So. 2d 754, 2008 Miss. App. LEXIS 108 (Miss. Ct. App.), cert. denied, 997 So. 2d 924, 2008 Miss. LEXIS 534 (Miss. 2008).

Miss. R. Civ. P. 56 summary judgment hearing is not an action "tried upon the facts without a jury" so as to trigger Miss. R. Civ. P. 52 applicability; therefore, in a claim brought under the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., a trial court did not err by failing to make findings of fact, and at any rate the issues in the case were addressed by the trial court. Harmon v. Regions Bank, 961 So. 2d 693, 2007 Miss. LEXIS 326 (Miss. 2007).

Where a trial court made several findings on the record regarding its decision to deny a motion for reconsideration in a case filed under the Federal Employers Liability Act, no reversal was required; the findings were sufficiently situated as to allow an appellate court to make its own determinations. Ill. Cent. R.R. v. McDaniel, 951 So. 2d 523, 2006 Miss. LEXIS 468 (Miss. 2006), cert. denied, 549 U.S. 1208, 127 S. Ct. 1332, 167 L. Ed. 2d 78, 2007 U.S. LEXIS 2107 (U.S. 2007).

Finding against the employer, a railroad, in the employee's asbestos-related claims originally brought under the Federal Employers Liability Act was appropriate because the record was more than sufficient for appellate review; thus, the circuit court did not abuse its discretion in denying the employer's request for specific findings of fact and conclusions of law. Ill. Cent. R.R. v. Acuff, 950 So. 2d 947, 2006 Miss. LEXIS 386 (Miss. 2006), cert. denied, 549 U.S. 1280, 127 S. Ct. 1826, 167 L. Ed. 2d 321, 2007 U.S. LEXIS 3060 (U.S. 2007).

Miss. R. Civ. P. 52 was not applicable to the facts of the appeal at bar because the circuit court was functioning as an appellate court in reviewing the city's determination to terminate two city streets, precluding further expansion of said streets. Charles E. Morgan Constr. Co. v. City of Starkville, 909 So. 2d 1145, 2005 Miss. App. LEXIS 67 (Miss. Ct. App. 2005).

Trial court, in a tort claim brought by a business against a city, did not err; although abbreviated, its findings of facts and conclusions of law in its order and judgment were sufficient. City of Jackson v. Internal Engine Parts Group, Inc., 903 So. 2d 60, 2005 Miss. LEXIS 219 (Miss. 2005).

Trial court erred in failing to provide findings of fact and conclusions of law when requested to do so by party to divorce. West v. West, 881 So. 2d 188, 2004 Miss. LEXIS 1025 (Miss.), op. withdrawn, sub. op., 891 So. 2d 203, 2004 Miss. LEXIS 1411 (Miss. 2004).

Because the trial court failed to provide findings of fact and conclusions of law regarding the contracts case, the appellate court could not determine whether an error had occurred; the case was reversed and remanded. Fulop v. Suta, 847 So. 2d 893, 2002 Miss. App. LEXIS 875 (Miss. Ct. App. 2002).

**Procedure.**

Chancellor on remand was required to make separate and specific findings of fact and conclusions of law, in view of convoluted and complex nature of facts and issues involved. TXG Intrastate Pipeline Co. v. Grossnickle, 716 So. 2d 991, 1997 Miss. LEXIS 512 (Miss. 1997).

Whether to adopt verbatim, in whole or in part, proposed findings of fact and conclusions of law submitted by a party is within the trial court's sound discretion. Rice Researchers, Inc. v. Hiter, 512 So. 2d 1259, 1987 Miss. LEXIS 2754 (Miss. 1987).

**Review.**

In divorce proceedings, a chancellor applied the correct legal standards and made findings of fact that were supported by substantial evidence in compliance with Miss. R. Civ. P. 52(a) and did not err in denying a husband's request for additional findings and legal conclusions. Swiderski v. Swiderski, 18 So. 3d 280, 2009 Miss. App. LEXIS 149 (Miss. Ct. App.), cert. denied, 19 So. 3d 82, 2009 Miss. LEXIS 465 (Miss. 2009).

There was no merit to the state's argument, based upon Miss. R. Civ. P. 52, that the owner waived his right to appeal since he failed to file a motion to reconsider after entry of the summary judgment, because after the entry of summary judgment, which decided all issues between all parties involved, the party seeking to appeal need only file a notice of appeal within the appropriate time to preserve his appeal, and the parties were not precluded from filing post-judgment motions, but they were not required to file further documents to preserve the appeal. 1999 Buick Century v. State, 966 So. 2d 841, 2007 Miss. App. LEXIS 663 (Miss. Ct. App. 2007).

Although the supreme court preferred that trial courts made separate particularized findings of fact and conclusions of law, a trial court's general findings of fact and conclusions of law did not require reversal, and the findings and conclusions technically conformed to the requirements of Miss. R. Civ. P. 52. Ill. Cent. R.R. v. McDaniel, 2006 Miss. LEXIS 316 (Miss. June 15, 2006), op. withdrawn, sub. op., 951 So. 2d 523, 2006 Miss. LEXIS 468 (Miss. 2006).

Chancery court properly upheld a school board's decision to not renew a teacher's contract for the 2004-05 school year. The chancellor did not err in not making specific findings of fact pursuant to Miss. R. Civ. P. 52(a), since the board was the finder of fact, not the chancellor. Gordon v. Lafayette County Sch. Dist., 923 So. 2d 260, 2006 Miss. App. LEXIS 145 (Miss. Ct. App. 2006).

In the tax sale purchaser's appeal of the lower court's setting aside the conveyance to the purchaser after the property owner failed to redeem, the case was neither complex nor complicated. While the chancellor should have made findings of fact and conclusions of law, the chancery court's failure to do so did not constitute reversible error. Lawrence v. Rankin, 870 So. 2d 673, 2004 Miss. App. LEXIS 305 (Miss. Ct. App. 2004).

Court of appeals erred in ruling that a chancellor's findings were insufficient to support granting a divorce to a wife on the grounds of the husband's habitual cruel and unusual treatment; the record showed that the husband's indictment and arrest on three counts of attempted murder, his pressuring the wife to run the family business after his arrest, and his probable placement of child pornography on the family computer, caused the wife to suffer from and be treated for depression. Bodne v. King, 835 So. 2d 52, 2003 Miss. LEXIS 27 (Miss. 2003).

Though after a bench trial the chancellor failed to cite any legal authority in her order, the case was not factually complex and the final judgment adequately stated her findings of fact and aptly explained what she did; thus, her order did not violate Miss. R. Civ. P. 52(a). Pilgrim Rest Missionary Baptist Church v. Wallace, 835 So. 2d 67, 2003 Miss. LEXIS 28 (Miss. 2003).

The purpose of Miss. R. Civ. P. 52(a) is to obtain a detailed explanation of a bench trial result when requested, and it does not matter that the court dictates one in open court for the court reporter to transcribe, or dictates one while in chambers for a secretary to type; it is the content that matters, not the place at which the judge is sitting when expressing his reasoning. Davis v. Davis, 829 So. 2d 712, 2002 Miss. App. LEXIS 575 (Miss. Ct. App. 2002).

Chancery court was required by the appellate court to make findings of fact in a divorce proceeding the chancellor had dismissed without making findings of fact because the case was hotly contested and the facts complex, and the failure to make findings of fact in the case was an abuse of discretion. Snoddy v. Snoddy, 791 So. 2d 333, 2001 Miss. App. LEXIS 310 (Miss. Ct. App. 2001).

Trial court erred in failing to provide findings of fact and conclusions of law when requested to do so by party to divorce, requiring remand. Lowery v. Lowery, 657 So. 2d 817, 1995 Miss. LEXIS 332 (Miss. 1995).

Where chancery court was requested to make particularized findings of fact and conclusions of law but declined to do so, making general findings of fact and conclusions of law instead, chancellor technically complied with requirements of this rule, and although particularized findings would have aided court on appeal, reversal was not warranted. Century 21 Deep South Properties, Ltd. v. Corson, 612 So. 2d 359, 1992 Miss. LEXIS 804 (Miss. 1992).

**Special findings.**

Chancery court abused its discretion in failing to make finding that the quantum meruit factors were not met with regard to minors because did not make specific findings of fact after an explicit instruction to do so on remand, and it appeared to earlier find that the factors were met but without explanation or findings, reversed course; the chancery court had make detailed findings on remand regarding its decision on quantum meruit, whether it decided the factors were met or not. Eubanks v. Huber (In re Estate of Eubanks), 251 So. 3d 734, 2018 Miss. LEXIS 365 (Miss. 2018).

In a case involving alimony and equitable distribution, compliance with this rule was shown where a chancellor made general findings of fact and conclusions of law for equitable distribution; specific findings of fact and conclusions of law were not necessary because the chancellor found that alimony was inappropriate. Sims v. Sims, 169 So. 3d 937, 2014 Miss. App. LEXIS 381 (Miss. Ct. App. 2014).

Chancellor erred by failing to make specific findings of fact and conclusions of law because there existed a material change in circumstances adverse to the interest of the children that had occurred since the issuance of the custody decree, which warranted an Albright analysis with specific factual findings. Bryant v. Bryant, 105 So. 3d 1146, 2012 Miss. App. LEXIS 805 (Miss. Ct. App. 2012).

Siblings waived their issue on appeal regarding the validity of the decedent's inter vivos transfer to the daughter since the siblings failed to request special findings regarding the decedent's cash gift under Miss. R. Civ. P. 52(a). Howell v. May, 983 So. 2d 313, 2007 Miss. App. LEXIS 426 (Miss. Ct. App. 2007), cert. denied, 981 So. 2d 298, 2008 Miss. LEXIS 268 (Miss. 2008).

Where trial court modified an agreed judgment of paternity to adjust the father's visitation with his minor child, the judgment consisted of twelve pages and included detailed fact-findings and legal conclusions on the issues of modification of custody and visitation. The father was not entitled to have the chancellor revisit the judgment to make additional findings. Balius v. Gaines, 95 So. 3d 730, 2012 Miss. App. LEXIS 488 (Miss. Ct. App. 2012).

Where contempt case pending before lower court in divorce action was simple, there was no need for special findings of facts and conclusions of law in the absence of a request by either party. Morreale v. Morreale, 646 So. 2d 1264, 1994 Miss. LEXIS 634 (Miss. 1994).

**Time.**

Motion filed by a county board of supervisors to dismiss a property owner's appeal was denied because the appeal was not untimely filed under Miss. R. App. P. 4 since the owner timely filed his Miss. R. Civ. P. 52 and 59 motions; although the owner had previously filed his notice of appeal,the premature filing did not nullify his appeal. Wirtz v. Adams Cty. Bd. of Supervisors, 278 So. 3d 1170, 2019 Miss. App. LEXIS 156 (Miss. Ct. App. 2019).

Because defendant did not file his Miss. R. Civ. P. 52(b) motion for additional findings until his first post-judgment motion (his motion to reconsider) was denied more than eight months after entry of judgment, defendant's rule 52(b) motion was not timely and did not toll the time for filing of a notice of appeal. It followed that the Supreme Court lacked jurisdiction to review the circuit court's judgment denying defendant's Miss. R. Civ. P. 60(b) motion. Canerdy v. Montgomery, 202 So. 3d 627, 2016 Miss. App. LEXIS 63 (Miss. Ct. App. 2016), cert. denied, 203 So. 3d 599, 2016 Miss. LEXIS 404 (Miss. 2016), cert. denied, 580 U.S. 1175, 137 S. Ct. 1230, 197 L. Ed. 2d 469, 2017 U.S. LEXIS 1716 (U.S. 2017).

In a divorce case, a former husband's appeal was time-barred because it was not perfected within 10 days of a final judgment entered in January 2007; the husband's post-trial motions were untimely under Miss. R. Civ. P. 52 and Miss. R. Civ. P. 59, and a chancellor did not have the authority to extend the time for such. The January 2007 judgment was final because it attended to all of the issues before the chancellor, including the support of two minor children, the equitable distribution of marital assets and liabilities, whether to award a former wife alimony, and whether to award the former wife attorney's fees. Anderson v. Anderson, 8 So. 3d 264, 2009 Miss. App. LEXIS 195 (Miss. Ct. App. 2009).

In a divorce case, a former husband's request for findings of fact was time-barred because it was filed more than 10 days after entry of a final judgment, pursuant to Miss. R. Civ. P. 52(b); the fact that a chancellor granted the request did not make the motion timely since the chancellor lacked authority to extend the time limitation. The chancellor's decision to grant the request and make additional findings was only harmless error. Anderson v. Anderson, 8 So. 3d 264, 2009 Miss. App. LEXIS 195 (Miss. Ct. App. 2009).

**Waiver on appeal.**

Since a mother failed to assert an alleged error post-trial to the chancellor, as permitted by Miss. R. Civ. P. 52, she waived the right to complain as to this issue on appeal. Robinson v. Brown, 2011 Miss. App. LEXIS 31 (Miss. Ct. App. Jan. 25, 2011), op. withdrawn, sub. op., modified, 58 So. 3d 38, 2011 Miss. App. LEXIS 160 (Miss. Ct. App. 2011).

**Illustrative cases.**

There was no abuse of discretion in a chancellor's refusal to make further findings in a child custody matter because the chancellor's opinion, as delivered from the bench, spanned more than ten pages of the transcript and adequately addressed the issues that were before the court. The chancellor resolved the major factual disputes explicitly and cited and employed the relevant standards for modification and custody. Pevey v. Pevey, 270 So. 3d 250, 2018 Miss. App. LEXIS 406 (Miss. Ct. App. 2018).

Denial of a husband's motion for findings of fact and conclusions of law was proper because adequate findings of fact and conclusions of law were provided in the order denying the husband's motion for relief from judgment; the issues asserted in his motion for relief from judgment had been ruled on and rejected by the previous chancellor, and the husband improperly asked the chancellor ruling on his motion for relief from judgment to review the findings, rulings and judgments previously entered by the original chancellor. McNeese v. Graves, 129 So. 3d 125, 2013 Miss. App. LEXIS 670 (Miss. Ct. App. 2013).

## RESEARCH REFERENCES

**ALR.**

Power of Successor or Substituted Judge, in Civil Case, to Render Decision or Enter Judgment on Testimony Heard by Predecessor. 84 A.L.R.5th 399.

## Rule 53. Masters, referees, and commissioners.

(a) *Appointment and compensation.* — The court may appoint one or more persons in each county to be masters of the court, and the court in which any action is pending may appoint a special master therein. As used in these rules, the word "Master" includes a referee, an auditor, an examiner, a commissioner, and a special commissioner. The master shall receive a reasonable compensation for services rendered, as fixed by law or as allowed by the court and taxed in the costs and collected in the same manner as the fees of the clerk.

(b) *Qualifications.* — The master shall be an attorney at law, authorized to practice law before all courts of the State of Mississippi. However, in extraordinary circumstances where the finding to be made is of a complex, technical, non legal nature, a person other than an attorney possessing the requisite qualifications of a person skilled in the field, area, or subject of the inquiry may be appointed as a master; additionally, persons other than attorneys may be appointed as special commissioners to conduct judicially-ordered sales and partitions of real or personal property.

(c) *Reference: when made.* — With the written consent of the parties, the court may refer any issue of fact or law to a master. Otherwise, a reference shall be made only upon a showing that some exceptional condition requires it.

(d) *Powers.* — The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearing and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He shall have the power to administer oaths, to take the examination of witnesses in cases pending in any court, to examine and report upon all matters referred to him, and to execute all decrees directed to him to be executed.

Masters shall have the power to direct the issuance of subpoenas for witnesses to attend before them to testify in any matter referred to them or generally in the cause. If any witness shall fail to appear, the master shall proceed by process to compel the witness to attend and give evidence.

(e) *Proceedings.* — When a reference is made, the clerk shall forthwith furnish the master with a certified copy of the order of reference, which shall constitute sufficient certification of his authority. Upon receipt thereof, unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys which is to be held in any event within ten days following the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in his discretion, may adjourn the proceedings to a future day, giving notice of same to the absent party.

(f) *Statements of account.* — The court may direct an account to be taken in any cause in vacation or in term, and when the master shall doubt as to the principles upon which the account shall be taken or as to the propriety of admitting any item of debit or credit claimed by either party, he may state in writing the points on which he shall doubt and submit same for decision to the court in vacation or in term.

(g) *Report.* —

(1) *Contents and filing.* — The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and, unless otherwise directed by the order of reference, shall file with it a transcript of the proceeding and of the evidence in the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) *Acceptance and objections.* — The court shall accept the master's findings of fact unless manifestly wrong. Within ten days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as provided by Rule 6(d). The court after hearing may adopt the report or modify it or may reject it in whole or in any part or may receive further evidence or may recommit it with instructions.

(3) *Stipulation as to findings.* — The effect of a master's report is the same regardless of whether the parties have consented to the reference; however, when the parties stipulate that a master's finding of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(4) *Draft report.* — Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

(h) *Bond; when required.* — The court may require a special commissioner appointed to conduct a sale of any property to give bond in such penalty and with sufficient sureties to be approved as the court may direct, payable to the State of Mississippi, and conditioned to pay according to law all money which may come into his hands as such special commissioner. The bond shall be filed with the court. For any breach of its condition, execution may be issued on order of the court for the sum due. However, when the clerk of the court or the sheriff is appointed to make a sale and the order does not provide for a bond, the official bond of the clerk or the sheriff shall be held as security in the premises.

**HISTORY: Amended effective March 1, 1989; April 13, 2000; Comments repealed effective July 1, 2014.**

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective April 13, 2000, Rule 53(c) was amended to give the court discretion to appoint a master on the written consent of the parties without a showing of an exceptional condition. 753-754 So. 2d. XVII (West Miss.Cas. 2000).

Effective March 1, 1989, Rule 53 was amended to correct a typographical error. 536- 538 So. 2d XXVII (West Miss. Cas. 1989).

## JUDICIAL DECISIONS

### ANALYSIS

Appointment improper.
Master's fee.
Objections.
Review.

**Appointment improper.**

Circuit court abused its discretion in appointing a special master where she gave little consideration to the insurer's objection, gave the special master broad authority, explicitly authorized the special master to participate in ex parte communications with counsel in clear violation of Miss. Code Jud. Conduct Canon 3B(7), and by imposing a concealed-billing approach, prevented determination of the reasonableness of the special master's compensation. Safeco Ins. Co. of Am. v. State ex rel. Hood, — So. 3d —, 2019 Miss. LEXIS 296 (Miss. Aug. 22, 2019).

**Master's fee.**

In an asbestos case alleging failure to warn, it was not error to order a manufacturer to pay an injured employee's share of a master's fee, despite a prior order dividing the fee between the parties, because (1) the fee was a cost that could be awarded to a prevailing party, and (2) the employee prevailed. Union Carbide Corp. v. Nix, 142 So. 3d 374, 2014 Miss. LEXIS 271 (Miss. 2014).

**Objections.**

Daughter's assertion that the chancery court erred when it would not hear her objections to the commissioners' valuation and partition report, was without merit because the daughter never served written objections to the report within ten days of it having been filed or at any time before the final partition hearing. Oliver v. Oliver (In re Estate of Oliver), — So. 3d —, 2019 Miss. App. LEXIS 155 (Miss. Ct. App. Apr. 16, 2019), cert. denied, 287 So. 3d 218, 2020 Miss. LEXIS 24 (Miss. 2020), cert. denied, — So. 3d —, 2020 Miss. LEXIS 201 (Miss. 2020), cert. denied, — U.S. —, 141 S. Ct. 266, 208 L. Ed. 2d 34, 2020 U.S. LEXIS 3956 (U.S. 2020).

Siblings did not submit their objections to the special commissioners' report in the form of a motion and did not notice a hearing, they simply objected to the special commissioners' recommendations and suggested alternative partition methods commensurate with their position; their document failed to include a written notice of a hearing and did not even include are quest for hearing; nothing in their document placed the chancellor on notice that the siblings desired a hearing on their objections. Miles v. Miles, 949 So. 2d 774, 2006 Miss. App. LEXIS 507 (Miss. Ct. App. 2006), cert. denied, 949 So. 2d 37, 2007 Miss. LEXIS 155 (Miss. 2007).

Husband in divorce proceeding was not given opportunity to review master's report and make objections prior to its filing and approval by chancellor, requiring reversal and remand to chancery court for compliance with subdivision (g) of this rule. Thornton v. Thornton, 562 So. 2d 112, 1990 Miss. LEXIS 260 (Miss. 1990).

**Review.**

Process leading to a permanent restraining order did not comply with the rule because there was no order of reference, no report of the special master, and no opportunity for the parties to file objections to the special master's report; however, because a girlfriend apparently acquiesced in a truncated procedure, and she did not make an issue of it on appeal, she waived any objection to the procedural irregularities. Waite v. Adkisson, 282 So. 3d 744, 2019 Miss. App. LEXIS 387 (Miss. Ct. App. 2019).

Chancellor was within his discretion to ratify and affirm prior orders and judgments of the court because the chancellor possessed the authority to accept or reject the special master's report; the special master's report did not address all of the claims between all of the parties. Sullivan v. Estate of Maddox, 283 So. 3d 222, 2019 Miss. App. LEXIS 364 (Miss. Ct. App. 2019).

Special master's report was properly accepted because (1) the special master had the requisite skill, (2) no manifest error was shown, and (3) claims belonging to a properly dismissed corporation could not be considered. Wayne Johnson Elec. Inc. v. Robinson Elec. Supply Co., 266 So. 3d 643, 2019 Miss. LEXIS 122 (Miss. 2019).

Regarding a chancellor's ruling on an ex-husband's child-support arrearages, the chancellor adopted the master's findings in accordance with Miss. R. Civ. P. 53(g)(2). The appellate court did not find the chancellor's determination to be manifestly wrong or clearly erroneous, or that the chancellor applied an incorrect legal standard. Wilson v. Stewart, 171 So. 3d 522, 2014 Miss. App. LEXIS 712 (Miss. Ct. App. 2014), cert. denied, 2015 Miss. LEXIS 404 (Miss. Aug. 6, 2015).

Special master's authority was limited to the assignment given to her by the chancellor, and the chancellor's specific delegation to the special master did not instruct her to address the merits of the partner's claims, nor did she address the partner's claims for breach of partnership, breach of fiduciary duties, and tortious breach of the partnership agreement; all of the partners' claims were not resolved by the special master's report. Cuevas v. Kellum, 12 So. 3d 1154, 2009 Miss. App. LEXIS 366 (Miss. Ct. App. 2009).

Chancery court did not err by holding a hearing and taking additional evidence after a master's decision on a father's claim that he was unable to work and pay child support due to a medical condition because such was permitted under Miss. R. Civ. P. 53(g)(2); the master's decision regarding contempt had no effect until the chancery court accepted or rejected it. Davison v. Miss. Dep't of Human Servs., 938 So. 2d 912, 2006 Miss. App. LEXIS 716 (Miss. Ct. App. 2006).

Where a chancery clerk was appointed as a special master to conduct a partition sale, Miss. R. Civ. P. 53 governed and the special master was not required to subscribe to the oath in Miss. Code Ann. § 11-21-17, as the rules governed over any conflicts between the rules of civil procedure and statutes. Dunaway v. Morgan, 918 So. 2d 872, 2006 Miss. App. LEXIS 9 (Miss. Ct. App. 2006).

In a long, complicated dispute among decedent's eight heirs as to how to divide decedent's 50 acres of property, the chancellor did not err in rejecting the special commissioner's third report, and in modifying the commissioner's fourth and final report. Lynn v. Lynn (In re Will of Lynn), 878 So. 2d 1052, 2004 Miss. App. LEXIS 695 (Miss. Ct. App. 2004).

Chancellor erred in refusing to hear appeal from master's conclusions of law on basis that parties had agreed to use a special master as a referee; parties were not bound by master's report solely because of their consent. Trovato v. Trovato, 649 So. 2d 815, 1995 Miss. LEXIS 33 (Miss. 1995).

Master's decision, that it was inequitable to require husband to pay his child support arrearage, was a conclusion of law, and therefore chancellor was correct in reviewing case on a motion for reconsideration. Williams v. Rembert, 654 So. 2d 26, 1995 Miss. LEXIS 197 (Miss. 1995).

# CHAPTER VII. JUDGMENT

## Rule 54. Judgments; costs.

(a) *Definitions.* — "Judgment" as used in these rules includes a final decree and any order from which an appeal lies.

(b) *Judgment upon multiple claims or involving multiple parties.* — When more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an expressed determination that there is no just reason for delay and upon an expressed direction for the entry of the judgment. In the absence of such determination and direction, any order or other form of decision, however designated which adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) *Judgment summarily dismissing a motion for post-conviction collateral relief.* — When a court summarily dismisses a motion for post-conviction collateral relief under section 99-39-11(2) of the Mississippi Code, the order must identify the files, records, transcripts, and correspondence the court relied on and direct that certified copies of those documents be placed in the motion cause number's file.

(d) *Demand for judgment.* — A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled by the proof and which is within the jurisdiction of the court to grant, even if the party has not demanded such relief in his pleadings; however, final judgment shall not be entered for a monetary amount greater than that demanded in the pleadings or amended pleadings.

(e) *Costs.* — Except when express provision therefor is made in a statute, costs shall be allowed as of course to the prevailing party unless the court otherwise directs, and this provision is applicable in all cases in which the State of Mississippi is a party plaintiff in civil actions as in cases of individual suitors. In all cases where costs are adjudged against any party who has given security for costs, execution may be ordered to issue against such security. Costs may be taxed by the clerk on one day's notice. On motions served within five days of the receipt of notice of such taxation, the action of the clerk may be reviewed by the court.

**HISTORY: Comments repealed and Advisory Committee Notes amended effective July 1, 2014; Rule amended to add new (c) and redesignate former (c) and (d) as (d) and (e), effective July 1, 2018.**

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 2018, Rule 54 was amended to add subsection (c), which concerns summary dismissals of motions for post-conviction collateral relief.

## ADVISORY COMMITTEE NOTE

Although it is not specifically described in the rule itself, there are several different stages that lead to the creation of a judgment that is final and appealable. It is important to differentiate the various steps that are part of this process. The first distinction is between the adjudication, either by a decision of the court or a verdict of the jury, and the judgment that is entered thereon. The terms "decision" and "judgment" are not synonymous under these rules. The decision consists of the court's opinion which consists of findings of fact and conclusions of law; the rendition of judgment is the pronouncement of that decision and the act that gives it legal effect.

A second distinction that should be noted is between the judgment itself and the "filing," or the "entry," of the judgment. A judgment is the final determination of an action and thus has the effect of terminating the litigation; it is "the act of the court." "Filing" simply refers to the delivery of the judgment to the clerk for entry and preservation. The "entry" of the judgment is the ministerial notation of the judgment by the clerk of the court pursuant to Rules 58 and 79(a); however, it is crucial to the effectiveness of the judgment and for measuring the time periods for appeal and the filing of various motions.

Rule 54(b) is designed to facilitate the entry of a final judgment upon one or more but fewer than all the claims or as to one or more but fewer than all the parties in an action involving multiple claims or multiple parties, so as to enable the non-prevailing party to perfect an appeal as of right of a final judgment. Absent a certification under Rule 54(b), any order in a multiple-party or multiple-claim action that does not dispose of the entire action is interlocutory, even it if appears to adjudicate a separable portion of the controversy. Given that separate, piecemeal appeals of interlocutory orders entered in a single action would usually be inefficient, parties may not appeal interlocutory orders as of right. Instead, a party may request the trial court to certify such an interlocutory order as final judgment pursuant to Rule 54(b), so that an appeal of right may be taken pursuant to M.R.A.P. 4, or, alternatively, a party may petition the Supreme Court for permission to appeal an interlocutory order pursuant to M.R.A.P. 5. If a party attempts to perfect an appeal as of right pursuant to M.R.A.P. 4 of an order that does not dispose of all the claims between the parties, such appeal will be dismissed for lack of jurisdiction unless the order appealed from has been properly certified as a final judgment pursuant to Rule 54(b). See, e.g., *Williams v. Delta Reg'l Med. Ctr.,* 740 So. 2d 284 (Miss. 1999).

Rule 54(b) gives a trial court discretion to certify an interlocutory order as a final judgment if the court determines that "there is no just reason for delay" of the appeal. Rule 54(b) certification should be reserved for cases in which delay of the appeal might prejudice a party. See *Cox v. Howard, Weil, Laboussie, Friedrichs, Inc.,* 512 So. 2d 897, 900 (Miss. 1987). Courts should grant Rule 54(b) certification "cautiously in the interest of sound judicial administration in order to preserve the established judicial policy against piecemeal appeals." *See Indiana Lumbermen's Mut. Ins. Co. v. Curtis Mathes, Mfg. Co.,* 456 So. 2d 750, 752-53 (Miss. 1984).

If the trial court chooses to certify an interlocutory order as a final judgment pursuant to Rule 54(b), it must do so in a definite, unmistakable manner. If the reasons for the Rule 54(b) certification are not clear from the record, the trial court should set forth its findings and reasons for certification. *See Cox,* 512 So. 2d at 900-01.

Rule 54(d) must be read in conjunction with Rule 8, which requires that every pleading asserting a claim include a demand for the relief to which the pleader believes himself entitled. Thus, Rule 54(d) applies to any demand for relief, whether made by defendant or plaintiff or presented by way of an original claim, counter-claim, cross-claim, or third-party claim. A default judgment may not extend to matters outside the issues raised by the pleadings or beyond the scope of the relief demanded; a judgment in a default case that awards relief that either is more than or different in kind from that requested originally is null and void and defendant may attack it collaterally in another proceeding.

Three related concepts should be distinguished in considering Rule 54(e): These are costs, fees, and expenses. Costs refer to those charges that one party has incurred and is permitted to have reimbursed by his opponent as part of the judgment in the action. Although costs has an everyday meaning synonymous with expenses, taxable costs under Rule 54(e) is more limited and represents those official expenses, such as court fees, that a court will assess against a litigant. Costs almost always amount to less than a successful litigant's total expenses in connection with a law suit and their recovery is nearly always awarded to the successful party.

Fees are those amounts paid to the court or one of its officers for particular charges that generally are delineated by statute. Most commonly these include such items as filing fees, clerk's and sheriff's charges, and witnesses' fees. In most instances an award of costs will include reimbursement for the fees paid by the party in whose favor the cost award is made.

Expenses include all the expenditures actually made by a litigant in connection with the action. Both fees and costs are expenses but by no means constitute all of them. Absent a special statute or rule, or an exceptional exercise of judicial discretion, such items as attorney's fees, travel expenditures, and investigatory expenses will not qualify either as statutory fees or reimbursable costs. These expenses must be borne by the litigants.

## JUDICIAL DECISIONS

### ANALYSIS

In general.
Construction.
Applicability.
Appeal.
Costs.
Demands.
Judgment.
Multiple claims or parties.
Presumptions.
Relief.
Timeliness.
Illustrative cases.

**In general.**

A summary judgment of liability, leaving for a jury determination the issue of damages or the relief to be awarded, is not a true Rule 54(b) judgment. White v. Mills, 735 So. 2d 428, 1999 Miss. LEXIS 160 (Miss. 1999).

**Construction.**

Judgments are markedly distinguishable from interlocutory orders; judgments impact more than the rights of the parties, and the entry and filing of a judgment is necessary to give third parties, such as creditors, lien holders, and other interested third parties, notice of the judgment in order to protect their rights, but an interlocutory order, with limited exceptions, impacts only the parties. Graceland Care Ctr. of New Albany, LLC v. Hamlet ex rel. Kinard, 236 So. 3d 1, 2017 Miss. LEXIS 430 (Miss. 2017).

M.R.C.P. Rule 54(c) does not preclude a Rule 15(b) amendment after judgment has been entered; phrase "amended pleadings" in Rule 54(c) refers to and contemplates pleadings amended in accordance with procedures, including timeliness, authorized in Rule 15(b). Queen v. Queen, 551 So. 2d 197, 1989 Miss. LEXIS 363 (Miss. 1989).

Chancellor did not err in modifying judgment voiced in open court at conclusion of hearing, since chancellor's oral pronouncement did not constitute the court's final judgment. Banks v. Banks, 511 So. 2d 933, 1987 Miss. LEXIS 2694 (Miss. 1987).

**Applicability.**

Because the circuit court's partial summary judgment in plaintiffs' favor was an interlocutory order, and not a final judgment, the Miss. R. Civ. P. 54(b) standard applies to the motion to reconsider and the circuit court was free to reconsider and reverse its decision for any reason it deemed sufficient, even in the absence of new evidence or an intervening change in or clarification of the substantive law. Cutrer v. Singing River Health Sys., 302 So. 3d 648, 2020 Miss. App. LEXIS 30 (Miss. Ct. App.), cert. denied, 302 So. 3d 644, 2020 Miss. LEXIS 354 (Miss. 2020).

Rule did not apply to the orders granting a party's motions for time, as those orders were not directly appealable. Graceland Care Ctr. of New Albany, LLC

v. Hamlet, 2017 Miss. LEXIS 327 (Miss. Aug. 17, 2017), op. withdrawn, sub. op., 236 So. 3d 1, 2017 Miss. LEXIS 430 (Miss. 2017).

**Appeal.**

Supreme Court found that it had jurisdiction over the appeal but that appellant did not designate the documents on which he based his appellate challenge to the chancellor's decision granting authority to the executor of a decedent's estate to disburse funds to the estate's attorneys. Therefore, the chancellor's decision that appellant had not probated a claim against the estate and thus lacked standing to challenge payment of estate expenses was not subject to appellate review. Rogers v. Estate of Pavlou (In re Estate of Pavlou), 308 So. 3d 1284, 2021 Miss. LEXIS 1 (Miss. 2021).

Appellate court lacked jurisdiction to consider a wife's appeal of the chancery court's entry of a divorce because, while the judgment stated that it was final, the chancery court had not entered a final, appealable judgment in the case inasmuch as the judgment expressly stated that the court reserved jurisdiction to divide the marital estate and resolve all other financial matters related to the divorce, and the judge did not make any statement to the effect that there was "no just reason for delay" of an appeal. Montgomery v. Montgomery, 281 So. 3d 171, 2019 Miss. App. LEXIS 84 (Miss. Ct. App. 2019).

Mississippi law, consistent with case law from the United States Court of Appeals for the Fifth Circuit, establishes that the reconsideration of interlocutory orders proceeds pursuant to Miss. R. Civ. P. 54(b). Maness v. K&A Enters. of Miss., LLC, 250 So. 3d 402, 2018 Miss. LEXIS 338 (Miss. 2018).

Appellate court lacked jurisdiction over a wife's appeal because the judgment was not final or appealable where the trial court did not certify that it was an appealable judgment, the wife neither sought nor was granted permission to proceed with an interlocutory appeal, and the her motions for reconsideration of the judgment denying a divorce and to amend had not been resolved and remained pending in the trial court. Hoffman v. Hoffman, 200 So. 3d 465, 2016 Miss. App. LEXIS 580 (Miss. Ct. App. 2016).

County court's certification for appeal was invalid because its "partial final judgment" did not decide a claim between two parties where it merely decided an issue concerning the patient's recoupment defense, and recoupment was purely a defensive claim, which could not be used offensively in the law courts. Brown v. Collections, Inc., 188 So. 3d 1171, 2016 Miss. LEXIS 84 (Miss. 2016).

Mother's appeal had to be dismissed because the father's petition for modification of visitation and custody had not been ruled on by the chancery court, the mother had not requested permission to file an interlocutory appeal, and there was nothing in the judgment or record to indicate that the chancery court intended to grant a final, appealable judgment or issued a certification that the judgment was final. McBride v. McBride, 169 So. 3d 942, 2014 Miss. App. LEXIS 384 (Miss. Ct. App. 2014).

Appellate court lacked jurisdiction to hear an appeal because a chancellor's interim judgment was interlocutory in nature and not a final, appealable judgment where the language in the interim judgment that it was a final judgment had been scratched out and initialed by the chancellor, the chancellor had apparently not ruled on a pending issue regarding attorneys' fees, and there was no final judgment certification. Lewis v. Harvey (In re Estate of Lewis), 135 So. 3d 202, 2014 Miss. App. LEXIS 141 (Miss. Ct. App. 2014).

Appellate court lacked jurisdiction to consider the merits of a case because a chancellor's order–that the purported heirs' claims for establishment as children of their putative deceased father were barred by Miss. Code § 91-1-15–was not certified, did not include all parties, was amended after the appeal was filed, and the purported heirs neither sought nor received permission to proceed with an interlocutory appeal. Young v. Pollion (In re Gardner), 126 So. 3d 95, 2013 Miss. App. LEXIS 747 (Miss. Ct. App. 2013).

Because a summary judgment was not certified as final under Miss. R. Civ. P.

54(b), and because a tenant neither sought nor was afforded permission under Miss. R. App. P. 5 to proceed with an interlocutory appeal, the appellate court lacked jurisdiction to hear the tenant's appeal. Anderson v. Britton & Koontz Bank, N.A., 55 So. 3d 1130, 2011 Miss. App. LEXIS 76 (Miss. Ct. App. 2011).

Because the court could not see where postponing the final judgment for the pet food company until the remaining claims could be adjudicated would have resulted in any prejudice, hardship, or injustice to any of the parties, the trial judge abused his discretion in granting a Miss. R. Civ. P. 54(b) judgment in favor of the company, and the appellate court dismissed the appeal of decdent's spouse for lack of jurisdiction. Myatt v. Peco Foods of Miss., Inc., 22 So. 3d 334, 2009 Miss. App. LEXIS 778 (Miss. Ct. App. 2009).

Denial of a motion for Miss. R. Civ. P. 54(b) certification may not be appealed. Wansley v. Speed Corp., 900 So. 2d 1167, 2005 Miss. LEXIS 192 (Miss. 2005).

**Costs.**

Circuit court erred in denying the taxpayers' motion to tax costs because the applicable statute undisputedly mandated that the county board of supervisors pay "the costs," and the civil and appellate rules provided that costs included, inter alia, the premiums paid for cost of supersedeas bonds. Gulfport Partners V, L.P. v. Harrison Cty. Bd. of Supervisors & Tal Flurry, 231 So. 3d 234, 2017 Miss. App. LEXIS 292 (Miss. Ct. App. 2017), cert. denied, 2017 Miss. LEXIS 466 (Miss. Dec. 7, 2017), cert. denied, 2017 Miss. LEXIS 467 (Miss. Dec. 7, 2017), cert. denied, 2017 Miss. LEXIS 473 (Miss. Dec. 7, 2017), cert. denied, 2017 Miss. LEXIS 478 (Miss. Dec. 7, 2017).

While certain statutes provided for expert-witness fees to be taxed as costs in certain cases, there was no such statute applicable to this case involving breach of fiduciary duty, and the chancellor did not abuse his discretion in refusing to award attorney fees and expert-witness fees, as the chancellor's supported findings of fact indicated that the business owner's behavior failed to show malice or gross negligence. Lane v. Lampkin, 176 So. 3d 62, 2014 Miss. App. LEXIS 497 (Miss. Ct. App. 2014), rev'd, 175 So. 3d 1222, 2015 Miss. LEXIS 503 (Miss. 2015).

In an asbestos case alleging failure to warn, it was not error to order a manufacturer to pay an injured employee's share of a master's fee, despite a prior order dividing the fee between the parties, because (1) the fee was a cost that could be awarded to a prevailing party, and (2) the employee prevailed. Union Carbide Corp. v. Nix, 142 So. 3d 374, 2014 Miss. LEXIS 271 (Miss. 2014).

Pursuant to Miss. R. Civ. P. 54(d), the creditor demonstrated that exceptional circumstances existed in order for him to receive accounting fees; it was entirely foreseeable by the debtor that his breach of the contract and his continued denial of its existence would lead to substantial litigation and accounting costs, which should be borne by the debtor. Allred v. Fairchild, 916 So. 2d 529, 2005 Miss. LEXIS 809 (Miss. 2005).

The chancellor properly ordered an equal division of costs in an adverse possession action, notwithstanding that the defendants were the prevailing parties, where the chancellor found that the defendants could have ameliorated the situation by other means, such as filing an action to remove cloud upon the title to the disputed property, rather than abruptly erecting a fence on the disputed land with such obvious sentimental value to the plaintiff. Stringer v. Robinson, 760 So. 2d 6, 1999 Miss. App. LEXIS 500 (Miss. Ct. App. 1999).

Injured automobile passenger was not entitled to award of attorney fees and costs in declaratory judgment action against driver's insurer, where there was no contractual or statutory authority for such an award, nor was the case one for punitive damages. Miller v. Allstate Ins. Co., 631 So. 2d 789, 1994 Miss. LEXIS 53 (Miss. 1994).

**Demands.**

Patron's personal injury suit against a store was remanded to the state court in which it was originally filed because the store removed the suit after the expiration of the one-year period in 28 U.S.C. § 1446(b); the equitable exception to the one-year period did not apply because although the patron waited until just before trial to amend her complaint to seek more than $75,000, such was warranted by new medical findings concerning the patron's injuries and was allowable under Miss. R. Civ. P. 54(c) and Miss. R. Civ. P. 15. Smith v. Wal-Mart Stores, Inc., 489 F. Supp. 2d 600, 2007 U.S. Dist. LEXIS 43431 (N.D. Miss. 2007).

The chancellor did err in basing a finding of contempt in part on the defendant husband's failure to pay April, 1998 alimony and child support and in including the amount past due in the judgment against him, notwithstanding the contention that the wife did not specifically seek that relief in her amended counter-motion for contempt, which was filed on April 6, 1998, since she was not required to speculate as to the dollar amount of unpaid obligations that might accrue between the time her pleading was filed and a hearing held on the matter. Watkins v. Watkins, 748 So. 2d 808, 1999 Miss. App. LEXIS 326 (Miss. Ct. App. 1999).

Chancellor did not err in imposing lien in wife's favor to secure lump sum alimony payment, despite absence in wife's pleadings of any request for lien. Smith v. Smith, 607 So. 2d 122, 1992 Miss. LEXIS 664 (Miss. 1992).

Language of subdivision (c) of this rule did not preclude award of monetary damages to plaintiff, where he alleged in his complaint that he was entitled to recover a certain amount from defendants; although in his prayer for relief he did not demand that amount or any monetary judgment against defendants, it was clear from his complaint that his allegations gave rise to such a demand and posed no surprise to defendants. Cain v. Robinson, 523 So. 2d 29, 1988 Miss. LEXIS 123 (Miss. 1988).

**Judgment.**

Because the circuit court's order did not expressly grant the property owners' motion for summary judgment, and only disposed of the lessee's and the assignee's motions for summary judgment, and because the circuit judge failed to certify the order as a final judgment, the circuit court's order was interlocutory as it did not dispose all of the claims against all of the parties and was not certified as a final judgment, and the appellate court lacked jurisdiction over the appeal. Crown Commun., LLC v. T6 Unison Site Mgmt., LLC, 138 So. 3d 256, 2014 Miss. App. LEXIS 244 (Miss. Ct. App. 2014).

Appeal from a grant of summary judgment in favor of a painting subcontractor in a negligence action was properly dismissed because there was neither a Miss. R. Civ. P. 54(b) certification in the record with regard to the subcontractor, nor was there a petition for an interlocutory appeal under Miss. R. app. P. 5. Thus, the order was not appealable as a final judgment. Lloyd G. Oliphant & Sons Paint Co. v. Logan, 12 So. 3d 614, 2009 Miss. App. LEXIS 370 (Miss. Ct. App. 2009).

Order granting summary judgment was not a final appealable judgment under Miss. R. Civ. P. 54(b) because, by its terms, the trial court reserved ruling on other issues raised in the petition for damages and injunctive relief; that the trial judge treated the order as a final judgment did not render it so. Wiggins v. Perry, 989 So. 2d 419, 2008 Miss. App. LEXIS 433 (Miss. Ct. App. 2008).

Wife's appeal on a divorce action was dismissed where the appellate court lacked jurisdiction over the appeal because the chancellor's entry of judgment as to fewer than all of the claims before the court did not comply with the requirements of Miss. R. Civ. P. 54(b). Walters v. Walters, 956 So. 2d 1050, 2007 Miss. App. LEXIS 249 (Miss. Ct. App. 2007).

Trial court's interlocutory order, finding that the personal representative's wrongful death action against a convenience store was not barred by the tolling of the statute of limitations, was not a final appealable judgment, as it left the action pending in the trial court; therefore, the order did not estop the convenience store from relitigating the tolling issue in a motion to reconsider . Anderson v. R & D Foods, Inc., 913 So. 2d 394, 2005 Miss. App. LEXIS 294 (Miss. Ct. App. 2005).

Trial court's order of summary judgment was proper under Miss. R. Civ. P. 54(b) in an action against the sellers of a home for fraud in connection with the sale of the home. Laird v. ERA Bayshore Realty, 841 So. 2d 178, 2003 Miss. App. LEXIS 231 (Miss. Ct. App. 2003).

Final judgment issued by chancellor in paternity case was more than interlocutory in nature; it was a final, appealable judgment, comprehensive in scope, replete with extensive findings of fact and conclusions of law. Mississippi State Dep't of Human Servs. v. Barnett, 633 So. 2d 430, 1993 Miss. LEXIS 602 (Miss. 1993).

**Multiple claims or parties.**

Absent proper jurisdiction, the supreme court could not address the denial of summary judgment regarding the claims remaining because it lacked jurisdiction over those claims pending in the trial court. Jourdan River Estates, LLC v. Favre, 278 So. 3d 1135, 2019 Miss. LEXIS 345 (Miss. 2019).

Dismissal of an appeal from an order of summary judgment granted in favor of the manufacturer of a man buggy that was involved in an accident was appropriate because the appellate court lacked jurisdiction to consider the matter as the order of summary judgment was not a final judgment, in that not all of the accident victim's claims were decided in the order, and the order was not certified as a final judgment. Davenport v. Hertz Equip. Rental Corp., 187 So. 3d 194, 2016 Miss. App. LEXIS 112 (Miss. Ct. App. 2016).

Since the circuit court's order did not dispose of all of the claims against all of the parties and was not certified as a final judgment, the order was interlocutory and the court dismissed the appeal for lack of jurisdiction. Meekins v. Kennon, 141 So. 3d 51, 2014 Miss. App. LEXIS 347 (Miss. Ct. App. 2014).

Certification of the partial grant of summary judgment in favor of a lessee was invalid because the order certified as final did not fall within the limited category of decisions to which the rule could be applied since it left a portion of the lessee's claim pending; the chancellor's grant of partial summary judgment did not decide a claim between the two parties but merely decided an issue within their claims. Northeast Mental Health - Mental Retardation Comm'n v. Cleveland, 126 So. 3d 1020, 2013 Miss. App. LEXIS 841 (Miss. Ct. App. 2013).

In a case in which a car dealership employee appealed a circuit court's entry of summary judgment in favor of a sheriff's department, the appellate court lacked jurisdiction because the case against a car owner remained pending and there was no determination from the circuit court as to some danger of injustice caused by delay. The appeal was interlocutory. Melton v. Lawrence County Sheriff's Dep't, 20 So. 3d 762, 2009 Miss. App. LEXIS 759 (Miss. Ct. App. 2009).

Insured's appeal was dismissed in an action against an insurer and a motorist, because summary judgment for the insurer did not terminate the action where the trial court did not make any adjudication concerning the motorist, and the insured failed to have the judgment as to the insurer certified as final pursuant to Miss. R. Civ. P. 54(b). Burnett v. State Farm Mut. Auto. Ins., 30 So. 3d 1260, 2010 Miss. App. LEXIS 134 (Miss. Ct. App.), cert. dismissed, 39 So. 3d 5, 2010 Miss. LEXIS 334 (Miss. 2010).

Pursuant to Miss. R. Civ. P. 12(h)(1), certain defendants waived the defenses of insufficiency of service of process and insufficiency of process by omitting these defenses from their answer and motion to dismiss. Therefore, under Miss. R. Civ. P. 54(b) and 58, the order dismissing those defendants fully adjudicated the case as to all parties and it was a final, appealable judgment. Sauvage v. Meadowcrest Living Ctr., LLC, 28 So. 3d 589, 2010 Miss. LEXIS 93 (Miss. 2010).

Trial court improvidently granted a final judgment pursuant to Miss. R. Civ. P. 54(b) when it granted summary judgment to a homeowner on a claim of false filing of a construction lien because an intertwined slander of title claim, which arose out of the lien filing, remained to be adjudicated and involved a commonality of operative facts. Reeves Constr. & Supply, Inc. v. Corrigan, 24 So. 3d 1077, 2010 Miss. App. LEXIS 1 (Miss. Ct. App. 2010).

In insureds' suit against insurers and its agent regarding a deductible, summary judgment rulings for the insurers were erroneously certified under Miss. R. Civ. P. 54(b) because the insureds' claims against the agent were not part of the appeals, and any damage award was predicated partly on resolution of the claims against the agent. Southern Healthcare Servs. v. Lloyd's of London, 20 So. 3d 84, 2009 Miss. App. LEXIS 740 (Miss. Ct. App. 2009).

Law firm's appeal from judgment in favor of a school district and its legal counsel, finding that certain special meetings were not a nullity or void, was dismissed because the judgment did not fall within the purview of Miss. R. Civ. P. 54(b) as factual allegations and remaining prayers for relief were still pending as to all defendants. Colom Law Firm, LLC v. Bd. of Trs., 16 So. 3d 692, 2009 Miss. LEXIS 259 (Miss. 2009).

Appeal from the dismissal of a negligence case filed against a first driver for lack of service of process was interlocutory and not appealable because the dismissal order did not dispose of claims against a second driver, and the order on its face was not certified as a final judgment in accordance with Miss. R. Civ. P. 54(b). Milyanovich v. Feeley, 10 So. 3d 529, 2009 Miss. App. LEXIS 211 (Miss. Ct. App. 2009).

Insured's appeal from the denial of his motion for an additur to his damage award in his negligence suit against a driver or, alternatively, a new trial was dismissed as the requirements of Miss. R. Civ. P. 54(b) were not met where the insured's bad faith suit against his insurer, arising from the same automobile accident, was still proceeding. The order gave no indication that it was meant to be a final, appealable judgment with respect to the parties to the exclusion of the insured's cause of action against the insurer, which continued under the same styling and cause number, and the trial court made no express determination that there was no just reason for delay; nor did it expressly direct that a final judgment be entered pursuant to Rule 54(b). Jennings v. McCelleis, 987 So. 2d 1041, 2008 Miss. App. LEXIS 269 (Miss. Ct. App. 2008).

Although the issue could not have been considered in a prior appeal from a case involving a bail bond where the claims against all parties had not yet been resolved, the granting of a motion to dismiss as to the agent of a bail bonding company was properly considered in a second appeal because it was no longer interlocutory in nature; however, the dismissal was found to be appropriate on the claims of respondent superior and agency since there were no pending claims against the agent's employer. Stringer v. Am. Bankers Ins. Co. of Fla., 969 So. 2d 113, 2007 Miss. App. LEXIS 433 (Miss. Ct. App. 2007), cert. dismissed, 552 U.S. 1306, 128 S. Ct. 1925, 170 L. Ed. 2d 741, 2008 U.S. LEXIS 3407 (U.S. 2008).

Where oil and gas lease royalty payment claims against two lessees were barred by limitations, summary judgment as to them was proper, but because a third lessee remained in litigation, there had been no final judgment for appeals purposes and absent certification under Miss. R. Civ. P. 54(b), the appeal required dismissal. Nygaard v. Getty Oil Co., 877 So. 2d 559, 2004 Miss. App. LEXIS 668 (Miss. Ct. App. 2004).

Because (1) the trial court mentioned only the insurance company's motion to dismiss and did not mention any other defendants, and (2) no Miss. R. Civ. P. 54(b) certificate was entered by the trial court, the order was purely interlocutory and was not a final appealable judgment; thus, plaintiffs' appeal was not properly before the appellate court and was dismissed for lack of jurisdiction. Salts v. Gulf Nat'l Life Ins. Co., 849 So. 2d 848, 2002 Miss. LEXIS 246 (Miss. 2002).

Appeals from an order not dismissing all the parties to a lawsuit was interlocutory, absent certification as a final judgment by the trial judge. Fairley v. George County, 800 So. 2d 1159, 2001 Miss. LEXIS 313 (Miss. 2001).

Trucking company's appeal of default judgment was dismissed because the judgment had not resolved all issues involving all parties and the company had not obtained the trial court certificate required by Miss. R. Civ. P. 54(b) before attempting to appeal an interlocutory order. Waynebuilt & Son, Inc. v. Houpt, 797 So. 2d 1046, 2001 Miss. App. LEXIS 318 (Miss. Ct. App. 2001).

An appeal of a default judgment entered against a third party defendant was dismissed since the default judgment did not terminate the original cause of action and the trial court did not certify the case for

appeal under subsection (b). Wayne-Built & Son, Inc v. Houpt Trucking, 2001 Miss. App. LEXIS 200 (Miss. Ct. App. May 15, 2001), op. withdrawn, sub. op., 797 So. 2d 1046, 2001 Miss. App. LEXIS 318 (Miss. Ct. App. 2001).

An appeal by the plaintiff in a medical malpractice case from the grant of summary judgment to one defendant was dismissed since the order appealed from did not adjudicate the plaintiff's claim against the other defendant and was not certified under Rule 54(b) as a final judgment as to the defendant to whom summary judgment was granted. Gilchrist v. Veach, 754 So. 2d 1172, 2000 Miss. LEXIS 53 (Miss. 2000).

In an action involving multiple defendants and in the absence of a Rule 54(b) certification, orders regarding a grant of interpleader, the transfer of the case to another county, and attorney's fees were interlocutory and were not appealable as final judgments. Scruggs, Millette, Bozeman & Dent, P.A. v. Merkel & Cocke, P.A., 763 So. 2d 869, 2000 Miss. LEXIS 172 (Miss. 2000).

An order was interlocutory and not appealable where the action involved several defendants, the order disposed only of the claim for damages against one defendant, and the appellant failed to have the judgment certified as a final judgment. Mitchell v. Blackmon, 760 So. 2d 691, 2000 Miss. LEXIS 62 (Miss. 2000).

**Presumptions.**

In a father's challenge to the trial court's determination of his alimony obligation, notwithstanding the chancellor's failure to explicitly state that he was ruling on the tax liability from the year complained of, the judgment was a final judgment in compliance with Miss. R. Civ. P. 54; it was clear from the chancellor's order that the tax liability discussed in the motion for rehearing was different from the tax liability presented at trial. Parker v. Parker, 934 So. 2d 359, 2006 Miss. App. LEXIS 543 (Miss. Ct. App. 2006).

Mississippi's procedural rules clearly create a presumption favoring the award of costs to the prevailing party; it is therefore incumbent upon unsuccessful party to overcome this presumption by showing some special circumstances. Northern Elec. Co. v. Phillips, 673 So. 2d 1384, 1996 Miss. LEXIS 217 (Miss. 1996).

**Relief.**

Equitable lien on a husband's law practice to secure the payment of future alimony did not err, despite a wife's failure to specifically seek such relief, because the wife's prayer for general relief gave the husband sufficient notice a chancellor could impose any relief the proof entitled the wife to within the court's jurisdiction. Shumake v. Shumake, 233 So. 3d 234, 2017 Miss. LEXIS 204 (Miss. 2017).

Chancery court properly entered final judgment in favor of appellee because appellant never pleaded a claim for damages; subsection (c) limits a court's ability to award monetary damages without a pleading. RSL Funding, LLC v. Saucier (In re Transfer of Structured Settlement Payment Rights by Benny Ray Saucier), 207 So. 3d 689, 2016 Miss. App. LEXIS 801 (Miss. Ct. App. 2016).

Trial court's declaratory judgment establishing plaintiffs' ownership of shallow gas rights did not exceed the scope of the complaint's demand for relief, because plaintiffs could not recover damages on their conversion claim against defendants without first establishing lawful ownership of those rights. Tellus Operating Group, LLC v. Tex. Petroleum Inv. Co., 105 So. 3d 274, 2012 Miss. LEXIS 488 (Miss. 2012).

Insurance company was not entitled to an award of indemnity against a drilling company because the insurance company failed to show that it had made settlement-of-claims payments to injured parties under compulsion of law; since the insurance company paid the settlements as a volunteer, it was not entitled to recovery. Hartford Cas. Ins. Co. v. Halliburton Co., 826 So. 2d 1206, 2001 Miss. LEXIS 247 (Miss. 2001).

Complaint contained specific plea for punitive damages against defendant for its bad faith refusal to pay, and there was therefore no merit in defendant's contention that punitive damages were awarded on a ground not raised in plaintiff's complaint. Dynasteel Corp. v. Aztec Industries, Inc., 611 So. 2d 977, 1992 Miss. LEXIS 828 (Miss. 1992).

**Timeliness.**

Because the judgment by a chancellor denying the health care providers' claim against the decedent's estate did not adjudicate all claims, rights, and liabilities involved and because no certification for appeal by the chancellor appeared in the record, the judgment was interlocutory. Accordingly, the appeal by the providers was timely filed because the providers filed their appeal within thirty days from the date the chancellor issued a judgment closing the estate. Rush Found. Hosp. v. Carlisle, 269 So. 3d 222, 2018 Miss. App. LEXIS 111 (Miss. Ct. App. 2018).

Because appellants voluntarily dismissed their appeal from a trial court's Miss. R. Civ. P. 54(b) final judgment after the expiration of the thirty day period for an appeal, their subsequent arguments that their jury trial waiver was ineffective, that the trial court's Rule 54(b) certification was erroneous, and that the trial court erroneously denied a motion to intervene were not properly before the appellate court as they were untimely filed. Rolison v. Fryar, 204 So. 3d 725, 2016 Miss. LEXIS 488 (Miss. 2016).

As a trial court did not abuse its discretion in holding that the dismissal of a particular defendant was a final, appealable judgment under Miss. R. Civ. P. 54(b), an appeal was untimely under Miss. R. App. P. 4(a) where it was taken from a later order that dismissed the remaining defendants. Cook v. Wallot, 172 So. 3d 788, 2013 Miss. App. LEXIS 245 (Miss. Ct. App. 2013).

In an action involving a dispute over an easement, the appellant property owner's appeal was not untimely because, when a trial court certified a claim for appeal under Miss. R. Civ. P. 54(b), the time for taking the appeal began to run on the date of certification. Therefore, the chancellor's December 18th order constituted the final, appealable judgment and the appeal was filed within 30 days of that order. Calvert v. Griggs, 992 So. 2d 627, 2008 Miss. LEXIS 516 (Miss. 2008).

**Illustrative cases.**

Appellate court lacked jurisdiction in an appeal because the judgment which was appealed was not a final, appealable judgment as the chancery court's order failed to adjudicate the rights of all the parties and the court's order was not certified as a final judgment. Taborian Urgent Care Ctr. v. BDT Hous. Servs. Enter., 271 So. 3d 556, 2018 Miss. App. LEXIS 562 (Miss. Ct. App. 2018).

Because a summary judgment order was not certified as a final order, a prematurely filed notice of appeal on that order by a medical supply business had no affect at all on the county court's jurisdiction over the lawsuit still pending before it. Accordingly, the county court had jurisdiction to hear, rule upon, and enter judgment upon the prevailing corporate principal's motion for attorney fees. Patton Med. of Gulf Coast, Inc. v. Relle, 269 So. 3d 266, 2018 Miss. App. LEXIS 156 (Miss. Ct. App. 2018).

Trial court did not err in granting relief under Miss. R. Civ. P. 60, and the successor trial judge did not err in reversing the previous trial judge's rulings on summary judgment because the trial court had authority to revise the order denying the motion for summary judgment. Collins v. City of Newton, 240 So. 3d 1211, 2018 Miss. LEXIS 123 (Miss. 2018).

Because application of judicial immunity was dispositive of a conservator's claims regarding the alleged mishandling of a conservatorship, a trial court did not abuse its discretion in certifying a judgment of dismissal regarding the judges involved in the suit as a final, appealable judgment. Moreover, if the judges were entitled to immunity, it was especially inequitable to require them to wait until the entire case was tried before permitting them to appeal. Newsome v. Shoemake, 234 So. 3d 1215, 2017 Miss. LEXIS 367 (Miss. 2017).

Chancellor properly issued a certified judgment, dispensing of a second-mortgage debt prior to a reconsideration of alimony, because, by determining that the second mortgage was to be divided equitably upon payment, and then later evaluating the amount and necessity of alimony, the chancellor properly reconsidered not only the issue of equitable distribution, but also the awards of lump sum and periodic alimony after properly dividing the marital assets. Gutierrez v. Gutierrez, 233 So. 3d 797, 2017 Miss. LEXIS 247 (Miss. 2017).

Chancellor's entry of judgment regarding the conveyance of assets related to investment-fund accounts was not a final, appealable judgment because, while the chancery court directed the entry of a final judgment denying a daughter's petition for the recovery/collection of the assets, to set aside the conveyance of personal property, and for recovery of assets, nowhere in the order did the chancellor state that there was no reason for delay. Jeffers v. Saget, 235 So. 3d 103, 2017 Miss. App. LEXIS 166 (Miss. Ct. App. 2017).

Dismissal of an appeal for lack of jurisdiction was appropriate because the circuit court's judgment dismissing a patient's medical negligence claim against a nurse anesthetist, for failure to prosecute, was not certified, and the patient's remaining claim against the employer of the nurse anesthetist remained pending before the circuit court, even though the employer never answered the complaint or appeared in the action. Havard v. Sumrall, 194 So. 3d 188, 2016 Miss. App. LEXIS 375 (Miss. Ct. App. 2016).

Circuit court did not abuse its discretion in granting a certification of final judgment and dismissing the claims against the owner of a man buggy that was involved in an accident because the accident victim's motion for reconsideration did not prevent the court from entering a final judgment in favor of the owner. Moreover, the circuit court denied the victim's motion for reconsideration on the same day that it granted the owner's certified final judgment. Davenport v. Hertz Equip. Rental Corp., 187 So. 3d 194, 2016 Miss. App. LEXIS 112 (Miss. Ct. App. 2016).

Trial court erred by granting the administratrix of a decedent's estate additional time to file an appeal in a medical malpractice action against doctors and a hospital because the court granted the administratrix relief from an order certifying as final for appeal an order dismissing the doctors that was corrected by two separate orders by the court. Moreover, the running of the time to appeal began when the hospital, the last defendant, was dismissed from the case. Pope v. Brock, 179 So. 3d 1120, 2015 Miss. LEXIS 609 (Miss. 2015).

Not only did a trial judge have the authority to change the judge's prior rulings, but the judge's directed verdict as to possession of disputed equipment was not contrary to the judge's prior rulings. Rather, the judge recognized that disputed issues existed that warranted a trial, and, once the issues were fleshed out at trial, it became clear that the contract between the parties was unambiguous and that the award of ownership of the equipment at issue was to the seller. Lampkin Constr. Co. v. Sand Specialties & Aggregates, LLC, 179 So. 3d 1095, 2015 Miss. LEXIS 607 (Miss. 2015).

Dismissal of an appeal was necessary, for lack of jurisdiction, because the order appealed, although titled a "final order," was actually an interlocutory order that failed to constitute a final judgment, reflecting final adjudication of all claims before the chancery court, and the judgment was not certified as a final judgment. Newson v. Newson, 138 So. 3d 275, 2014 Miss. App. LEXIS 258 (Miss. Ct. App. 2014).

Circuit court's judgment to deny an employer's motion to confirm an arbitration award (but not to vacate the award) was a final judgment, and the appellate court had jurisdiction to consider the appeal because the former employee was time-barred from contesting the confirmation of the award. Wells Fargo Advisors, LLC v. Runnels, 126 So. 3d 137, 2013 Miss. App. LEXIS 781 (Miss. Ct. App. 2013).

Owner's appeal was dismissed for lack of jurisdiction because his personal injury complaint alleged multiple claims against three parties, the circuit court's grant of summary judgment to an inspector lacked a final judgment certification, and there was no evidence the Mississippi Supreme Court granted permission to appeal an interlocutory order. Clausell v. Bourque, 122 So. 3d 825, 2013 Miss. App. LEXIS 642 (Miss. Ct. App. 2013).

Son's appeal of a judgment of the chancery court awarding $ 4,000 of the $ 5,000 held in escrow to his siblings in a dispute regarding the distribution of their father's estate was dismissed for lack of jurisdiction as there was no Miss. R. Civ. P. 54(b) certification from the chancery court, and the allocation of the $ 1,000 in the trust account to the appropriate party was pending in the chancery court; the chancery court had not disposed of all the claims when the son perfected his appeal, making the appeal an interlocutory one. In re Conservatorship of Graves, 172 So. 3d 779, 2013 Miss. App. LEXIS 237 (Miss. Ct. App. 2013).

Although entitled a "final judgment," a chancellor's order was not final and appealable. While the order held a father in contempt for failure to pay child support it did not decide the amount of arrearage nor did it determine amount of child support to be paid in the future after father was found to be entitled to reduction in child support obligation, and the order did not contain language indicating that there was no just reason for delaying an appeal of the order. Maurer v. Boyd, 111 So. 3d 690, 2013 Miss. App. LEXIS 171 (Miss. Ct. App. 2013).

Even though a circuit court's order compelling only some of the mobile home buyers' claims against a lender to arbitration was not a typical final judgment, the appellate court had jurisdiction to review the merits of the lender's appeal. Green Tree Servicing LLC v. Simmons, 108 So. 3d 476, 2013 Miss. App. LEXIS 79 (Miss. Ct. App. 2013).

Although the parties requested child support in their respective complaint and counter-complaint for divorce, the chancellor expressly declined to rule on the issue of child support and did not certify the judgment as final pursuant to Miss. R. Civ. P. 54(b); accordingly, the appellate court lacked jurisdiction to review the issues on appeal. S.E.B. v. R.E.B., 67 So. 3d 14, 2011 Miss. App. LEXIS 392 (Miss. Ct. App. 2011).

Although Miss. R. Civ. P. 68 applied because the jury's award was less than the defendant's rejected offer of settlement, costs were limited to those allowable under Miss. R. Civ. P. 54(d) and, therefore, the plaintiff could not be taxed with costs for copying, trial materials, and court reporter fees, or for expert witnesses costs in excess of Miss. Code Ann. § 25-7-47. Hubbard v. Delta Sanitation of Miss., 64 So. 3d 547, 2011 Miss. App. LEXIS 240 (Miss. Ct. App. 2011).

While the agent argued that the circuit court's order was not a final judgment which expressly dismissed the claims with prejudice under Miss. R. Civ. P. 54(b), the order clearly used words of finality and adjudication; the order concluded that the agent could not maintain the cause of action against the insurers and twice included the phrase "ordered and adjudged. Because the circuit court's opinion and order was final and appealable and agent's notice of appeal was untimely filed and she failed to file a motion for an extension of time under Miss. R. App. P. 4(g), ther appeal was dismissed for lack of jurisdiction. Rigdon v. Miss. Farm Bureau Fed'n, 22 So. 3d 321, 2009 Miss. App. LEXIS 764 (Miss. Ct. App. 2009).

In plaintiff's suit against the manufacturer of a forklift, the trial court did not abuse its discretion in excluding the testimony of plaintiff's expert witness under Miss. R. Evid. 702; the expert's findings were speculative and his methodology failed to meet the Daubert standard. The trial court did not err by entering a final judgment for the manufacturer under Miss. R. Civ. P. 54(b). Townsend v. Doosan Infracore Am. Corp., 3 So. 3d 150, 2009 Miss. App. LEXIS 92 (Miss. Ct. App. 2009).

Where the parents of a child killed in a drunk driving accident sued the store that sold alcohol to the driver minor, the trial court issued a declaratory judgment holding that the store's insurance policy covered the parents' claims. The trial court certified the declaratory judgment as a final judgment pursuant to Miss. R. Civ. P. 54(b); therefore, the insurance company was permitted to appeal. S.C. Ins. Co. v. Keymon, 974 So. 2d 226, 2008 Miss. LEXIS 67 (Miss. 2008).

In a case where partial summary judgment was granted to a utility company on the issue of trespass damages, an appeal from the ruling was dismissed because the trial court improperly entered a Miss. R. Civ. P. 54(b) final judgment since the litigation was not complex, and the appeal would have resulted in piecemeal litigation; moreover, the case was not an appropriate example of an interlocutory appeal either since it did not involve merely questions of law. Byrd v. Miss. Power Co., 943

So. 2d 108, 2006 Miss. App. LEXIS 861 (Miss. Ct. App. 2006).

Fact that a former wife included a claim for modification of alimony in her pleadings and attached a copy of a property agreement to the pleadings was sufficient to put the former husband on notice that an escalation clause in the agreement could be the basis of a decision. D'Avignon v. D'Avignon, 945 So. 2d 401, 2006 Miss. App. LEXIS 549 (Miss. Ct. App. 2006), overruled, Moseley v. Smith, 180 So. 3d 667, 2014 Miss. App. LEXIS 689 (Miss. Ct. App. 2014).

Where an attorney did not immediately appeal a judgment pursuant to Miss. R. Civ. P. 54(b) that the law firm's president had not usurped corporate authority by transferring firm revenues to himself, the attorney waived her right to challenge that ruling after a final judgment was entered. Jowett v. Scruggs, 901 So. 2d 638, 2004 Miss. App. LEXIS 768 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273, 2005 Miss. LEXIS 312 (Miss. 2005).

Where the court of appeals affirmed the chancery court as to its order regarding temporary child custody, and where the father obtained further review by petition for certiorari, the evidence in the record supported the contention that the change of custody was intended to be temporary until the trial court could hold a full hearing on the merits after the litigation (then pending in federal district court against a special chancellor) was over. For that reason, the order was not final and permanent, and the Mississippi Supreme Court did not have jurisdiction to review the change of custody. McDonald v. McDonald, 876 So. 2d 296, 2004 Miss. LEXIS 795 (Miss.), cert. denied, 543 U.S. 943, 125 S. Ct. 355, 160 L. Ed. 2d 255, 2004 U.S. LEXIS 6971 (U.S. 2004).

Employee's claims for actual damages, and for attorney's fees remained pending, the trial court never made a Miss. R. Civ. P. 54(b) certification, the trial court's order dismissing the punitive damages claim was interlocutory, and the question presented did not compel suspension of the procedural requirements of Miss. R. App. P. 5(a) to allow an interlocutory appeal, thus, the appeal was dismissed for lack of an appealable final judgment. Millsaps v. Stout, 860 So. 2d 852, 2003 Miss. App. LEXIS 1148 (Miss. Ct. App. 2003).

In an appeal from what was in effect, a partial summary judgment, which resolved the ownership of the disputed life insurance policy as being owned by the decedent, the ultimate issue of who was the proper beneficiary, the decedent's former husband, or the decedent's child, was apparently reserved, there was no showing to justify a certification, and therefore, the appeal was an improper interlocutory appeal, and was dismissed. Evans v. Moore, 853 So. 2d 850, 2003 Miss. App. LEXIS 751 (Miss. Ct. App. 2003).

Chancellor did not err in granting relief to divorced spouse beyond that requested by the spouse in her motion because, in light of the broad discretionary powers granted to a chancellor to fashion appropriate relief in resolving the financial aspects of a dissolving marriage, the pleadings were sufficient to fairly put the parties on notice that the chancellor would be asked to make an appropriate ruling on the parties' competing rights and obligations. Pope v. Pope, 803 So. 2d 499, 2002 Miss. App. LEXIS 3 (Miss. Ct. App. 2002).

The grant of summary judgment in favor of a medical center in a wrongful death medical malpractice action was not an appealable order as there were two defendants in the action and the lower court order made no adjudication with regard to the other defendant. Williams v. Delta Reg'l Med. Ctr., 740 So. 2d 284, 1999 Miss. LEXIS 174 (Miss. 1999).

Chancery court had only issued a ruling and denied motions, and there was nothing in record suggesting entry of any final order or judgment disposing of pending custody issues on merits, and therefore supreme court was required to dismiss appeal. Cortesi v. Cortesi, 566 So. 2d 702, 1990 Miss. LEXIS 430 (Miss. 1990).

Since a final judgment had been made dismissing one defendant from the action and the remaining defendant was impecunious, the appellate court decided to hear an interlocutory appeal regarding the summary judgment matter and not postpone its determination until after trial, because waiting would only result in inefficiency. May v. V.F.W. Post #2539, 577 So.

2d 372, 1991 Miss. LEXIS 116 (Miss. 1991).

Appeal was timely, where appellant gave notice of appeal to both final order and previous interlocutory order, and his notice of appeal was perfected within thirty days from date of entry of final order. O'Neill v. O'Neill, 551 So. 2d 228, 1989 Miss. LEXIS 425 (Miss. 1989).

Matter before supreme court was not an interlocutory appeal, but a case where more than one claim for relief had been presented; since chancery court had decided controlling legal issue in the case, supreme court treated chancery court's order as a determination that there was no just reason for delay and that appeal should be heard. First United Bank v. Philmont Corp., 533 So. 2d 449, 1988 Miss. LEXIS 527 (Miss. 1988).

## RESEARCH REFERENCES

**ALR.**

Propriety under 28 U.S.C.S § 1920 and Rule 54(d) of Federal Rules of Civil Procedure of allowing prevailing party costs for copies of depositions. 155 A.L.R. Fed. 445.

Taxation of costs associated with videotaped depositions under 28 U.S.C.S. § 1920 and Rule 54(d) of Federal Rules of Civil Procedure. 156 A.L.R. Fed. 311.

## Rule 55. Default.

(a) *Entry.* — When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

(b) *Judgment.* — In all cases the party entitled to a judgment by default shall apply to the court therefor. If the party against whom judgment by default is sought has appeared in the action, he (or if appearing by representative, his representative) shall be served with written notice of the application for judgment at least three days prior to the hearing of such application; however, judgment by default may be entered by the court on the day the case is set for trial without such three days' notice. If in order to enable the court to enter judgment or to carry it into effect it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing with or without a jury, in the court's discretion, or order such references as it deems necessary and proper.

(c) *Setting aside default.* — For good cause shown, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) *Plaintiffs, counter-claimants, and cross-claimants.* — The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counter-claim. In all cases a judgment by default is subject to the limitation of Rule 54(c).

(e) *Proof required despite default in certain cases.* — No judgment by default shall be entered against a person under a legal disability or a party to a suit for divorce or annulment of marriage unless the claimant establishes his claim or rights to relief by evidence, provided, however, that divorces on ground of irreconcilable differences may be granted pro confesso as provided by statute.

**HISTORY: Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

## ADVISORY COMMITTEE NOTE

Before a default judgment can be entered, the court must have jurisdiction over the party against whom the judgment is sought; which also means that the party must have been effectively served with process.

Entry of default for failure to plead or otherwise defend is not limited to situations involving a failure to answer a complaint, but applies to any of the pleadings listed in M.R.C.P. 7(a).

The words "otherwise defend" refer to a Rule 12(b)(6) motion. See M.R.C.P. Rule 12(b). The mere appearance by the defending party will not keep the party from being in default for failure to plead or otherwise defend, but if the party appears and indicates a desire to contest the action, the court can exercise its discretion and refuse to enter a default judgment. This approach is in line with the general policy that whenever there is doubt whether a default judgment should be entered, the court ought to allow the case to be tried on the merits.

Rule 55(a) does not represent the only source of authority in these rules for the entry of a default that may lead to judgment. For example, Rule 37(b)(2)(C) and Rule 37(d) both provide for the use of a default judgment as a sanction for violation of the discovery rules.

When the prerequisites of Rule 55(a) are satisfied, an entry of default shall be made by the clerk without any action being taken by the court. The clerk's function, however, is not perfunctory. Before the clerk can enter a default the clerk must examine the affidavits filed and be satisfied that the requirements of Rule 55(a) are met. See M.R.C.P. App. A, Forms 36, 37, and 38. These elements of default must be shown by affidavit or other competent proof.

The traditional requirement that "one had to file documents in or actually physically appear before a court" in order to make a Rule 55(b) appearance has been relaxed. If a party has made "an indicia of defense or denial of the allegations of the complaint," such party is entitled to written notice of the application for default judgment at least three days prior to the hearing on such application. *Wheat v. Eakin,* 491 So. 2d 523, 525 (Miss. 1986). "[I]nformal contacts between parties may constitute an appearance." *Holmes v. Holmes,* 628 So. 2d 1361, 1364 (Miss. 1993). The Mississippi Supreme Court has found an appearance when "the defendants either 1) served or sent a document to the plaintiff indicating in writing the defendant's intent to defend, 2) filed a document with the court indicating in writing the defendant's intent to defend, or 3) had counsel communicate to opposing counsel the defendant's intent to defend." *American States Ins. Co. v. Rogillio,* 10 So. 3d 463, 467 (Miss. 2009). A defendant who has filed an answer to the complaint but who has failed to file a timely answer to an amended complaint has entered an appearance for Rule 55(b) purposes. See *Chassaniol v. Bank of Kilmichael,* 626 So. 2d 127, 130-31 (Miss. 1993). A defendant whose attorney has written the plaintiff's attorney in a divorce case and informed him that the defendant desired to settle the case if possible but intended to defend if no settlement could be reached has entered an appearance for Rule 55(b) purposes. See *Holmes v. Holmes,* 628 So. 2d 1361, 1364 (Miss. 1993). A defendant who has served a motion to set aside the entry of default has entered an appearance for Rule 55(b) purposes. See *King v. Sigrest,* 641 So. 2d 1158, 1162 (Miss. 1994). A defendant, cannot, however, enter a Rule 55(b) appearance before the case has been commenced. See *Kumar v. Loper,* 80 So. 3d 808, 814 (Miss. 2012). The defendant bears the burden of proving that an appearance has been made. See *Dynasteel Corp. v. Aztec Indus., Inc.,* 611 So. 2d 977, 982 (Miss. 1992).

Although an appearance by a defending party does not immunize defendant from being in default for failure to plead or otherwise defend, it does entitle defendant to at least three days written notice of the application to the court for the entry of a judgment based on his default. This enables a defendant in default to appear at a subsequent hearing on the question of damages and contest the amount to be assessed against him. Damages must be fixed before an entry of default judgment and there is no estoppel by judgment until the judgment by default has been entered.

When a judgment by default is entered, it is treated as a conclusive and final adjudication of the issues necessary to justify the relief awarded and is given the same effect as a judgment rendered after a trial on the merits. A judgment entered pursuant to Rule 55(b) may be reviewed on appeal to the same extent as any other judgment; however, an order denying a motion for a default judgment is interlocutory and not appealable. M.R.C.P. 54(a).

After entry of default by the clerk, defendant has no further standing to contest the actual factual allegations of the plaintiff's claim for relief. If a defendant wishes an opportunity to challenge plaintiff's right to recover, a defendant's only recourse is to show good cause for setting aside the default under Rule 55(c) and, failing that, to contest the amount of recovery.

After entry of default by the clerk, the court must conduct an evidentiary hearing on the record to determine damages in cases in which the plaintiff seeks unliquidated damages. *Capitol One Services, Inc. v. Rawls,* 904 So. 2d 1010, 1018 (Miss. 2004). "[L]iquidated damages are set or determined by contract, while unliquidated damages are established by a verdict or award and cannot be determined by a fixed formula." Id. (quoting *Moeller v. American Guar. & Liab. Ins. Co.,* 812 So. 2d 953, 959-60 (Miss. 2002)). Pursuant to M.R.C.P. 54(c), a default judgment shall only order the type of relief sought in the demand for judgment (i.e., money damages, equitable relief, etc.), and shall not order money damages in an amount that exceeds the amount sought in the demand for judgment.

If a default has been entered, but a default judgment has not yet been entered, the defending party may move to set aside the entry of default "[f]or good cause shown" pursuant to M.R.C.P. 55(c). If a default judgment has been entered, the defendant may move to set aside the default judgment pursuant to M.R.C.P. 60(b). The standard for setting aside an entry of default pursuant to M.R.C.P. 55(c) is more liberal than the standard for setting aside a default judgment pursuant to M.R.C.P. 60(b). See *King v. Sigrest,* 641 So. 2d 1158, 1162 (Miss. 1994).

## JUDICIAL DECISIONS

### ANALYSIS

Construction.
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**Construction.**

Default is not treated as a general admission or an absolute confession. Similarly, a general denial is not sufficient to set aside a default judgment; a meritorious defense is one that is demonstrated through an affidavit or sworn form of testimony and conclusions and unsubstantiated allegations will not suffice. Leach v. Shelter Ins. Co., 909 So. 2d 1283, 2005 Miss. App. LEXIS 128 (Miss. Ct. App. 2005).

Neither attorney's letter to member of bar complaint tribunal nor her discovery requests constituted an "answer" or a sufficient responsive pleading to disciplinary complaint of Mississippi Bar, and therefore tribunal did not err in entering default against attorney. Harrison v. The Mississippi Bar, 637 So. 2d 204, 1994 Miss. LEXIS 266 (Miss. 1994).

Subdivision (b) of this rule allowed court to hold subsequent hearings in order to carry a default judgment into effect, and therefore trial judge did not err in entering default judgment on issue of liability alone. Pointer v. Huffman, 509 So. 2d 870, 1987 Miss. LEXIS 2583 (Miss. 1987).

**Applicability.**

Where a judgment debtor is only entitled to notice of the garnishment action if the garnishee suggests exemptions under § 11-35-33, the notice provisions of this rule are inconsistent with the statutes, and are not applicable. Folse v. Stennett-Yancey, 757 So. 2d 989, 2000 Miss. LEXIS 67 (Miss. 2000).

Mississippi State Bar rules of discipline contain no provisions concerning default judgments, and therefore Rules of Civil Procedure concerning default judgments apply to disciplinary proceedings. Harrison v. The Mississippi Bar, 637 So. 2d 204, 1994 Miss. LEXIS 266 (Miss. 1994).

Pretrial order in divorce action required parties to file consolidated pleadings as a way to put an end to excessive pleading and satellite litigation, and therefore answers were neither contemplated nor required, and wife was not entitled to default judgment for husband's failure to answer. Cumberland v. Cumberland, 564 So. 2d 839, 1990 Miss. LEXIS 282 (Miss. 1990).

There are no specific procedures concerning entry of default judgment in attorney disciplinary actions by the State Bar Committee, and therefore M.R.C.P. Rule 55 applies. Vining v. Mississippi State Bar Asso., 508 So. 2d 1047, 1987 Miss. LEXIS 2500 (Miss. 1987).

Although partial in nature, default resulted in a default judgment, which was more than the mere entry of default by the clerk, and therefore trial judge committed no error in addressing defendant's request for relief under M.R.C.P. Rule 60(b) instead of Rule 55(c). Pointer v. Huffman, 509 So. 2d 870, 1987 Miss. LEXIS 2583 (Miss. 1987).

**Appearance.**

Default judgment entered against the automobile insurers was not void for failure to comply with Miss. R. Civ. P. 55(b) where a telephone conversation between the injured driver's attorney and a claims specialist was not an appearance in the action. Am. States Ins. Co. v. Rogillio, 10 So. 3d 463, 2009 Miss. LEXIS 269 (Miss. 2009).

Where the process issued to defendants was deficient and not in substantial compliance with Miss. R. Civ. P. 4(b), a pro se response by one defendant might have constituted an appearance under Miss. R. Civ. P. 55, but was not a valid answer because it did not comport with the filing requirement of Miss. R. Civ. P. 5(d). Fletcher v. Limeco Corp., 996 So. 2d 773, 2008 Miss. LEXIS 598 (Miss. 2008).

In a negligence case, the defense of lack of personal jurisdiction was waived under Miss. R. Civ. P. 12(h)(1) because an out-of-state resident made a general appearance when he sought relief from a default judgment without raising that objection; therefore, the case was improperly dismissed for a failure timely serve process. Courtney v. McCluggage, 991 So. 2d 642, 2008 Miss. App. LEXIS 571 (Miss. Ct. App. 2008).

In initial suit by homeowners against a seller, for fraud, where the homebuilder appeared for a deposition pursuant to a subpoena, the homebuilder did not make an appearance when the homebuilder was not yet named as a party. Thus, when the homebuilder was later added as defendant in the homeowners' negligence action, and failed to timely answer, entry of default judgment was proper; further, the homebuilder's alleged inability to contact the homeowners' counsel did not annul the homebuilder's obligation to timely answer under Miss. R. Civ. P. 12. Williams v. Kelly, 872 So. 2d 783, 2004 Miss. App. LEXIS 420 (Miss. Ct. App. 2004).

Where defendant paid underlying debt immediately after service of process, but took no further action of record, defendant did not make an appearance so as to be entitled to notice within meaning of subdivision (b) of this rule. Dynasteel Corp. v. Aztec Industries, Inc., 611 So. 2d 977, 1992 Miss. LEXIS 828 (Miss. 1992).

**Damages.**

Because the Mississippi Supreme Court had no evidence before it to judge whether the awarded damages to the patron were reasonable and supported by the evidence, the judgment was vacated as to damages and remanded for a damages hearing on the record. Greater Canton Ford Mercury, Inc. v. Lane, 997 So. 2d 198, 2008 Miss. LEXIS 517 (Miss. 2008).

State default judgment did liquidate and establish the amount of a claimant's damages, including punitive damages, which, under the Official Comment to Miss. R. Civ. P. 55, was a conclusive and final adjudication of the issues. Under the principles of res judicata, the court was bound by the amount of punitive damages established by the default judgment for purposes of the claim filed under 11 U.S.C.S. § 502. In re Young, 2008 Bankr. LEXIS 1820 (Bankr. N.D. Miss. May 9, 2008).

Pursuant to Miss. R. Civ. P. 55(b), an on-the-record hearing must be held prior to the entry of default judgment under which unliquidated damages are requested. Hence, because plaintiffs sought unliquidated damages in their breach of contract action against a credit card company, court erred in not conducting an evidentiary hearing on the record prior to entering a default judgment against the company. Capital One Servs. v. Rawls, 904 So. 2d 1010, 2004 Miss. LEXIS 1407 (Miss. 2004), overruled in part, BB Buggies, Inc. v. Leon, 150 So. 3d 90, 2014 Miss. LEXIS 543 (Miss. 2014).

The rule does not require that the hearing to determine the amount of damages be of record. American 3-CI v. Farrow, 1999 Miss. App. LEXIS 61 (Miss. Ct. App. Feb. 23, 1999), op. withdrawn, sub. op., 749 So. 2d 298, 1999 Miss. App. LEXIS 594 (Miss. Ct. App. 1999).

Because plaintiffs' claims were not for liquidated damages and there was no evidence supportive of determination of damages in the record, a hearing was required and the matter was remanded for further proceedings. Journey v. Long, 585 So. 2d 1268, 1991 Miss. LEXIS 595 (Miss. 1991).

**Jurisdiction.**

Court of appeals had jurisdiction to review a couple's appeal of an order granting a nurse's motion to dismiss their action for failure to prosecute because the default judgment the couple obtained against the nurse finally adjudicated their claims; the couple timely raised the appeal within thirty days of entry of the judgment because they filed their appeal and raised as error the circuit court's dismissal of their complaint after the judgment was entered into the general docket. Havard v. Sumrall, 250 So. 3d 1282, 2017 Miss. App. LEXIS 634 (Miss. Ct. App. 2017), cert. denied, 250 So. 3d 1268, 2018 Miss. LEXIS 354 (Miss. 2018), cert. denied, 2018 Miss. LEXIS 351 (Miss. Aug. 9, 2018).

In an action arising from alleged defects in plaintiff purchasers' manufactured home, the trial court lacked jurisdiction to issue a default judgment pursuant to Miss. R. Civ. P. 55(b) against defendant bank, a nonresident corporation, because defendant was never properly served with process under Miss. R. Civ. P. 4(c)(5) and (d)(4) where the uncontested evidence showed that the person who signed for the process was a mailroom clerk who was not defendant's agent for service of process. Flagstar Bank v. Danos, 46 So. 3d 348, 2008 Miss. App. LEXIS 717 (Miss. Ct. App. 2008), rev'd, 46 So. 3d 298, 2010 Miss. LEXIS 457 (Miss. 2010).

**Notice.**

Denial of the operator, manager, and son's motion to set aside a default judgment was improper because the letter from their counsel to the waitress's counsel expressed an intent to defend against the claims asserted by the waitress and they were therefore entitled to three days' notice of the hearing on the default judgment under Miss. R. Civ. P. 55(b). Kumar v. Loper, 80 So. 3d 833, 2011 Miss. App. LEXIS 325 (Miss. Ct. App. 2011), vacated, 80 So. 3d 808, 2012 Miss. LEXIS 94 (Miss. 2012).

Chancery court erred in entering a default judgment against a construction corporation in homeowners' action for slander of title because under Miss. R. Civ. P. 55(b), the homeowners were obligated to provide the corporation notice of the hearing on their application for default judgment; while the corporation had not filed an answer to the complaint, it did indicate its intent to file a counterclaim if the homeowners filed a complaint. Tucker v. Williams, 7 So. 3d 961, 2009 Miss. App. LEXIS 163 (Miss. Ct. App. 2009).

Under Miss. R. Civ. P. 55, debtor was not entitled to notice of application of default judgment because he failed to answer state court summons and complaint. In re Young, 2008 Bankr. LEXIS 1820 (Bankr. N.D. Miss. May 9, 2008).

Although a debtor asserted that a state default judgment entered against him under Miss. R. Civ. P. 55(a) was issued without due process of law, a sheriff's proof of service demonstrated that the debtor received the summons and complaint. In re Young, 2008 Bankr. LEXIS 1820 (Bankr. N.D. Miss. May 9, 2008).

Although the purchaser's filing of his answer to the bank's motion for default judgment was untimely, it constituted an appearance and therefore resulted in the need for three days' notice and a hearing. Williams v. Chase Manhattan Bank, 834 So. 2d 718, 2003 Miss. App. LEXIS 20 (Miss. Ct. App. 2003).

The defendant was entitled to three days notice the plaintiff's application for default since communications between the defendant's attorney and the plaintiff were sufficient to satisfy the appearance requirements of subsection (b). Folse v. Stennet-Yancey, 1999 Miss. App. LEXIS 242 (Miss. Ct. App. May 4, 1999), rev'd, 757 So. 2d 989, 2000 Miss. LEXIS 67 (Miss. 2000).

Defendant was entitled to have default judgment set aside for failure of notice and hearing; it was clear that defendant had made an appearance, and thus defendant was entitled to notice and a hearing on plaintiff's application for default. King v. Sigrest, 641 So. 2d 1158, 1994 Miss. LEXIS 377 (Miss. 1994).

Wife had "appeared" in divorce action so as to merit three-day notice required by this rule, where she promptly contacted an attorney, who wrote her husband's attorney and informed him that she was represented by counsel and wished to settle the case, making clear, however, her intent to defend the suit should no settlement be reached. Holmes v. Holmes, 628 So. 2d 1361, 1993 Miss. LEXIS 569 (Miss. 1993).

Notice requirement of this rule was applicable in divorce action, since statute governing such actions provided no guidance in the area of notice. Holmes v. Holmes, 628 So. 2d 1361, 1993 Miss. LEXIS 569 (Miss. 1993).

**Procedure.**

Obtaining a default judgment under Miss. R. Civ. P. 55 is a two-step process. First, entry of default must be entered by the clerk of the court, which is obtained through a motion and supporting affidavits; then, the plaintiff must obtain a default judgment from the court. Brown v. Tate, 95 So. 3d 745, 2012 Miss. App. LEXIS 474 (Miss. Ct. App. 2012).

Court properly denied defendant's motion for relief from a default judgment in plaintiff's action to recover damages for timber that was cut from land; plaintiff was not required to first obtain an entry of default by the clerk of the court, pursuant to Miss. R. Civ. P. 55(a), prior to obtaining the default judgment based on the entirely separate ground of discovery abuse, pursuant to Miss. R. Civ. P. 37(b)(2)(C). Hood v. Mordecai, 900 So. 2d 370, 2004 Miss. App. LEXIS 873 (Miss. Ct. App. 2004), cert. denied, 898 So. 2d 679, 2005 Miss. LEXIS 278 (Miss. 2005).

County court erred in entering default judgment against defendant, where record failed to reveal any application for default or notice to defendant. Smith v. Everett, 483 So. 2d 325, 1986 Miss. LEXIS 2375 (Miss. 1986).

**Record of hearing.**

The failure to make a record of the hearing to assess damages rendered a default judgment void and required a new hearing for the limited purpose of assessing the plaintiff's damages. American 3-CI v. Farrow, 749 So. 2d 298, 1999 Miss. App. LEXIS 594 (Miss. Ct. App. 1999).

**Review.**

Driver's argument that a default judgment had to be reversed was properly before the supreme court because the driver's statement of the issues in which he challenged the entry of default was a sufficient challenge to the default judgment. Tucker v. Williams, 198 So. 3d 299, 2016 Miss. LEXIS 304 (Miss. 2016).

Driver's appeal of an entry of default was properly before the supreme court because after the trial court entered the default judgment, the driver timely filed his notice of appeal from the trial court's subsequent entry of a Miss. R. Civ. P. 54(b) final judgment respecting fewer than all of the claims and fewer than all of the parties. Tucker v. Williams, 198 So. 3d 299, 2016 Miss. LEXIS 304 (Miss. 2016).

Homeowners' claim for attorney's fees had been property established because the entry of default required that the court of appeals treat the claim for attorney's fees as a conclusive and final adjudication of the issues necessary to justify the relief awarded that was given the same effect as a judgment rendered after a trial on the merits; accordingly, the court of appeals reviewed the circuit court's findings of fact and conclusions of law to determine whether the ruling was supported by substantial, credible, and reasonable evidence. Woodkrest Custom Homes Inc. v. Cooper, 108 So. 3d 460, 2013 Miss. App. LEXIS 24 (Miss. Ct. App. 2013).

Because the default judgment had been entered, homeowners' claim for punitive damages has been properly established; the role of the court of appeals was to review the award of punitive damages to determine if such damages were proper based on the findings of fact and conclusions of law entered by the court to support the award. Woodkrest Custom Homes Inc. v. Cooper, 108 So. 3d 460, 2013 Miss. App. LEXIS 24 (Miss. Ct. App. 2013).

Homeowners' claims for breach of contract, misrepresentation, conversion, misappropriation, punitive damages, and for an accounting, which were asserted in the complaint, had been properly established because the default judgment had been entered. Woodkrest Custom Homes Inc. v. Cooper, 108 So. 3d 460, 2013 Miss. App. LEXIS 24 (Miss. Ct. App. 2013).

Because a husband did not challenge the granting of a divorce itself or the chancery court's decision to try the case in his absence, the husband's attempt to defend the case for the first time on appeal was improper, and the issues he raised were procedurally barred by Miss. Code Ann. § 93-5-7 (Rev. 2004) and Miss. R. Civ. P. 55(e). Lee v. Lee, 78 So. 3d 337, 2011 Miss. App. LEXIS 131 (Miss. Ct. App. 2011), rev'd, 78 So. 3d 326, 2012 Miss. LEXIS 36 (Miss. 2012).

Trial court erred in sua sponte entering a default judgment against a city under Miss. R. Civ. P. 55 in a suit brought under the Mississippi Tort Claims Act, specifically Miss. Code Ann. § 11-46-9(1)(c); although the city did not timely answer plaintiff's amended complaint pursuant to Miss. R. Civ. P. 15(a), the parties continued to engage in discovery for over four years and plaintiff had no intention of seeking of a default judgment. City of Jackson v. Presley, 942 So. 2d 777, 2006 Miss. LEXIS 649 (Miss. 2006).

When a trial court, after striking a responsive pleading, sua sponte entered a default judgment as to liability against a city under Miss. R. Civ. P. 55, which was akin to a summary judgment since the city was expressly foreclosed from presenting liability evidence at the trial of the case, the appellate court applied a de novo standard of review as to the trial court's entry of the default judgment as to liability against the city. City of Jackson v. Presley, 942 So. 2d 777, 2006 Miss. LEXIS 649 (Miss. 2006).

Trial judge did not abuse his discretion in denying the motorist's request to set aside the default judgment. Particularly since the evidence suggested that she did not have good cause for failing to answer as she was well educated and could have understood the complaint and the summons, she did not even go to her own insurer regarding a defense until she was already in default, and she did not present sufficient evidence that belied a colorable defense, or that the other insurer who sued her would not have suffered prejudice, with regard to its subrogation action, had the default judgment been set aside. Leach v. Shelter Ins. Co., 909 So. 2d 1283, 2005 Miss. App. LEXIS 128 (Miss. Ct. App. 2005).

Applications for default are addressed to sound discretion of trial court, and court on appeal has no authority to disturb trial court's exercise of its discretion absent a firm conclusion that that discretion has been abused. Shannon v. Henson, 499 So. 2d 758, 1986 Miss. LEXIS 2883 (Miss. 1986).

**Setting aside.**

Trial court properly denied a debt-collection company's motion to deem admitted the allegations of its second amended complaint because a bank had standing to contest the allegations of the company's claims for relief, and the record supported setting aside the entry of default. Franklin Collection Serv. v. Bancorpsouth

Bank, 275 So. 3d 1048, 2019 Miss. LEXIS 206 (Miss. 2019).

Trial court abused its discretion in failing to set aside the entry of default because a bank presented a reasonable, colorable defense on the merits to a debt-collection company's claims, and any prejudice to the company as a result of an expert's unavailability was due to its inaction. Franklin Collection Serv. v. Bancorpsouth Bank, 275 So. 3d 1048, 2019 Miss. LEXIS 206 (Miss. 2019).

Trial court abused its discretion in failing to set aside the entry of default because a bank presented a reasonable, colorable defense on the merits regarding its banking practices and whether those practices breached the deposit agreement and/or violated the implied covenant of good faith and fair dealing; the Uniform Commercial Code provides banks with the authority to determine the order in which a bank will post transactions to customer accounts. Franklin Collection Serv. v. Bancorpsouth Bank, 275 So. 3d 1048, 2019 Miss. LEXIS 206 (Miss. 2019).

Trial court abused its discretion in failing to set aside the entry of default because a bank presented a reasonable, colorable defense on the merits regarding a debt-collection company's notice of overdraft charges and whether a significant portion of the company's claims were time barred by the applicable three-year statute of limitations; daily notices and monthly bank statements reflecting the overdraft charges were mailed to the company in 2006, and it filed its complaint in 2010. Franklin Collection Serv. v. Bancorpsouth Bank, 275 So. 3d 1048, 2019 Miss. LEXIS 206 (Miss. 2019).

Trial court abused its discretion in failing to set aside the entry of default because a bank presented a reasonable, colorable defense on the merits regarding a debt-collection company's knowledge ofe overdraft charges and whether the bank the breached its duty to the company; the company's corporate officers either received or had access to the daily notices and monthly bank statements from the bank, thereby putting the company on notice of the overdraft charges. Franklin Collection Serv. v. Bancorpsouth Bank, 275 So. 3d 1048, 2019 Miss. LEXIS 206 (Miss. 2019).

Chancery court erred in denying a property owner's motion to set aside the entry of default and default judgment in favor of a tax-sale purchaser in its quiet title action because the court erred in finding that the owner failed to satisfy the three-part test to set aside the default judgment where the owner had a colorable defense with respect to whether service was properly effectuated regarding the notice of forfeiture inasmuch as the statutory notice scheme was not followed where the owner was not personally served, and all notices were mailed to, and the attempt at personal service made at, the property address, despite ample notice of record that of the owner's correct address. Vanaman v. Am. Pride Props., LLC, 287 So. 3d 251, 2018 Miss. App. LEXIS 650 (Miss. Ct. App. 2018), cert. dismissed, — So. 3d —, 2019 Miss. LEXIS 448 (Miss. 2019).

Although appellant did not show good cause for his default regarding appellee's action for reformation of deed based on mutual mistake, the chancery court erred in determining that appellant had not at least shown a colorable defense that the option to purchase was not a contract for sale governing the transaction in this case, and as appellee would not suffer the type of prejudice contemplated by the rule, the default judgment was set aside. Emery v. Greater Greenville Hous. & Revitalization Ass'n, 276 So. 3d 1278, 2018 Miss. App. LEXIS 293 (Miss. Ct. App. 2018), op. withdrawn, sub. op., — So. 3d —, 2019 Miss. App. LEXIS 15 (Miss. Ct. App. 2019).

Trial court abused its discretion by refusing to set aside the entry of default because a driver presented two colorable defenses; the accident reconstruction report produced in the prior federal court action the wife filed against the driver was sufficient to establish that the driver had a second colorable defense because it showed that the wife, not the driver, was at fault for the accident. Tucker v. Williams, 198 So. 3d 299, 2016 Miss. LEXIS 304 (Miss. 2016).

Trial court abused its discretion by refusing to set aside the entry of default because a driver presented two colorable defenses; because the claims of a husband and wife likely were compulsory counterclaims in a prior federal lawsuit, and the settlement agreement between the wife and the driver was not incorporated into the federal court's judgment of dismissal with prejudice, the driver presented a reasonable, colorable defense on the merits that the lawsuit was barred by res judicata. Tucker v. Williams, 198 So. 3d 299, 2016 Miss. LEXIS 304 (Miss. 2016).

Because a driver failed to present arguments to the trial court, the trial court did not abuse its discretion by finding that the driver failed to provide an excuse for the default; even under the supreme court's liberal standard applicable to setting aside an entry of default, the trial court did not abuse its discretion by rejecting the driver's reason for the default. Tucker v. Williams, 198 So. 3d 299, 2016 Miss. LEXIS 304 (Miss. 2016).

Because the extent of prejudice to the opposing party was a relevant consideration when ruling on a motion to set aside an entry of default, the trial court erred by failing to consider the driver's argument that the husband and wife would suffer little prejudice if the default were set aside. Tucker v. Williams, 198 So. 3d 299, 2016 Miss. LEXIS 304 (Miss. 2016).

Trial court abused its discretion by refusing to set aside the entry of default because a husband and wife would have suffered limited prejudice if the trial court set aside the entry of default; the driver's answer was filed seven months late, at that time, discovery was ongoing and no summary judgment motions had been filed, and the trial court's rulings denying relief to the driver were filed several months later. Tucker v. Williams, 198 So. 3d 299, 2016 Miss. LEXIS 304 (Miss. 2016).

Trial court erred in denying a motion to set aside a default judgment filed by the owners of an off-road vehicle because, while they were not entitled to notice where they had not appeared, were served with an amended complaint while they still had time to respond to the original complaint, and the parents of a child injured while driving the vehicle complied with the civil procedure rules, the owners had colorable defenses to the claims against them and the parents would not suffer prejudice. BB Buggies, Inc. v. Leon, 150 So. 3d 90, 2014 Miss. LEXIS 543 (Miss. 2014).

In an action filed by a husband and wife against a driver, the housing authority of a city, and the housing authority's insurer, the trial court did not abuse its discretion in setting aside entries of default against the driver and the insurer pursuant to Miss. R. Civ. P. 55(c) because vacation of the default entry for the driver and insurer would serve the interests of justice; the trial court determined that the insurer was never a proper defendant in the lawsuit, and under•the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-7(2), the driver could not be held personally liable. King v. Bunton, 43 So. 3d 361, 2010 Miss. LEXIS 162 (Miss. 2010).

In an action filed by a husband and wife against a driver, the housing authority of a city, and the housing authority's insurer, the trial court did not abuse its discretion in setting aside entries of default against the driver and the insurer pursuant to Miss. R. Civ. P. 55(c) because vacation of the default entry for the driver and insurer would serve the interests of justice; the trial court determined that the insurer was never a proper defendant in the lawsuit, and under the Mississippi Tort Claims Act, Miss. Code Ann. ' 11-46-7(2), the driver could not be held personally liable. King v. Bunton, 43 So. 3d 361, 2010 Miss. LEXIS 162 (Miss. 2010).

Trial court did not err in denying the car dealership's motion to set aside default judgment, Miss. R. Civ. P. 60(b)(6), as the dealership did not put forth evidence of good cause and the patron put forth sufficient evidence of prejudice that would result if the motion was granted. Greater Canton Ford Mercury, Inc. v. Lane, 997 So. 2d 198, 2008 Miss. LEXIS 517 (Miss. 2008).

District court did not violate the Anti-Injunction Act, 28 U.S.C.S. § 2283, in setting aside an entry of default that had been made pursuant to Miss. R. Civ. P. 55 against an insurer in a plaintiff's state court suit prior to the removal of the suit to the federal district court because the district court did not enjoin the state court proceedings, which had already been stayed when the insurer filed its notice of removal, and further the district court's power to set aside the pre-removal default judgment was well established. Burton v. Cont'l Cas. Co., 2006 U.S. Dist. LEXIS 79299 (S.D. Miss. Oct. 30, 2006).

Court did not err in refusing to set aside, pursuant to Miss. R. Civ. P. 55(c), a default judgment entered against a credit card company in plaintiffs' breach of contract action because the credit card company provided little explanation regarding its failure to appear for trial. Company also provided no explanation of why there was a 21-day delay between the filing of the entry of appearance and the filing of the motion to set aside the default judgment. Capital One Servs. v. Rawls, 904 So. 2d 1010, 2004 Miss. LEXIS 1407 (Miss. 2004), overruled in part, BB Buggies, Inc. v. Leon, 150 So. 3d 90, 2014 Miss. LEXIS 543 (Miss. 2014).

The circuit judge was within his discretion to set aside an entry of default where the appellee's motion provided numerous defenses that established good cause consistent with subsection (c). Tatum v. Barrentine, 2001 Miss. LEXIS 73 (Miss. Mar. 29, 2001), op. withdrawn, sub. op., 797 So. 2d 223, 2001 Miss. LEXIS 269 (Miss. 2001).

There is a more liberal standard for setting aside a default than for setting aside a default judgment. King v. Sigrest, 641 So. 2d 1158, 1994 Miss. LEXIS 377 (Miss. 1994).

Decision to grant or set aside a default judgment is addressed to the sound discretion of the trial court; this discretion must be exercised in accordance with rules set forth in M.R.C.P. 55(c) and 60(b). Williams v. Kilgore, 618 So. 2d 51, 1992 Miss. LEXIS 787 (Miss. 1992).

Trial court did not err in declining to set aside default judgment against plaintiff who failed to appear for trial, where she showed throughout litigation that she had no intention of complying with court's directives; three day notice requirement was inapplicable where application for default judgment was not made until day after trial and judgment was not entered until four days afterward. Sartain v. White, 588 So. 2d 204, 1991 Miss. LEXIS 709 (Miss. 1991).

Absent a motion or independent action having been brought, circuit court was without authority to set aside forfeiture order entered by default, and court erred in vacating order on its own initiative. State ex rel. Mississippi Bureau of Narcotics v. One Chevrolet Nova Auto., 573 So. 2d 787, 1990 Miss. LEXIS 816 (Miss. 1990).

Refusal to set aside default judgment was within circuit court's authority and was not error; although defendant's answer was only four days overdue, he was experienced in lawsuits and had engaged in "stonewalling" when sued in the past, and moreover he had no colorable defense to merits of plaintiff's claim on an unpaid open account. Bailey v. Georgia Cotton Goods Co., 543 So. 2d 180, 1989 Miss. LEXIS 244 (Miss. 1989).

Circuit court did not exceed its authority in refusing to set aside default judgment; although defendant made a substantial showing of a colorable defense on merits, he had filed no answer and made no appearance at or before trial, despite being fully advised of his peril, and it would be inequitable to plaintiff to deny her judgment any future force or effect. Guaranty Nat'l Ins. Co. v. Pittman, 501 So. 2d 377, 1987 Miss. LEXIS 2268 (Miss. 1987).

**Illustrative cases.**

Trial court did not err in denying a debt-collection company's motion to deem admitted the allegations of the second amended complaint under Miss. R. Civ. P. 8(d) because the motion was a default judgment, and the bank evidenced every intention of defending the suit; the bank appeared and timely answered the first amended complaint, participated in litigation, and moved for summary judgment. Franklin Collection Serv. v. Bancorpsouth Bank, 275 So. 3d 1048, 2019 Miss. LEXIS 206 (Miss. 2019).

Appellant established that he possessed a colorable defense that the warranty deed, rather than the option to purchase, controlled in determining what property was conveyed to him, and that the four additional properties in the deed's legal descriptions were not included due to mutual mistake, and the chancery court's determination to the contrary was based on an error of law. Emery v. Greater

Greenville Hous. & Revitalization Ass'n, — So. 3d —, 2019 Miss. App. LEXIS 15 (Miss. Ct. App. Jan. 8, 2019).

Property owner abandoned her motion for a default judgment because when the motion was properly noticed for a hearing and counsel was before the circuit court the owner stipulated to the dismissal of several defendants and the adjudication of the legal sufficiency of the tort-claims demand letter, and that was inconsistent with the owner's claim that a default judgment was proper; the owner did not ask the circuit court to direct the clerk to enter a default judgment. Durr v. City of Picayune, 185 So. 3d 1042, 2015 Miss. App. LEXIS 362 (Miss. Ct. App. 2015), cert. denied, 185 So. 3d 385, 2016 Miss. LEXIS 89 (Miss. 2016).

Trial court erred in denying a motion filed by an insured and its insurer (jointly, the insured) for relief from judgment because, while the parents added new claims to their products liability and personal injury lawsuit, the insured was not yet in default, the parents properly complied with the filing rules, and the insured did not had good cause for failing to answer the complaint, the insured had colorable defenses to the claims against them and the parents would not suffer prejudice. BB Buggies, Inc. v. Leon, 2014 Miss. LEXIS 372 (Miss. July 31, 2014), op. withdrawn, 2014 Miss. LEXIS 540 (Miss. Oct. 30, 2014), sub. op., 150 So. 3d 90, 2014 Miss. LEXIS 543 (Miss. 2014).

Trial court abused its discretion by denying a seller's motion to set aside a default judgment because there was a serious question as to whether a valid contract existed where the contract did not mention any attachments or amendments, contained no description of the property to be sold, did not include the county in which the subject property was located, "colorable" defenses were apparent from the four corners of the contract, and the alleged prejudice suffered by the buyers was unimpressive. Woodruff v. Thames, 143 So. 3d 546, 2014 Miss. LEXIS 370 (Miss. 2014).

Canadian defamation-based default judgment against a Mississippi blogger was not enforceable under the Securing the Protection of our Enduring and Established Constitutional Heritage Act; Canadian law did not provide at least as much protection as provided by the First Amendment and Mississippi law for freedom of speech and press, as Canadian plaintiffs did not have to prove falsity as an element of a prima facie defamation case, and there were insufficient allegations of falsity to permit a default judgment under Mississippi law. Trout Point Lodge, Ltd. v. Handshoe, 729 F.3d 481, 2013 U.S. App. LEXIS 18516 (5th Cir. Miss. 2013).

Circuit court did not err in entering a default judgment against contractors and denying their motion to set aside the default judgment where they failed to present any evidence of good cause or excusable neglect for the failure to take action to protect their rights, and failed to present a colorable defense; the facts did not support the contractors' argument that they were unaware of homeowners' suit against them, where one of the contractors received and signed for the summonses. Woodkrest Custom Homes Inc. v. Cooper, 24 So. 3d 340, 2009 Miss. App. LEXIS 843 (Miss. Ct. App. 2009).

Although the insurers' argument that the driver was not covered under the policy was a colorable defense, the trial court did not err in denying the motion under Miss. R. Civ. P. 55(c) where the insurers' inadvertent clerical error was inadequate to explain why they failed to answer the complaint, and the driver would have been prejudiced if the default judgment were set aside as he would be forced to continue his litigation in another court. Am. States Ins. Co. v. Rogillio, 10 So. 3d 463, 2009 Miss. LEXIS 269 (Miss. 2009).

Chancery court did not err in granting a divorce on the ground of desertion even though the proceedings were not heard in open court because the husband failed to answer the wife's complaint or enter an appearance. Luse v. Luse, 992 So. 2d 659, 2008 Miss. App. LEXIS 391 (Miss. Ct. App. 2008).

Drilling company's motion seeking indemnity against insurance company was a motion for summary judgment even though the company did not attach affidavits or responses to discovery since the motion dealt with the merits of the insurance company's case and the insurance company could not rely merely upon its denials and allegations. Hartford Cas. Ins. Co. v. Halliburton Co., 826 So. 2d 1206, 2001 Miss. LEXIS 247 (Miss. 2001).

A default judgment was properly granted in an attorney disciplinary proceeding, notwithstanding that the attorney appeared at the hearing and filed an answer on the same day, where his answer was not served within 20 days of service of process and he failed to show good cause why the default should not have been entered against him. Alexander v. The Mississippi Bar, 725 So. 2d 828, 1998 Miss. LEXIS 298 (Miss. 1998).

Respondent waived defenses of lack of personal jurisdiction or insufficiency of service of process where she failed to assert them by motion within prescribed 20 days, or in a responsive pleading or amendment thereof, and default judgment was properly entered where she failed to plead or otherwise defend a claim asserted against her. Terrell v. The Mississippi Bar, 635 So. 2d 1377, 1994 Miss. LEXIS 203 (Miss. 1994).

Default was properly entered against defendants in replevin action, where they did nothing for over three months following service of process upon them, the court then ordered them to answer or otherwise plead within two weeks, and again they did nothing. Rush v. North American Van Lines, Inc., 608 So. 2d 1205, 1992 Miss. LEXIS 488 (Miss. 1992), overruled in part, BB Buggies, Inc. v. Leon, 150 So. 3d 90, 2014 Miss. LEXIS 543 (Miss. 2014).

A divorce complainant must prove allegations of complaint, even when defendant has failed to answer, as a bill for divorce is never taken as confessed whether answered or not. Rawson v. Buta, 609 So. 2d 426, 1992 Miss. LEXIS 666 (Miss. 1992).

### Rule 56. Summary judgment.

(a) *For claimant.* — A party seeking to recover upon a claim, counter-claim, or cross-claim, or to obtain a declaratory judgment may, at any time after the expiration of thirty days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For defending party.* — A party against whom a claim, counter-claim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and proceedings thereon.* — The motion shall be served at least ten days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages.

(d) *Case not fully adjudicated on motion.* — If on motion under this rule judgment is not rendered on the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of affidavits; further testimony; defense required.* — Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) *When affidavits are unavailable.* — Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

(g) *Affidavits made in bad faith.* — Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) *Costs to prevailing party when summary judgment denied.* — If summary judgment is denied the court shall award to the prevailing party the reasonable expenses incurred in attending the hearing of the motion and may, if it finds that the motion is without reasonable cause, award attorneys' fees.

**HISTORY: Comments repealed and Advisory Committee Notes amended effective July 1, 2014; Advisory Committee Note amended effective January 16, 2020.**

## ADVISORY COMMITTEE NOTE

It is important to distinguish between a Rule 56 motion for summary judgment, a Rule 12(b)(6) motion to dismiss for failure to state a claim, and a Rule 12(c) motion for judgment on the pleadings. When ruling on a Rule 56 motion for summary judgment, the trial court may "pierce the pleadings" and consider extrinsic evidence, such as affidavits, depositions, answers to interrogatories, and admissions. When ruling on a Rule 12(b)(6) motion to dismiss for failure to state a claim, the trial court may not "pierce the pleadings" and shall only consider the allegations contained in the pleading asserting the claim. Similarly, when ruling on a Rule 12(c) motion on the pleadings, the trial court shall only consider the allegations within the pleadings. If matters outside the pleadings are presented to and considered by the trial court in connection with a motion for judgment on the pleadings or a motion to dismiss for failure to state a claim, the trial court must treat the motion as one for summary judgment and give all parties a reasonable opportunity to present pertinent material. See M.R.C.P. 12(b) and (c).

A trial court need not make findings of fact when ruling on a motion for summary judgment because "a Rule 56 summary judgment hearing is not an action 'tried upon the facts without a jury' so as to trigger Rule 52 applicability." *See Harmon v. Regions Bank,* 961 So. 2d 693, 700 (Miss. 2007). See also Uniform Rules of Circuit and County Court Practice.

Although the Court has held that an affidavit is not always required to obtain relief under Rule 56(f), a party must "present specific facts why he cannot oppose the motion" and must specifically demonstrate "how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing." *Howarth v. M & H Ventures, LLC,* 237 So. 3d 107, 113 (Miss. 2007).

[Advisory Committee Note adopted effective July 1, 2014; amended, effective January 16, 2020.]

## JUDICIAL DECISIONS

### ANALYSIS

In general.
Construction.
Applicability.
Affidavits.
Amendment of pleadings.
Attorneys' fees.
Burden of proof.
Conversion to summary judgment.
Costs.
Discovery.
Evidence.
Failure to respond.
Fraud.
Jury trial.
Limitations.
Materiality.
Multiple claims or multiple parties.
Notice.
Partial summary judgment.
Procedure.
Review.
Illustrative cases.

**In general.**

Motion for summary judgment is a pretrial motion that requires a trial judge to consider the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, in the light most favorable to the nonmovant and determine whether the plaintiff has presented sufficient evidence to create a fact issue on all the elements of the claims the plaintiff seeks to prove at trial. W.R. Berkley Corp. v. Rea's Country Lane Constr., 140 So. 3d 437, 2013 Miss. App. LEXIS 464 (Miss. Ct. App. 2013), cert. denied, 139 So. 3d 74, 2014 Miss. LEXIS 234 (Miss. 2014).

Appellate court found no error with a defendant's filing of a second motion for summary judgment where the defendant's first motion to dismiss only addressed summary judgment in the alternative in the last sentence; Miss. R. Civ. P. 56(a) did not limit the number of summary judgment motions. Riley v. F.A. Richard & Assocs., 16 So. 3d 708, 2009 Miss. App. LEXIS 81 (Miss. Ct. App. 2009).

Court of appeals erred in reversing the trial court's grant of summary judgment for the bank in the mortgagor's action for wrongful foreclosure, based on the court of appeals finding that genuine issues of material fact existed as to whether mortgage had been paid in full and if the mortgagor was in default when the bank initiated foreclosure, because the property seller's assignment of the mortgage to the bank was absolute; therefore, the seller had no further interest in the mortgage and his cancellation of mortgage was invalid. Also, the record showed that there was no wrongful foreclosure because the foreclosure proceedings were terminated when the mortgagor filed bankruptcy and the mortgagor admitted he had missed payments. McKinley v. Lamar Bank, 2005 Miss. LEXIS 611 (Miss. Sept. 22, 2005), op. withdrawn, sub. op., 919 So. 2d 918, 2005 Miss. LEXIS 811 (Miss. 2005).

Summary judgment was properly granted to the bank in a foreclosure proceeding pursuant to Miss. R. Civ. P. 56(c) because the mortgagor did not deny that he had executed the note and the deed of trust or that he had defaulted, the mortgagor's claims of error were nonsensical and irrelevant, and the mortgagor failed to provide a full and adequate record to support his claims. Weatherly v. Union Planters Bank, N.A., 914 So. 2d 1222, 2005 Miss. App. LEXIS 585 (Miss. Ct. App. 2005).

Under Miss. R. Evid. 901 and Miss. R. Civ. P. 56(c), the unauthenticated documents provided by the workers should not have been considered because, in his deposition, one worker stated that there were two pumps made by the company in the plant, but he did not state that asbestos was present; the unauthenticated letter only established that a company pump was sold to the plant at some point, not that it contained asbestos components, and did not place asbestos-containing products attributable to the company in the plant. Gorman-Rupp Co. v. Hall, 908 So. 2d 749, 2005 Miss. LEXIS 489 (Miss. 2005).

Bridge contractor was hired by Mississippi Department of Transportation as an independent contractor, and under the language of the contract, said contractor bore responsibility for the signage at the construction site; however, under the Mississippi Torts Claim Act, Miss. Code Ann. § 11-46-1 etseq., MDOT could have still been liable under the narrow exceptions of Miss.Code Ann. § 11-46-9(1)(p) and (v), if MDOT had notice of the dangerous condition, and MDOT had adequate opportunity to protect or warn against the dangerous condition; in the latter respect, in the case at bar, MDOT's liability for the lack of warning signs and other measures at the bridge construction site was a question of fact, where it was clear that an MDOT representative made frequent visits to the construction site, and it was clear that at least on one occasion, MDOT requested that the contractor install additional warning devices. Chisolm v. Miss. DOT, 942 So. 2d 165, 2005 Miss. App. LEXIS 560 (Miss. Ct. App. 2005), rev'd, 942 So. 2d 136, 2006 Miss. LEXIS 638 (Miss. 2006).

Under Miss. Code Ann. § 11-46-9(1)(v), the Mississippi Department of Transportation (MDOT) and its employees could not be liable for any claim resulting from a dangerous condition on the State's property if: (1) that condition was not caused by the negligence or wrongful conduct of the employee,or (2) MDOT lacked notice and an adequate opportunity to warn of the dangerous condition. However, in the case at bar, based on testimony of MDOT employees,the appellate court found that there were clearly issues of fact for the jury as far as MDOTs notice of a dangerous condition at the bridge construction site, and MDOTs opportunity to have warned or protected against the condition; thus, in the suit by the heirs of the decedent who was killed at said construction site, summary judgment for the MDOT was improper. Chisolm v. Miss. DOT, 942 So. 2d 165, 2005 Miss. App. LEXIS 560 (Miss. Ct. App. 2005), rev'd, 942 So. 2d 136, 2006 Miss. LEXIS 638 (Miss. 2006).

Summary judgment was properly granted for a doctor on a patient's informed consent and malpractice claims because the patient failed to present expert medical testimony which was required to establish what type of warning the doctor should have given her about the risks of facial laser resurfacing and the treatment proximally causing her injury. McMichael v. Howell, 919 So. 2d 18, 2005 Miss. LEXIS 367 (Miss. 2005).

Summary judgment was properly granted in favor of the doctors on the patient's medical negligence, breach of contract, fraudulent concealment, and failure to secure informed consent claims where because the patient failed to provide any authority to support her claims, her issue on appeal was procedurally barred. Hodges v. Lucas, 904 So. 2d 1098, 2004 Miss. App. LEXIS 975 (Miss. Ct. App. 2004).

Summary judgment was properly granted in favor of the buyers on the homeowner's complaint to cancel deed, remove cloud, and confirm title to certain property; the issue of violations of restrictive covenants and zoning regulations had been litigated to conclusion in the federal court system and was res judicata, the buyers were found to be bona fide purchasers and the homeowner failed to identify any perfected claims, which should have encumbered their title to the property. Deramus v. Pierce, 904 So. 2d 1104,

2004 Miss. App. LEXIS 980 (Miss. Ct. App. 2004).

Summary judgment was properly granted in favor of the corporations on the doctor's allegations that the corporations prepared and published reports that contained false, defamatory, and libelous statements concerning him; a qualified privilege existed as to the corporations because the statements in the review were made to those with a direct interest in the subject matter, there was not excessive publication because the corporations confined the remarks about the doctor to those interested in the review process, and the doctor failed to meet his burden of production and persuasion on the issue of actual malice. Eckman v. Cooper Tire & Rubber Co., 2004 Miss. LEXIS 1161 (Miss. Sept. 9, 2004), op. withdrawn, sub. op., 893 So. 2d 1049, 2005 Miss. LEXIS 113 (Miss. 2005).

Summary judgment was properly granted in favor of the doctor on the daughter's medical malpractice action where Miss. R. Civ. P. 26(b)(4) mandated certain disclosures concerning expert witnesses, and the necessity for litigants to understand that there was an obligation to timely comply with the orders of trial courts; the daughter wholly failed in her duty to designate a medical expert, a crucial component of her cause of action. Brooks v. Roberts, 882 So. 2d 229, 2004 Miss. LEXIS 1170 (Miss. 2004).

Summary judgment was properly granted in favor of the lawyers on the client's legal malpractice action where the first lawyer, he could not be held liable because he had neither personally participated in a negligent act nor directly supervised anyone who had committed wrongful conduct; the client failed to show how the second lawyer was actively involved in his representation or that she acted negligently, and with regard to the remaining lawyers, the client made a conclusory statement that a fiduciary duty was violated, which was insufficient to avoid summary judgment. Keszenheimer v. Boyd, 897 So. 2d 190, 2004 Miss. App. LEXIS 874 (Miss. Ct. App. 2004), cert. denied, 896 So. 2d 373, 2005 Miss. LEXIS 196 (Miss. 2005).

Teacher alleged that the school board waited almost a year after the judgment before filing a notice of appeal. The difficulty with that argument was that the summary judgment finding a breach of the board's statutory obligations only resolved liability and left open the issue of damages; thus, for appeal purposes, the summary judgment was not final. Bd. of Educ. v. Fisher, 874 So. 2d 1019, 2004 Miss. App. LEXIS 503 (Miss. Ct. App. 2004).

Summary judgment was properly granted in favor of the clients in their action against the legal services where the pre-paid legal expense agreemen did not contain a valid, binding arbitration agreement. Pre-Paid Legal Servs. v. Mealey, 875 So. 2d 1075, 2004 Miss. LEXIS 670 (Miss.), cert. denied, 543 U.S. 1000, 125 S. Ct. 625, 160 L. Ed. 2d 459, 2004 U.S. LEXIS 7707 (U.S. 2004).

Summary judgment was properly granted to defendants where plaintiff (witness to the accident) was not a foreseeable plaintiff to whom defendants owed a duty of care. Satchfield v. R. R. Morrison & Son, Inc., 872 So. 2d 661, 2004 Miss. LEXIS 464 (Miss. 2004).

Trial court erred in granting daughter's summary judgment motion as questions of fact were raised as to whether a prior order of dismissal by the court resolved all of the landowner's claims against the daughter and whether the landowner was competent to voluntarily dismiss his claims. Humphrey v. Smith, 868 So. 2d 371, 2004 Miss. App. LEXIS 205 (Miss. Ct. App. 2004).

Summary judgment was properly granted in favor of the doctor's estate in a patient's medical malpractice action where the patient's allegation of lack of informed consent was insufficient rebuttal in light of the doctor's estate's introduction of the form indicating that the patient's informed consent was obtained; the patient failed to show that a reasonable patient, once informed of the risks, would have withheld consent, and that, if left untreated, the patient's spinal stenosis would have progressed to the point that he would probably have had the same condition if he had not undergone the surgery. Barton v. Estate of Buckley, 867 So. 2d 271, 2004 Miss. App. LEXIS 169 (Miss. Ct. App. 2004).

Trial court properly granted summary judgment for defendants in a medical malpractice case where, since the hospital was protected by the Mississippi Tort Claims Act (MTCA), the husband had to meet the requirements of Miss. Code Ann. § 11-46-11; he did not substantially comply with the MTCA requirements; plaintiff filed his complaint after the one-year statute of limitations had expired. Davis v. Hoss, 869 So. 2d 397, 2004 Miss. LEXIS 319 (Miss. 2004).

As employee would have had to have been working on a vessel of navigation when injured in order to meet the requirements of the Jones Act, but was in fact doing repair work from a diver's platform, the trial court properly granted the employer's summary judgment motion against the employee. McArthur v. Ingalls Shipbuilding, Inc., 879 So. 2d 500, 2004 Miss. App. LEXIS 252 (Miss. Ct. App.), cert. denied, 882 So. 2d 234, 2004 Miss. LEXIS 1000 (Miss. 2004).

Summary judgment was improperly granted based on accord and satisfaction in favor of defendants in the patient's medical malpractice action where none of the parties referenced an agreement between the patient and any of the defendants; there was no accord and satisfaction, and neither the trial court nor defendants offered any analysis of the four requirements of an accord and satisfaction. Medlin v. Hazlehurst Emergency Physicians, 2004 Miss. LEXIS 10 (Miss. Jan. 15, 2004), op. withdrawn, 2004 Miss. LEXIS 1297 (Miss. Sept. 23, 2004), op. withdrawn, 2004 Miss. LEXIS 1298 (Miss. Sept. 23, 2004), op. withdrawn, 2004 Miss. LEXIS 1299 (Miss. Sept. 23, 2004), op. withdrawn, 2004 Miss. LEXIS 1301 (Miss. Sept. 23, 2004), op. withdrawn, sub. op., 889 So. 2d 496, 2004 Miss. LEXIS 1196 (Miss. 2004).

Summary judgment was properly denied as to defendants in the patient's medical malpractice action where genuine issues of material fact existed as to whether the remedies sought by the patient were inconsistent; the patient provided expert witness evidence in support of her medical negligence allegations, and the trial court's findings of good cause in denying the physicians' summary judgment motion based on the statute of limitations was proper. Medlin v. Hazlehurst Emergency Physicians, 2004 Miss. LEXIS 10 (Miss. Jan. 15, 2004), op. withdrawn, 2004 Miss. LEXIS 1297 (Miss. Sept. 23, 2004), op. withdrawn, 2004 Miss. LEXIS 1298 (Miss. Sept. 23, 2004), op. withdrawn, 2004 Miss. LEXIS 1299 (Miss. Sept. 23, 2004), op. withdrawn, 2004 Miss. LEXIS 1301 (Miss. Sept. 23, 2004), op. withdrawn, sub. op., 889 So. 2d 496, 2004 Miss. LEXIS 1196 (Miss. 2004).

Summary judgment was properly granted in favor of the insurer where, since the insured could not bring a legal action against the co-employee at the time of the accident, he was not entitled to recover uninsured motorist benefits from his insurer. Steen v. Metro. Prop. & Cas. Ins. Co., 858 So. 2d 186, 2003 Miss. App. LEXIS 991 (Miss. Ct. App. 2003).

Trial court properly dismissed claims against a contractor on summary judgment, but improperly labeled its decision as a dismissal for failure to state a claim under Miss. R. Civ. P. 12(b)(6); as the court made its decision after reviewing the complaint, the answer, the motion to dismiss, the response to it, and the accompanying exhibits, its decision was properly labeled a summary judgment under Miss. R. Civ. P. 56. Rein v. Benchmark Constr. Co., 2003 Miss. LEXIS 282 (Miss. June 12, 2003), op. withdrawn, sub. op., 865 So. 2d 1134, 2004 Miss. LEXIS 180 (Miss. 2004).

Trial court properly granted city summary judgment where the owners could not bring a writ of mandamus against the city for a bridge closing where that decision was made as part of the city's discretionary authority as a public entity; the closing of the bridge also marked the end of the city's previously-existing duty to maintain and repair the bridge. Hobson v. City of Vicksburg, 848 So. 2d 199, 2003 Miss. App. LEXIS 556 (Miss. Ct. App. 2003), aff'd, 2003 Miss. App. LEXIS 622 (Miss. Ct. App. June 17, 2003).

Summary judgment in favor of the employer was improperly denied where it was determined that the employee was acting in the course and scope of his employment when he was injured, that his injuries were not the result of an intentional tort, and that his injuries were compensable under the Mississippi Workers' Compensation Act, and, as such, that the exclusivity provision of the act barred his tort claims against the employer. Hurdle v. Holloway, 848 So. 2d 183, 2003 Miss. LEXIS 293 (Miss. 2003).

The standards employed for a summary judgment and directed verdict are the same, just employed at different times during a proceeding. Breland v. Gulfside Casino Pshp., 736 So. 2d 446, 1999 Miss. App. LEXIS 128 (Miss. Ct. App. 1999).

A trial judge is not required to grant a summary judgment based solely on the fact that the opposing party did not respond; the determining factor involved in granting a summary judgment is whether or not there is a "genuine issue as to any material fact." George County by & Through Board of Supervisors v. Davis, 721 So. 2d 1101, 1998 Miss. LEXIS 638 (Miss. 1999).

Subsection (e) does not entitle a party to summary judgment by default where the nonmoving party files no response, for even in the absence of a response the court may enter judgment only "if appropriate," i.e., if no genuine issue of material fact exists. Foster v. Noel, 715 So. 2d 174, 1998 Miss. LEXIS 270 (Miss. 1998).

Where one party swears to one version of the matter in issue and the other party says the opposite, an issue of fact sufficient to require denial of a motion for summary judgment is present. Daniels v. GNB, Inc., 629 So. 2d 595, 1993 Miss. LEXIS 573 (Miss. 1993).

Where a contract or deed is ambiguous within its "four corners," ultimate disposition of case– i.e., construction of contractual provisions– generally involves triable issues of fact and, thus, disposition is inappropriate at summary judgment stage. Pursue Energy Corp. v. Perkins, 558 So. 2d 349, 1990 Miss. LEXIS 63 (Miss. 1990).

Evidence must be viewed in light most favorable to party against whom motion has been made; if in this view moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his favor, otherwise motion should be denied. Brown v. Credit Ctr., Inc., 444 So. 2d 358, 1983 Miss. LEXIS 3053 (Miss. 1983).

**Construction.**

Circuit court did not err in considering a purchaser's motion for summary judgment after a chancery court had denied the purchaser summary judgment based upon the same amended complaint because the circuit court was not bound by the doctrine of res judicata to deny the motion; a denial of a motion for summary judgment is not a final judgment, and Miss. R. Civ. P. 56 does not limit the number of motions for summary judgment that a party may file. Smith v. Campus Edge of Hattiesburg, LLC, 30 So. 3d 1284, 2010 Miss. App. LEXIS 145 (Miss. Ct. App. 2010).

Miss. R. Civ. P. 56 summary judgment hearing is not an action "tried upon the facts without a jury" so as to trigger Miss. R. Civ. P. 52 applicability; therefore, in a claim brought under the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., a trial court did not err by failing to make findings of fact, and at any rate the issues in the case were addressed by the trial court. Harmon v. Regions Bank, 961 So. 2d 693, 2007 Miss. LEXIS 326 (Miss. 2007).

In construing this rule, it was appropriate for Mississippi Supreme Court to rely on federal law. Murphree v. Federal Ins. Co., 707 So. 2d 523, 1997 Miss. LEXIS 145 (Miss. 1997).

M.R.C.P. 6(b) is a general rule and is therefore subject to specific provisions of M.R.C.P. 56(b), and therefore trial judge correctly granted defendant leave to file dispositive motion because, under M.R.C.P. 56(b), a motion for summary judgment is proper at any time. Diogenes Editions v. State by & Through Board of Trustees of Insts. of Higher Learning, 700 So. 2d 316, 1997 Miss. LEXIS 447 (Miss. 1997).

This rule means the same and should be construed the same whether motion for summary judgment is filed in circuit court or chancery court, and whether case is to be heard by a jury or is to be tried before the court without a jury. Dennis v. Searle, 457 So. 2d 941, 1984 Miss. LEXIS 1949 (Miss. 1984).

**Applicability.**

Dismissal for insufficiency of service of process should be entered without prejudice, but a summary judgment is with prejudice and precludes refiling of the complaint. Thornton v. Freeman, 242 So. 3d 188, 2018 Miss. App. LEXIS 138 (Miss. Ct. App. 2018).

Summary judgment was an appropriate means to determine the possessory rights to a recreational vehicle because the judge's use of Miss. R. Civ. P. 56 supplemented – and was not inconsistent with – the requirement under Miss. Code Ann. § 11-37-145 that replevins be resolved as early as possible. Lacoste v. Sys. & Servs. Techs., 126 So. 3d 111, 2013 Miss. App. LEXIS 760 (Miss. Ct. App. 2013).

When a victim was raped by a parolee accepted from another state for supervision, summary judgment was correctly granted to the State in the victim's action against it for negligently accepting supervision of the parolee and negligently supervising him because acceptance of the parolee's supervision was mandatory under the Uniform Act for Out-of-State Parolee Supervision, Miss. Code Ann. § 47-7-71, as he had family and a job in Mississippi, and decisions made by the parolee's supervising parole officer in the course of the parolee's supervision were discretionary, so the State could not be held liable under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq. Doe v. State ex rel. Miss. Dep't of Corr., 859 So. 2d 350, 2003 Miss. LEXIS 603 (Miss. 2003).

Where precautions were taken to warn motorists of a dangerous road condition, the city was not required to actively patrol areas containing warning signs to see if a third party had removed the signs, and no evidence was presented to indicate that the city knew or should have known that the sign was blown or tipped over; therefore, the city was entitled to immunity from suit and entitled to summary judgment. Mitchell v. City of Greenville, 846 So. 2d 1028, 2003 Miss. LEXIS 259 (Miss. 2003).

Where a Mississippi attorney challenged a Pennsylvania court's jurisdiction over him in a fee dispute with a Pennsylvania corporation and failed to appeal the Pennsylvania court's determination that it had such jurisdiction, the doctrine of res judicata barred the attorney from challenging the issue of jurisdiction in the corporation's proceedings to register in Mississippi the ultimate Pennsylvania judgment against the attorney; hence, the trial court improperly granted summary judgment to the attorney and improperly struck the foreign judgment from its judgment rolls. Global Oceanic Enters. v. Hynum, 857 So. 2d 659, 2003 Miss. LEXIS 362 (Miss. 2003).

Since circuit court acted entirely within the pleadings and struck all affidavits before ruling, supreme court treated judgment below as though court had dismissed complaint for failure to state a claim upon which relief could be granted, as opposed to one disposed of on summary judgment. State ex rel. Moore v. Molpus, 578 So. 2d 624, 1991 Miss. LEXIS 186 (Miss. 1991).

Summary judgment practice under M.R.C.P. Rule 56 is inapplicable in contests of probated claims, because it is inconsistent with statutory procedure requiring claimant to enter court to introduce evidence in support of claim and permitting personal representative to rebut claim. Biloxi Regional Medical Center, Inc. v. Estate of Ross, 546 So. 2d 667, 1989 Miss. LEXIS 297 (Miss. 1989).

Course of proceedings and final judgment entered in plaintiff's previous lawsuit were matters extraneous to pleadings in plaintiff's later action, and circuit court correctly exercised authority granted it under M.R.C.P. Rule 12(b) and considered defendants' motion to dismiss as one for summary judgment. Walton v. Bourgeois, 512 So. 2d 698, 1987 Miss. LEXIS 2680 (Miss. 1987).

**Affidavits.**

Business companies in an accountant malpractice case properly submitted the affidavit by their expert witness, a forensic accountant, the day before the summary judgment hearing. Furthermore, because the accounting firm claimed that the expert witness failed to show that accounting firm breached its duty to the companies, the companies were entitled to respond. Great Southern Excavators, Inc. v. TEC Partners, LLP, 231 So. 3d 1011, 2017 Miss. App. LEXIS 210 (Miss. Ct. App.), cert. denied, 229 So. 3d 123, 2017 Miss. LEXIS 498 (Miss. 2017).

Trial court acted within its discretion in electing not to consider the unsworn report of an expert witness and the expert's affidavit when they were not filed by the claimant until the day of the hearing on the premises owner's motion for summary judgment. Chandler v. Mary Mahoney's, Inc., 126 So. 3d 972, 2013 Miss. App. LEXIS 794 (Miss. Ct. App. 2013).

Loan servicer proved that it was entitled to possession of the borrowers' recreational vehicle (RV) through the affidavit of its employee and agent who was authorized to speak on its behalf. The affidavit provided that the loan servicer was the authorized servicing agent for a bank, which was the successor bank by a merger, and the title to the RV showed that predecessor bank was the lienholder on the RV, so that the successor bank became the lienholder of the RV. Lacoste v. Sys. & Servs. Techs., 126 So. 3d 111, 2013 Miss. App. LEXIS 760 (Miss. Ct. App. 2013).

Even assuming that defendants waived their objection to an affidavit plaintiff filed in opposition to their motion for summary judgment, the trial court was not bound to accept the affidavit as competent evidence because it did not meet the requirements of Miss. R. Civ. P. 56(e). Karpinsky v. Am. Nat'l Ins. Co., 109 So. 3d 84, 2013 Miss. LEXIS 67 (Miss. 2013).

In a slip-and-fall case, an affidavit a mall customer filed in opposition to summary judgment was insufficient to establish that the mall owner or maintenance company had actual or constructive knowledge of spilled water and sufficient time to correct it, as the affidavit was not based upon personal knowledge and did not set forth facts that would be admissible in evidence, as required by by Miss. R. Civ. P. 56(e). Karpinsky v. Am. Nat'l Ins. Co., 109 So. 3d 84, 2013 Miss. LEXIS 67 (Miss. 2013).

Plaintiff corporation failed to satisfy the requirements for the grant of summary judgment, as it provided only a conclusory, self-serving affidavit in support thereof. Likewise, defendant's agent's motion for partial summary judgment failed to show the lack of a genuine issue of material fact and therefore he was not entitled to summary judgment. Dalton v. Cellular South, Inc., 20 So. 3d 1227, 2009 Miss. LEXIS 536 (Miss. 2009).

Trial court's denial of a wife's motion under Miss. R. Civ. P. 59 to set aside an order granting summary judgment in favor of a logging company did not result in manifest injustice because the trial court did not abuse its discretion in denying the wife's request for an order of continuance pursuant to Miss. R. Civ. P. 56(f) on the ground that her request was untimely under Rule 3(b) of the Local Rules for the Fifth Circuit Court District; almost two years passed between the filing of the wife's complaint and the filing of the company's motion for summary judgment, affording both parties ample time in which to conduct discovery in the case, and any information that the wife sought to "discover" was largely available to her immediately after the injury occurred. Moore v. M & M Logging, Inc., 51 So. 3d 216, 2010 Miss. App. LEXIS 213 (Miss. Ct. App. 2010), cert. denied, 50 So. 3d 1003, 2011 Miss. LEXIS 22 (Miss. 2011).

Summary judgment was improperly granted in a medical negligence case because, although affidavits submitted by two wrongful death beneficiaries were not as complete as they could have been, the pleadings, the answers to interrogatories, and the lack of a medical affidavit to contradict the allegations of negligence were sufficient to prevent summary judgment; therefore, the trial court should have allowed for supplementation of the affidavits offered by the beneficiaries and a continuance under Miss. R. Civ. P. 56(e), (f). Maxwell v. Baptist Mem. Hospital-Desoto, Inc., 2007 Miss. App. LEXIS 226 (Miss. Ct. App. Apr. 10, 2007), op. withdrawn, sub. op., 15 So. 3d 427, 2008 Miss. App. LEXIS 331 (Miss. Ct. App. 2008).

In neglecting to provide the affidavit of a medical expert to support her medical malpractice claim, plaintiff failed to comply with Miss. R. Civ. P. 56(e); the anticipated expert opinion set forth by plaintiff could not have been based on her personal knowledge. Griffin v. Pinson, 952 So. 2d 963, 2006 Miss. App. LEXIS 718 (Miss. Ct. App. 2006), cert. denied, 951 So. 2d 563, 2007 Miss. LEXIS 523 (Miss. 2007).

Where employees of a subcontractor were injured while working on an electrical device on the premises of a casino, in pertinent part, their expert's affidavit simply stated that he had reviewed the materials in regard to the fire, and that it was "his professional opinion that fault lied in allowing installation of equipment under live ("hot") electrical conditions." The trial court properly concluded that said affidavit was conclusory in nature and failed to meet the requirements of Miss. R. Civ. P. 56(e); further, while the casino's liaison coordinated matters with the general contractor (who was immune under the workers' compensation statute), the record was clear that the general contractor assumed full responsibility for the work, and consequently, summary judgment for the casino on the issue of liability was proper. Matthews v. Horseshoe Casino, 919 So. 2d 278, 2005 Miss. App. LEXIS 607 (Miss. Ct. App. 2005).

Trial court did not err in granting summary judgment to an heir and in refusing to consider certain affidavits filed by beneficiaries where one affidavit was filed on the day of the hearing and not at least one day prior to the hearing as required by Miss. R. Civ. P. 56(c) and the court found that the affidavit could have been filed months prior to hearing on the motion. Smith v. Smith (In re Will of Smith), 910 So. 2d 562, 2005 Miss. LEXIS 145 (Miss. 2005).

Trial court did not err in granting summary judgment to an heir and in refusing to consider an affidavit filed by a beneficiary on the day of the hearing on the heir's motion for summary judgment claiming that the executor had told him that a handwritting expert had been retained by the estate because the expert had not rendered a final report, and no affidavit had been obtained nor was the beneficiary's affidavit based on personal knowledge. The affidavit was basically hearsay and should have been executed by the executor, as to what the executor had done. Smith v. Smith (In re Will of Smith), 910 So. 2d 562, 2005 Miss. LEXIS 145 (Miss. 2005).

Court erred in granting one attorney's motion for summary judgment, pursuant to Miss. R. Civ. P. 56(c), in a client's legal malpractice action against two attorneys because the client's expert affidavit was timely filed; the affidavit raised a question of fact to be determined by a trier of fact. Luvene v. Waldrup, 905 So. 2d 697, 2004 Miss. App. LEXIS 724 (Miss. Ct. App. 2004), aff'd in part and rev'd in part, 903 So. 2d 745, 2005 Miss. LEXIS 359 (Miss. 2005).

Evidence submitted by the landowners would not support a finding that the State actually conveyed the tracts during the pre-1890 window of opportunity; the skeletonized abstracts and other evidence did not support the landowners' adverse possession claim. Bd. of Educ. v. Warner, 853 So. 2d 1159, 2003 Miss. LEXIS 311 (Miss. 2003).

The need for additional time as allowed under subsection (f) is not proven merely through allegation; thus, where the party opposing summary judgment has not attempted discovery and presents only speculation of what might be uncovered, additional time will not be granted. Hobgood v. Koch Pipeline Southeast, Inc., 769 So. 2d 838, 2000 Miss. App. LEXIS 123 (Miss. Ct. App. 2000), cert. denied, 531 U.S. 1073, 121 S. Ct. 766, 148 L. Ed. 2d 666, 2001 U.S. LEXIS 174 (U.S. 2001).

The court properly considered affidavits submitted by the movants on the day of the hearing since the affidavits only affirmed the contents of the complaint and since the judge granted an enlargement of time in which the plaintiffs could file affidavits. Quinn v. Mississippi State Univ., 720 So. 2d 843, 1998 Miss. LEXIS 328 (Miss. 1998), overruled in part, City of Jackson v. Estate of Stewart, 908 So. 2d 703, 2005 Miss. LEXIS 298 (Miss. 2005).

Most, if not all, affidavits are hearsay, but they are nevertheless properly considered on summary judgment as long as they are based on personal knowledge and set forth facts such as would be admissible in evidence. Stewart v. Southeast Foods, 688 So. 2d 733, 1996 Miss. LEXIS 643 (Miss. 1996).

A party must move to strike an affidavit that violates this rule, and if he fails to do so he will waive his objection; in absence of a gross miscarriage of justice, court may consider the defective affidavit. Haygood v. First Nat'l Bank, 517 So. 2d 553, 1987 Miss. LEXIS 2923 (Miss. 1987).

Trial court abused its discretion in declining to grant plaintiff's motion for continuance, due to her inability to file affidavit of her expert in opposition to defendant's motion for summary judgment. Terrell v. Rankin, 511 So. 2d 126, 1987 Miss. LEXIS 2616 (Miss. 1987).

Although answer and amended answer alleged a defense, these pleadings were merely signed by counsel for defendant without verification or indication of personal knowledge, and they were insufficient to withstand summary judgment. Hill v. Consumer Nat'l Bank, 482 So. 2d 1124, 1986 Miss. LEXIS 2351 (Miss. 1986).

Where party against whom a motion for summary judgment is made wishes to attack one or more affidavits upon which motion is based, he must file in trial court a motion to strike the affidavit. Brown v. Credit Ctr., Inc., 444 So. 2d 358, 1983 Miss. LEXIS 3053 (Miss. 1983).

**Amendment of pleadings.**

Where leave to amend a complaint was sought at a hearing for summary judgment, but a motion for such was not filed until after summary judgment was granted, the motion was properly denied as untimely. Harmon v. Regions Bank, 961 So. 2d 693, 2007 Miss. LEXIS 326 (Miss. 2007).

Summary judgment was improperly entered against plaintiffs, where they should have been allowed leave to amend their complaint and should have been allowed a more complete exploration of the facts put in issue by their amended complaint. McDonald v. Holmes, 595 So. 2d 434, 1992 Miss. LEXIS 93 (Miss. 1992), overruled in part, Capital City Ins. Co. v. G.B. "Boots" Smith Corp., 889 So. 2d 505, 2004 Miss. LEXIS 1329 (Miss. 2004).

**Attorneys' fees.**

Trial court's award of attorneys' fees under Miss. R. Civ. P. 56(h) was reversed where the fee award was not based on finding the election winner's summary-judgment motion had been without reasonable cause, but instead was based on the erroneous belief that such award was mandatory. Perkins v. McAdams, 234 So. 3d 413, 2017 Miss. LEXIS 419 (Miss. 2017).

**Burden of proof.**

Mississippi courts are unified in their interpretation of the legislative mandate set forth in Miss. Code Ann. § 11-1-63, the Mississippi products liability statute. Moreover, in explicit terms, the statute requires that when a claimant asserts a design defect theory of liability, the claimant not only must provide proof that the seller knew, or in light of reasonably available knowledge or in the exercise of reasonable care should have known, about the danger causing injury, but also, the claimant must provide evidence that the product failed to function as expected by way of producing evidence of a feasible design alternative that could have reasonably prevented the claimant's injury. In the case at bar, where a handgun fell from plaintiff's car door and discharged (in part, it was undisputed that the safety was off), he failed to prove the aforementioned elements and summary judgment for defendant was proper. Williams v. Bennett, 921 So. 2d 1269, 2006 Miss. LEXIS 46 (Miss. 2006).

Summary judgment was properly awarded to a county under Miss. R. Civ. P. 56(c) in a wrongful death action filed by a driver's beneficiaries because the beneficiaries failed to present any evidence that the accumulation of excess gravel on roads constituted a dangerous condition. Lowery v. Harrison County Bd. of Supervisors, 891 So. 2d 264, 2004 Miss. App. LEXIS 1003 (Miss. Ct. App. 2004).

Summary judgment was properly granted in favor of medical defendants in the heirs' medical malpractice suit where the heirs' expert's affidavit was untimely filed and the heirs failed to show excusable neglect for their untimely filing. Bowie v. Montfort Jones Mem'l Hosp., 861 So. 2d 1037, 2003 Miss. LEXIS 877 (Miss. 2003).

In a wrongful death case, a court properly granted partial summary judgment to plaintiff on the issue of apportionment where the doctor's rebuttal evidence did not indicate any fault attributable to a third party. Eckman v. Moore, 2003 Miss. LEXIS 552 (Miss. Oct. 23, 2003), op. withdrawn, 2004 Miss. LEXIS 310 (Miss. Mar. 25, 2004), sub. op., 876 So. 2d 975, 2004 Miss. LEXIS 287 (Miss. 2004).

Summary judgment was properly granted in favor of a construction company where a passenger admitted that barriers and signs had been in place and that all who approached had notice of the road's status as closed for construction; this admission meant that the passenger could not prove an essential element of a negligence claim and one for which she would bear the burden to prove at trial that the company had breached its duty of care, but the passenger could not show that the driver had driven with the degree of care demanded by the circumstances. Spoo v. T. L. Wallace Constr. Co., 858 So. 2d 199, 2003 Miss. App. LEXIS 990 (Miss. Ct. App. 2003).

Hearing on summary judgment was the flashpoint when a plaintiff's proof was evaluated, and summary judgment was entered against plaintiff motorist in a negligence action, as the motorist failed to bring forward any significant probative evidence demonstrating the existence of a triable issue of fact as to the motorist's claims of damages or injuries; motorist's unsubstantiated assertions were not enough to prevent summary judgment. Watson v. Johnson, 848 So. 2d 873, 2002 Miss. App. LEXIS 872 (Miss. Ct. App. 2002).

Trial court erred in granting summary judgment to widow of deceased patient in suit against doctor, nurses, and hospital since the widow showed through affidavits, depositions, and answers to interrogatories and the common knowledge of lay people that a material issue of fact existed as to the doctor's, nurses', and hospital's negligence in medical malpractice suit, and the doctor, nurses, and hospital failed to provide evidence to prove the non-existence of a genuine issue of fact. Dailey v. Methodist Med. Ctr., 790 So. 2d 903, 2001 Miss. App. LEXIS 290 (Miss. Ct. App. 2001).

Once absence of genuine material issues has been shown, burden of rebuttal falls upon non-moving party to produce specific facts showing that there is a genuine material issue for trial, and non-moving party's claim must be supported by more than a mere scintilla of colorable evidence; it must be evidence upon which a fair-minded jury could return a favorable verdict. Wilbourn v. Stennett, Wilkinson & Ward, 687 So. 2d 1205, 1996 Miss. LEXIS 678 (Miss. 1996).

Summary judgment movant has a burden of persuasion, a burden to establish that there is no genuine issue of material fact to be tried; party opposing motion must rebut, if he is to avoid entry of an adverse judgment, by bringing forth probative evidence legally sufficient to make apparent the existence of triable fact issues. Erby v. North Mississippi Medical Ctr., 654 So. 2d 495, 1995 Miss. LEXIS 139 (Miss. 1995).

Summary judgment movant has a burden of persuasion– a burden to establish that there is no genuine issue of material fact to be tried; party opposing motion must rebut, if he is to avoid entry of an adverse judgment, by bringing forth probative evidence legally sufficient to make apparent the existence of triable fact issues. Simmons v. Thompson Mach., 631 So. 2d 798, 1994 Miss. LEXIS 51 (Miss. 1994).

Party opposing summary judgment may not create an issue of fact by arguments and assertions in briefs or legal memoranda. Magee v. Transcontinental Gas Pipe Line Corp., 551 So. 2d 182, 1989 Miss. LEXIS 365 (Miss. 1989).

Party opposing summary judgment must support his claims by facts sworn to on personal knowledge in depositions, answers to interrogatories or affidavits, or through such other appropriate forms as stipulations of fact or admissions procured under M.R.C.P. Rule 36. Walker v. Skiwski, 529 So. 2d 184, 1988 Miss. LEXIS 360 (Miss. 1988).

Burden of producing evidence in support of, or in opposition to, a motion for summary judgment is a function of rules regarding burden of proof at trial on issue in question; movant's burden is one of production and persuasion, not of proof, and movant has burden of production only where at trial the movant would have the burden of proof. Fruchter v. Lynch Oil Co., 522 So. 2d 195, 1988 Miss. LEXIS 58 (Miss. 1988).

Where a party opposes summary judgment on a claim or defense as to which that party will bear burden of proof at trial, and when moving party can show a complete failure of proof on an essential element of that claim or defense, then all other issues become immaterial, and moving party is entitled to judgment as a matter of law. Grisham v. John Q. Long V.F.W. Post, No. 4057, Inc., 519 So. 2d 413, 1988 Miss. LEXIS 12 (Miss. 1988).

Where plaintiff failed to make an adequate showing on an essential element on which he would bear burden of proof at trial, summary judgment in favor of defendant on that claim was appropriate. Galloway v. Travelers Ins. Co., 515 So. 2d 678, 1987 Miss. LEXIS 2598 (Miss. 1987).

**Conversion to summary judgment.**

When a party introduces evidence outside of the pleadings in defense or support of a Miss. R. Civ. P. 12(b)(6) motion, the motion is converted into one for summary judgment. Sullivan v. Tullos, 20 So. 3d 1, 2008 Miss. App. LEXIS 673 (Miss. Ct. App. 2008), rev'd, 19 So. 3d 1271, 2009 Miss. LEXIS 501 (Miss. 2009).

Even though a motion to dismiss should have been treated as a motion for summary judgment because facts outside of the pleadings were considered, the error was harmless because, even though an employment contract attached to the motion was considered, another almost identical contract was referenced in the pleadings. Therefore, a chancellor did not become privy to any knowledge by virtue of one contract that he did not already have from the other contract. Winters v. Calhoun County Sch. Dist., 990 So. 2d 238, 2008 Miss. App. LEXIS 193 (Miss. Ct. App. 2008).

**Costs.**

Language in subdivision (h) of this rule is explicit regarding recovery of expenses for prevailing party, but rule is discretionary as to award of reasonable attorney's fees. Southwest Miss. Regional Medical Ctr. v. Lawrence, 684 So. 2d 1257, 1996 Miss. LEXIS 642 (Miss. 1996).

Cross-appeal for recovery of expenses by party who successfully defended against summary judgment motion was without merit, where there was no evidence in record as to the party's costs or attorneys' fees. Lamb Constr. Co. v. Renova, 573 So. 2d 1378, 1990 Miss. LEXIS 817 (Miss. 1990).

Although insurer successfully defended against insureds' motion for summary judgment on issue of liability, insurer's cross-appeal for expenses and attorneys' fees was without merit, where record did not contain transcript of hearing on motion, and therefore court on appeal did not know whether insurer offered proof of reasonable expenses and attorneys' fees in connection with defending the motion. Cooper v. State Farm Fire & Casualty Co., 568 So. 2d 687, 1990 Miss. LEXIS 273 (Miss. 1990).

Trial court did not err in failing to award plaintiff her expenses, costs and attorney's fees when defendants' M.R.C.P. Rule 12 motions to dismiss were denied; provision in Rule 56 (h) of award of costs to prevailing party was not applicable to motions under Rule 12. Joseph v. Tennessee Partners, Inc., 501 So. 2d 371, 1987 Miss. LEXIS 2271 (Miss. 1987), overruled, Churchill v. Pearl River Basin Dev. Dist., 619 So. 2d 900, 1993 Miss. LEXIS 74 (Miss. 1993).

**Discovery.**

Because the delays in discovery were attributable to a son, the trial court was within its discretion to deny the son's motion for a continuance; the son never sent a single interrogatory, request for production, or request for admission to hospitals or a doctor, and his request to extend discovery was filed nearly four months after the motions hearing. Phillips v. Delta Reg'l Med. Ctr., 290 So. 3d 386, 2020 Miss. App. LEXIS 27 (Miss. Ct. App. 2020).

Trial court was within its discretion in denying a son's motion for a continuance because the motion did not satisfy the mandatory requirements set forth in subsection (f); the son failed to articulate specific facts as to why he was unable to properly oppose the motion for summary judgment and failed to show how postponing the ruling would assist him in opposing summary judgment. Phillips v. Delta Reg'l Med. Ctr., 290 So. 3d 386, 2020 Miss. App. LEXIS 27 (Miss. Ct. App. 2020).

Circuit court did not abuse its discretion in denying a physician's motion for a continuance or in granting a hospital summary judgment where the request did not contain specific facts or information on any additional discovery that would have created a genuine issue of fact, and the physician's claims failed as a matter of law. O'Hea v. George Reg'l Health & Rehab. Ctr., 276 So. 3d 1266, 2018 Miss. App. LEXIS 627 (Miss. Ct. App. 2018), cert. denied, 276 So. 3d 658, 2019 Miss. LEXIS 274 (Miss. 2019).

Further discovery would not have enabled the former LLC member to prove equitable estoppel given his uncontradicted assertion that he had no interaction with the purchasing member since the final sale agreement. Brown v. McKee, 242 So. 3d 121, 2018 Miss. LEXIS 201 (Miss. 2018).

Even if the purchasing LLC member's silence established an affirmative act of concealment, additional discovery would not have aided the former member in showing what efforts he had taken to discover the alleged fraud. Brown v. McKee, 242 So. 3d 121, 2018 Miss. LEXIS 201 (Miss. 2018).

Denying a former LLC member's Miss. R. Civ. P. 56(f) motion was not error where he admitted that he had not exercised reasonable diligence in discovering his alleged injuries in underselling his interest in the LLC, thus further discovery would not have changed the finding as to when his claims had accrued, and there were no allegations that the purchasing LLC member had taken affirmative act to prevent the former member from discovering the claim. Brown v. McKee, 242 So. 3d 121, 2018 Miss. LEXIS 201 (Miss. 2018).

Appellant failed to show why additional time was required to respond at summary judgment because the appellant's brief contained no specifics whatsoever except that the appellant would have liked to have inspected the properties of the appellee and the appellee's parent, something which would have had no effect on the result of the case as it hinged on whether the summons and complaint were mailed, which appellant's attorney admitted could have been proven with available witnesses. Thornton v. Freeman, 242 So. 3d 188, 2018 Miss. App. LEXIS 138 (Miss. Ct. App. 2018).

Movant for a continuance did not offer sufficient information for the appellate court to conclude that the chancellor abused the chancellor's discretion when the chancellor denied the motion for a continuance. Bray v. Wooten, 247 So. 3d 1283, 2017 Miss. App. LEXIS 475 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 69, 2018 Miss. LEXIS 240 (Miss. 2018).

Plaintiff was not entitled to additional time to seek affidavits proving the authenticity of photographs and written notations on the photographs because the plaintiff had sufficient time to seek any affidavits needed to oppose summary judgment and failed to do so. Estate of Luster v. Mardi Gras Casino Corp., 121 So. 3d 962, 2013 Miss. App. LEXIS 608 (Miss. Ct. App. 2013).

In a case alleging exposure to toxic mold and other substances, the action was properly dismissed by summary judgment where several injured parties did not show a need for additional time for discovery under Miss. R. Civ. P. 56(f); they had failed to designate an expert showing causation for over three years. Hosey v. Mediamolle, 963 So. 2d 1267, 2007 Miss. App. LEXIS 585 (Miss. Ct. App. 2007).

As an employee had not requested more time to conduct discovery, and no amount of additional discovery would pierce the employer and general contractor's workers' compensation immunity, the trial court did not act prematurely in granting summary judgment to those defendants. Powe v. Roy Anderson Constr. Co., 910 So. 2d 1197, 2005 Miss. App. LEXIS 603 (Miss. Ct. App. 2005), cert. denied, 942 So. 2d 164, 2006 Miss. LEXIS 640 (Miss. 2006).

When the patient discovered that the patient's child had died in the womb, the patient should have known that there was some causal connection between the death and the doctor's treatment. Moreover, even if the patient did not recognize the causal connection at the time of death, there was absolutely no indication that the patient made any attempts to determine the cause of the patient's child's death until after one year had elapsed; thus, there was no issue of fact with respect to whether the discovery rule tolled the statute of limitations, and accordingly, the state hospital and its doctor were entitled to summary judgment. Wright v. Quesnel, 876 So. 2d 362, 2004 Miss. LEXIS 801 (Miss. 2004).

Where two chemical companies failed to follow the procedure set forth in Miss. R. Civ. P. 56 and instead just filed an opposition to a motion for summary judgment filed by a toilet company in a contamination case, an appellate court rejected the chemical companies' later claim that summary judgment was prematurely granted; the chemical companies could have sought a continuance to allow additional time for discovery. Kerr-McGee Corp. v. Maranatha Faith Ctr., Inc., 873 So. 2d 103, 2004 Miss. LEXIS 500 (Miss. 2004).

Where the insured employer named in the policy put in writing the limits on uninsured motorist coverage that it wanted, that satisfied Miss. Code Ann. § 83-11-101(2), thus, the limits on uninsured motorist coverage solely to vehicles that the employer owned was effective; since the contract was unambiguous, there was no factual issue, and therefore, no need to conduct additional discovery. Trotter v. Fed. Ins. Co., 865 So. 2d 411, 2004 Miss. App. LEXIS 107 (Miss. Ct. App. 2004).

Where plaintiffs in a negligence action against defendants, a hospital and physicians, submitted their designated expert's affidavit over two months after the discovery deadline and a few days after the discovery deadline for defendants to submit their expert witnesses, the facts did not justify the ultimate penalty of summary judgment, where plaintiffs' expert's affidavit showed the elements of duty and causation, and there was a genuine issue of fact regarding negligence. Bowie v. Montfort Jones Mem'l Hosp., 850 So. 2d 1210, 2002 Miss. App. LEXIS 563 (Miss. Ct. App. 2002), rev'd, 861 So. 2d 1037, 2003 Miss. LEXIS 877 (Miss. 2003).

Trial court did not err in denying request of wife of injured patient for additional time to conduct further discovery or in ruling for the doctor on his summary judgment motion as to the wife's medical malpractice claims since the wife failed to identify an expert witness in response to the doctor's discovery requests, but merely stated in reply that an expert's identity would be provided once retained. Hill v. Warden, 796 So. 2d 276, 2001 Miss. App. LEXIS 389 (Miss. Ct. App. 2001).

The trial court did not abuse its discretion by denying the plaintiffs' motion to postpone adjudication of the defendants' motion for summary judgment, notwithstanding their contention that discovery was in the "embryonic stages," that the time in which the defendants were to designate their expert had not arrived under the parties' scheduling order, and that they would not be able to depose a defense expert as to the assertions made in his affidavit prior to the date of the hearing on the motion for summary judgment, since the plaintiffs had ample opportunity to obtain expert affidavits of their own regarding their claims, the earliest of the plaintiffs' actions was filed six years before the defendants filed their motion for summary judgment, and there was no indication in the record that during that six years the plaintiffs propounded any interrogatories, requests for production, or requests for admission. Prescott v. Leaf River Forest Prods., 1999 Miss. LEXIS 90 (Miss. Mar. 4, 1999), op. withdrawn, sub. op., 740 So. 2d 301, 1999 Miss. LEXIS 253 (Miss. 1999).

Plaintiff had ample time and opportunity to file discovery requests and to depose his own experts; thus, trial court did not err in refusing to grant a continuance to allow him to conduct further discovery prior to ruling on defendant's summary judgment motion. Holifield v. Pitts Swabbing Co., 533 So. 2d 1112, 1988 Miss. LEXIS 531 (Miss. 1988).

Party opposing summary judgment may not rely on vague assertions that discovery will produce needed, but unspecified, facts, particularly where there was ample time and opportunity for discovery; subdivision (f) of this rule is not designed to protect litigants who are lazy or dilatory, and normally party invoking this provision must show what steps have been taken to obtain access to information allegedly within exclusive possession of other party. Marx v. Truck Renting & Leasing Asso., 520 So. 2d 1333, 1987 Miss. LEXIS 2855 (Miss. 1987), overruled in part, Commonwealth Brands v. Morgan, 110 So. 3d 752, 2013 Miss. LEXIS 141 (Miss. 2013).

**Evidence.**

Trial court did not err in granting summary judgment to a pharmacy that had allegedly caused a person's wrongful death by failing to fill a prescription because neither of two affidavits presented to show the pharmacy's legal duty set out the applicable standard of care. Sellars v. Walgreen Co., 971 So. 2d 1278, 2008 Miss. App. LEXIS 3 (Miss. Ct. App. 2008).

Summary judgment was properly granted to an ambulance service on a passenger's negligence claim arising out of the service's transport of the passenger for treatment of a heart attack, because even though the ambulance broke down en route to a hospital: (1) records showed that the service routinely maintained the ambulance; (2) no evidence was offered as to how an inoperative air conditioner might have caused the ambulance to break down; (3) there was no evidence that the passenger's health condition suffered in any way from the service's alleged failure to use a heart monitor; (4) evidence showed that damage to the passenger's heart was not caused by the delay in transport but had occurred during the onset of his heart attack the night before the transport; and (5) regardless of whether a contract of carriage existed between the parties, no genuine issue of material fact existed as to damages. Stricklin v. Medexpress of Miss., LLC, 963 So. 2d 568, 2007 Miss. App. LEXIS 521 (Miss. Ct. App. 2007).

Summary judgment was properly awarded to an attorney, pursuant to Miss. R. Civ. P. 56(c), in a client's legal malpractice/negligence action because the client failed to designate, offer, or list any expert on her list of witnesses who could support her allegations of legal malpractice. Montgomery v. Woolbright, 904 So. 2d 1027, 2004 Miss. LEXIS 1452 (Miss. 2004) (Miss. – 2004).

Summary judgment under Miss. R. Civ. P. 56(c) was not proper in a wrongful death action against a company where there were questions as to whether a driver who was involved in the accident that resulted in the death of the decedent was under the control of the company at the time of the accident. There was testimony that the driver was on his way to work in response to a call from the company offering him seasonal employment and that the company sometimes provided employees with gas for their personal vehicles. Moreland v. Kimes & Stone Constr. Co., 900 So. 2d 377, 2004 Miss. App. LEXIS 925 (Miss. Ct. App. 2004), cert. denied, 898 So. 2d 679, 2005 Miss. LEXIS 280 (Miss. 2005).

Appellate court reviewed defendants' Miss. R. Civ. P. 12(b)(6)motion to dismiss under the summary judgment standard as the trial court considered exhibits, including deposition testimony, to the motion along with defendants' answer. Gulledge v. Shaw, 880 So. 2d 288, 2004 Miss. LEXIS 777 (Miss. 2004).

In a contract dispute, a court properly granted summary judgment to a wood buyer where the seller claimed that the determination of the load's grade by visual inspection was inaccurate and should have been discredited by the trial court, but the only evidence offered was the testimony of a disgruntled ex-employee and his opinion that the method of determining the grade was inaccurate, neither of which were sufficient to create a question as to an issue of material fact. Boone v. Hercules, Inc., 872 So. 2d 730, 2004 Miss. App. LEXIS 424 (Miss. Ct. App. 2004).

Term "re-subdivided" was not clearly defined in the restrictive covenant, and even if the appellate court had accepted the lot owners association's broad interpretation of the term, the evidence did not establish a re-subdivision where two homeowners revised their lot line to account for a drainage problem; no new lot was created, and there was nothing smaller created from the two lots, thus, because the language in the covenant was not specific enough to show a violation of the covenant or to allow for enforcement, summary judgment for the homeowners was proper. Lake Castle Lot Owners Ass'n v. Litsinger, 868 So. 2d 377, 2004 Miss. App. LEXIS 204 (Miss. Ct. App. 2004).

By refusing to offer an expert witness to support her claim for lack of informed consent to a medical procedure for removal of a bunion, the patient offered no genuine issues of material fact for the trial court's determination; thus, pursuant to Miss. R. Civ. P. 56(c), the doctor's motion for summary judgment was properly granted. Jamison v. Kilgore, 905 So.

2d 610, 2004 Miss. App. LEXIS 255 (Miss. Ct. App. 2004), aff'd, 903 So. 2d 45, 2005 Miss. LEXIS 484 (Miss. 2005).

Trial court properly granted a workers' compensation carrier and adjuster summary judgment in connection with an employee's bad faith claim; though thepayment of benefits was delayed for a month, nothing more was established than simple negligence by the carrier and the adjuster, and the employee failed to cooperate with the carrier's properly handled investigation of the matter. Pilate v. Am. Federated Ins. Co., 865 So. 2d 387, 2004 Miss. App. LEXIS 108 (Miss. Ct. App. 2004).

Summary judgment was inappropriately granted in favor of the apartment complex in the victim's negligence action where the criminal had testified that he had received a key to the victim's apartment from an apartment manager, and that in later depositions he refused to subject himself to cross-examination; it appeared from the testimony given by the criminal in his deposition that he knew the manager, had knowledge of other apartments in the complex, and had knowledge of a master key that would unlock all units including the unit in question, and the parties should have been given an opportunity to explore those matters. Doe v. Stegall, 900 So. 2d 363, 2003 Miss. App. LEXIS 1068 (Miss. Ct. App. 2003), cert. denied, 898 So. 2d 679, 2005 Miss. LEXIS 284 (Miss. 2005).

Deputy responding to a call from a fellow officer was not speeding, and while the deputy failed to anticipate that another vehicle might be pulling out from the blind spot in front of the truck in front of the deputy, the deputy's decision to steer around that turning truck did not exhibit a wilful or wanton disregard for the safety of others or a willingness that harm should follow; thus, summary judgment for the county was proper. Kelley v. Grenada County, 859 So. 2d 1049, 2003 Miss. App. LEXIS 1080 (Miss. Ct. App. 2003).

Circuit court erred in granting a school district's motion for summary judgment where the factual circumstances surrounding a student's assault of another student, loud taunting and threatening gestures bore on the question of the level of care exercised by the teacher in supervising her class at the time.

Where conflicting evidence was presented on whether the police officer, who was engaged in a high speed chase when the officer struck the decedent, had the officer's blue lights flashing, summary judgment pursuant to Miss. R. Civ. P. 56 was improperly granted in favor of the city in a wrongful death action; the conflicting testimony raised an issue of material fact as to whether the officer's behavior constituted reckless disregard under Miss. Code Ann. § 11-46-9(1)(c). Johnson v. City of Cleveland, 846 So. 2d 1031, 2003 Miss. LEXIS 257 (Miss. 2003).

Trial court's grant of the employer's motion to dismiss or, in the alternative, motion for summary judgment, was proper where the letter in question was not sufficient to place an affirmative duty on the employer to preserve the machine; further, the Supreme Court refused to recognize a separate tort of negligent spoliation of evidence. Richardson v. Sara Lee Corp., 847 So. 2d 821, 2003 Miss. LEXIS 270 (Miss. 2003).

Summary judgment was properly granted in favor of the insurer and its agent where no evidence was presented to suggest that the insurer had acted with malice, gross negligence or reckless disregard in handling the insured's life insurance claim; the insurer had an arguable and legitimate reason to deny the insured's claim, which the insurer subsequently paid in full, and there was no evidence that the insurer acted in bad faith. Gordon v. Nat'l States Ins. Co., 851 So. 2d 363, 2003 Miss. LEXIS 271 (Miss. 2003).

Grant of summary judgment in favor of a corporation was proper in an action involving the loss of bull semen where the evidence demonstrated that the relationship between the corporation and the representative was not one of employer/employee or of master/servant. Gray v. ABS Global, Inc., 850 So. 2d 180, 2003 Miss. App. LEXIS 626 (Miss. Ct. App. 2003).

Circuit court erred in granting a school district's motion for summary judgment where the factual circumstances surrounding a student's assault and loud taunting and threatening gestures by the assailant, bore on the question of the level of care exercised by the teacher in supervising her class at the time. Henderson v. Simpson County Pub. Sch. Dist., 847 So. 2d 856, 2003 Miss. LEXIS 286 (Miss. 2003).

Summary judgment was properly granted in favor of the restaurant in a patron's suit for negligence after an injury by an allegedly defective chair in one of the corporation's restaurants; the patron did not present evidence that either the restaurant or the corporation had notice that a dangerous condition existed on the premises and she admitted that she knew of no facts supporting her claim that the chair was defective or that the restaurant had notice of the alleged instability in the chair. Young v. Wendy's Int'l, 840 So. 2d 782, 2003 Miss. App. LEXIS 190 (Miss. Ct. App. 2003).

While any factual issue must be material to withstand motion for summary judgment, it is also true that evidentiary matters– admissions in pleadings, answers to interrogatories, depositions, affidavits– are viewed in light most favorable to non-moving party, who has the benefit of every reasonable doubt. Garrett v. Northwest Miss. Junior College, 674 So. 2d 1, 1996 Miss. LEXIS 211 (Miss. 1996).

Summary judgment in favor of city was improperly granted, where city failed to place into record a copy of its insurance policy by which it alleged its coverage for plaintiffs' claim was cancelled and its immunity reacquired, and absence of this document was not cured by mayor's affidavit which was conclusory, opinionated, and obviously based only on information and belief. Scott v. Biloxi, 592 So. 2d 1003, 1991 Miss. LEXIS 967 (Miss. 1991).

Defendant in medical malpractice action was entitled to summary judgment, where plaintiffs failed to supply evidence of defendant's malpractice in a form which would be competent evidence at trial. Walker v. Skiwski, 529 So. 2d 184, 1988 Miss. LEXIS 360 (Miss. 1988).

Assuming medical malpractice case involves an area not within common knowledge of laymen, absent expert medical testimony which (a) articulates duty of care physician owes to a particular patient under the circumstances, and (b) identifies particulars wherein physician breached that duty and caused injury to plaintiff, a plaintiff's claim for negligence must fail. Phillips v. Hull, 516 So. 2d 488, 1987 Miss. LEXIS 2239 (Miss. 1987).

**Failure to respond.**

In a case alleging predatory lending practices, summary judgment was properly granted in favor of a creditor because two debtors failed to show the existence of a genuine issue of material fact by merely resting on their pleadings, which did not make any allegations based on personal knowledge; moreover, the debtors failed to comply with a scheduling order that required a response to the motion. Stuckey v. Provident Bank, 912 So. 2d 859, 2005 Miss. LEXIS 174 (Miss. 2005).

Where two chemical companies failed to refute an expert's affidavit that contamination did not come from a toilet company or result from a migration of contaminates over its property, summary judgment was properly granted in favor of the toilet company, and the opportunity for allocation of fault was not unfairly prejudiced. Kerr-McGee Corp. v. Maranatha Faith Ctr., Inc., 873 So. 2d 103, 2004 Miss. LEXIS 500 (Miss. 2004).

Summary judgment was properly granted for the defendant where the plaintiffs brought forth no counter affidavits to challenge an affidavit of a third party supporting the defendant. Roebuck v. McDade, 760 So. 2d 12, 1999 Miss. App. LEXIS 574 (Miss. Ct. App. 1999).

**Fraud.**

Insurer, garnished by a gunshot victim, was entitled to summary judgment due to the policy's exclusion of its insured's wilful acts. In her suit against insured (in which she was awarded punitive damages) and before the judge who sentenced the insured for aggravated assault, the victim had alleged the shooting was intentional; she could not be allowed to later assert that the shooting was not intentional, as this was inconsistent with the facts which she previously pled and testified to under oath. Thomas v. State Farm Fire & Cas. Co., 856 So. 2d 646, 2003 Miss. App. LEXIS 565 (Miss. Ct. App. 2003), cert. denied, 866 So. 2d 473, 2004 Miss. LEXIS 201 (Miss. 2004).

Summary judgment was properly granted to the home sellers on the buyers' claims of fraud, because the buyers' new evidence claim was untimely and they gave no explanation of why they were unable to locate an ex-husband of a former owner, failed to state the steps they had taken to locate the prior owner, and there was no genuine issue of fact, as there was no evidence in the record of willful or intentional misconduct by the sellers. Mitchell v. Nelson, 830 So. 2d 635, 2002 Miss. LEXIS 332 (Miss. 2002).

Triable issues of fact exist when facts or evidence support allegations of fraud and misrepresentation; fraud is never assumed but is essentially a question of facts which clear and convincing evidence must prove, and thus it is essentially a question of fact best left for the jury. Allen v. Mac Tools, Inc., 671 So. 2d 636, 1996 Miss. LEXIS 14 (Miss. 1996).

Mere general allegations which do not reveal detailed and precise facts will generally not prevent the award of summary judgment; in an allegation of fraud, however, precise facts which would establish fraud will often be known only by party alleged to have committed the fraud, and because the factor of intent requires knowledge of the perpetrator's state of mind, it may not be possible for an opponent to reveal detailed precise facts in support of his claim. Crystal Springs Ins. Agency, Inc. v. Commercial Union Ins. Co., 554 So. 2d 884, 1989 Miss. LEXIS 490 (Miss. 1989).

**Jury trial.**

Trucker's right to a jury trial under Miss. Const. Art. 3, § 31 was not violated when summary judgment was granted in a case alleging malicious prosecution and false arrest because there was probable cause to arrest the trucker when a company's products were found on his truck. Moreover, informing the police about the potentially stolen product did not amount to an untruthful statement to support a defamation claim, the communication of the information to the police was privileged, there was no claim for tortious interference with business relations absent evidence of an intent to damage the trucker's business, and an intentional infliction of emotional distress claim failed since there was no evidence of any conduct on the part of a superintendent or a company that evoked outrage or revulsion. Richard v. Supervalu, Inc., 974 So. 2d 944, 2008 Miss. App. LEXIS 94 (Miss. Ct. App. 2008).

This rule does not conflict with the constitutional right to trial by jury; trial by jury is about disputes of fact, and what may be a material matter of fact, and ab initio a proof-requiring question of fact, does not remain for the trier of fact once an undisputed record reveals no genuine issue thereof. Towner v. Moore, 604 So. 2d 1093, 1992 Miss. LEXIS 424 (Miss. 1992).

Summary judgment may never be granted in derogation of a party's constitutional right to trial by jury; on the other hand, there is no violation of this right when judgment is entered summarily in cases where there is no genuine issue of material fact and moving party is entitled to judgment as a matter of law, since there is no right to trial by jury in such cases. Brown v. McQuinn, 501 So. 2d 1093, 1986 Miss. LEXIS 2885 (Miss. 1986).

Summary judgment may never be granted in derogation of a party's constitutional right to trial by jury; on the other hand, there is no violation of right of trial by jury when judgment is entered summarily in cases where there is no genuine issue of material fact and moving party is entitled to judgment as a matter of law, as there is no right of trial by jury in such cases. Brown v. Credit Ctr., Inc., 444 So. 2d 358, 1983 Miss. LEXIS 3053 (Miss. 1983).

**Limitations.**

Where affidavits opposing a summary judgment motion were untimely, a trial court did not abuse its discretion by failing to grant a continuance because the proponents had almost two years after their complaint was filed to obtain expert testimony, and their failure to do so was inexcusable neglect. Maxwell v. Baptist Mem. Hospital-Desoto, Inc., 15 So. 3d 427, 2008 Miss. App. LEXIS 331 (Miss. Ct. App. 2008).

In her negligence action against a homeowner, decided in the homeowner's favor on summary judgment, on appeal, the worker asserted that Miss. R. Civ. P. 8(c) clearly set forth that the defense of statute of limitations was an affirmative defense which had to be set forth in responsive pleadings and that Miss. R. Civ. P. 12(b) required every defense to be asserted in responsive pleadings, except the seven which could be made by motion, and that the statute of limitations defense was not included therein; however, the defense of statute of limitations was proper for summary judgment where there existed no genuine issues of material fact on the issue. Robertson v. Moody, 918 So. 2d 787, 2005 Miss. App. LEXIS 327 (Miss. Ct. App. 2005).

Summary judgment was properly granted in favor of the contractor and the county in the homeowners' action to recover for water damage to their home based on allegation that the contractor was negligent in constructing the home and the county was negligent in inspecting the home and providing adequate drainage because the homeowners' claims were barred by Miss. Code Ann. §§ 15-1-41 and 14-1-49(1). Miss. Code Ann. § 15-1-41 was a statute of repose and began to run at the time the homeowners first occupied the home regardless of when the injury incurred, and their cause of action accrued under Miss. Code Ann. § 15-1-49 when the homeowners first asked the county to remedy the drainage problems. Baldwin v. Holliman, 913 So. 2d 400, 2005 Miss. App. LEXIS 297 (Miss. Ct. App. 2005), overruled in part, Windham v. Latco of Miss., Inc., 972 So. 2d 608, 2008 Miss. LEXIS 44 (Miss. 2008).

Grant of summary judgment against the insureds was proper where their claim against the insurer after the driver insured was injured in an accident was barred by the statute of limitation because the insurer was added as a defendant to the action more than three years after the extent of the driver insured's injuries was known. Jackson v. State Farm Mut. Auto. Ins. Co., 880 So. 2d 336, 2004 Miss. LEXIS 1053 (Miss. 2004).

Trial court, in granting summary judgment dismissing the landowner's money damages claims against the county, stated that the injury to the landowner was immediate rather than latent, so that the discovery rule would not apply; however, the trial court did not hold a hearing before making that finding of fact, genuine disputes as to the ability to discover a latent injury were questions of fact to be decided by the fact finder, not on summary judgment. Punzo v. Jackson County, 861 So. 2d 340, 2003 Miss. LEXIS 750 (Miss. 2003).

Affidavit submitted more than two months after summary judgment hearing was late and was not allowed under either M.R.C.P. Rule 6(d) or Rule 56(c); moreover, Rule 56(e) did not allow a supplemental affidavit to be submitted after time set out in Rule 56(c) or Rule 6(d). Jones v. James Reeves Contrs., 701 So. 2d 774, 1997 Miss. LEXIS 98 (Miss. 1997).

**Materiality.**

Where a client hired a law firm to pursue a medical malpractice claim on her behalf, where the law firm failed to effect service of process upon the health care provider and the suit was dismissed for lack of prosecution, where the client filed a legal malpractice claim against the law firm, and where the trial court granted summary judgment in favor of the law firm after finding that the client's lawsuit was not timely filed pursuant to the three-year statute of limitations under Miss. Code Ann. § 15-1-49, the reviewing court held that the evidence submitted on summary judgment raised a genuine issue of material fact regarding when the client knew or, with reasonable diligence, could have discovered the alleged legal malpractice. The law firm failed to communicate the lack of service, and the client presented evidence that she lacked actual knowledge of the alleged malpractice prior to her new counsel's review of the case file; as such, summary judgment was improper. Bennett v. Hill-Boren P.C., 52 So. 3d 364, 2011 Miss. LEXIS 63 (Miss. 2011).

Summary judgment was improper in a premises liability suit based on an injured party's slip and fall on a property owner's icy doormat because there was a genuine issue of material fact regarding whether the injured party was an invitee or a licensee at the time of the accident; the injured party was delivering mail to the owner's sister, who might have been an occupant that could confer invitee status on the injured party. Evans v. Hodge, 2 So.

3d 683, 2008 Miss. App. LEXIS 492 (Miss. Ct. App. 2008), cert. denied, 999 So. 2d 1280, 2009 Miss. LEXIS 78 (Miss. 2009).

Movie theater never disputed the fact that their cashier left her station and a fight ensued with the customer, who brought suit against the theater, but the appellate court failed to see how the words that were exchanged prior to the fight presented a material issue; the trial court did not err in granting the movie theater's motion for summary judgment. Adams v. Cinemark USA, Inc., 831 So. 2d 1156, 2002 Miss. LEXIS 395 (Miss. 2002).

Where parties dispute existence and legitimacy of insurance carrier's reason for delay or denial, these issues are ones of material fact, and plaintiff is entitled to have a jury pass upon his claim for punitive damages if reasonable minds could differ as to legitimacy of carrier's reason. Murphree v. Federal Ins. Co., 707 So. 2d 523, 1997 Miss. LEXIS 145 (Miss. 1997).

Accident at softball game resulting from batter's throwing of bat was not reasonably foreseeable and could not be prevented, thus even viewing evidence in light most favorable to plaintiff, there was no issue of material fact as to foreseeability of the accident occurring, and summary judgment was appropriate. Rolison v. City of Meridian, 691 So. 2d 440, 1997 Miss. LEXIS 81 (Miss. 1997).

Trial court correctly granted summary judgment for defendants in legal malpractice action, where plaintiff failed to make a causal connection between breach of attorney's duty of confidentiality and loyalty and his alleged damages. Wilbourn v. Stennett, Wilkinson & Ward, 687 So. 2d 1205, 1996 Miss. LEXIS 678 (Miss. 1996).

Trial court correctly granted summary judgment for attorney on adjoining landowner's claims against attorney in connection with rezoning matter, since there was no such tort as "the use of a falsehood to persuade the court to decide against a party." Roussel v. Robbins, 688 So. 2d 714, 1996 Miss. LEXIS 533 (Miss. 1996).

Trial court properly granted bank's motion for summary judgment in action by replacement trustee and trust beneficiaries, where there was no proof which would allow a hypothetical juror to find by a preponderance of the evidence that bank had actual knowledge that former trustee was embezzling from trust at the time of each transaction. Collier v. Trustmark Nat'l Bank, 678 So. 2d 693, 1996 Miss. LEXIS 412 (Miss. 1996).

Junior college was not entitled to summary judgment in negligence action brought by student following accident on milling machine, where there were genuine issues of material fact regarding extent of safety and use instructions student received, as well as adequacy of supervision by his teacher. Garrett v. Northwest Miss. Junior College, 674 So. 2d 1, 1996 Miss. LEXIS 211 (Miss. 1996).

Trial court erred in entering partial summary judgment against insurance company on grounds that aggravated assault defendant was an insured under his parents' homeowner's policy, where there were numerous material facts at issue concerning defendant's "household resident" status which should have been submitted to a jury. Merrimack Mut. Fire Ins. Co. v. McDill, 674 So. 2d 4, 1996 Miss. LEXIS 213 (Miss. 1996).

Summary judgment should not have been granted to defendant supermarket in slip and fall case, where there was dispute as to timely and non-negligent removal of banana from produce bin by store employees. Downs v. Choo, 656 So. 2d 84, 1995 Miss. LEXIS 279 (Miss. 1995).

Where a jury could reasonably infer that defendant waived its right to terminate contract by continuing to conduct business as usual with plaintiff after passage of deadline, trial court's grant of summary judgment was erroneous and required reversal. Canizaro v. Mobile Communications Corp. of Am., 655 So. 2d 25, 1995 Miss. LEXIS 138 (Miss. 1995).

Presence of fact issues in record does not per se entitle party to avoid summary judgment; court must be convinced that factual issue is a material one, one that matters in an outcome determinative sense. Erby v. North Mississippi Medical Ctr., 654 So. 2d 495, 1995 Miss. LEXIS 139 (Miss. 1995).

Although evidence of who was driving truck involved in collision with train was disputable, it was not material to the question of defendant's negligence and it was not a material fact precluding summary judgment. Strantz ex rel. Minga v. Pinion, 652 So. 2d 738, 1995 Miss. LEXIS 148 (Miss. 1995).

Since doctrine of open and obvious dangers had been abolished as a defense, case was remanded for trial in order for jury to find liability, if any, under statutory comparative negligence principles. Baptiste v. Jitney Jungle Stores of Am., 651 So. 2d 1063, 1995 Miss. LEXIS 122 (Miss. 1995).

Plaintiffs presented sufficient evidence of a causal connection between hospital's alleged breach of duty and their injury and damages to survive motion for summary judgment. Palmer v. Anderson Infirmary Benevolent Ass'n, 656 So. 2d 790, 1995 Miss. LEXIS 107 (Miss. 1995).

Summary judgment was inappropriate where case involved issues of contractual interpretation and allegations of fraudulent concealment; in addition, whether or not portion of property was located in actual floodway was contested by parties' respective witnesses. Yowell v. James Harkins Builder, Inc., 645 So. 2d 1340, 1994 Miss. LEXIS 570 (Miss. 1994).

Question whether letter advising manufacturer of fatality involving its product was a claim or not, following definition in manufacturer's insurance policy, was a vital fact issue, and where parties' evidence was in dispute as to what letter meant and as to what policy intended to be a "claim," summary judgment was improper. Taylor Mach. Works v. Great Am. Surplus Lines Ins. Co., 635 So. 2d 1357, 1994 Miss. LEXIS 78 (Miss. 1994).

Presence of fact issues in record does not per se entitle a party to avoid summary judgment; court must be convinced that the factual issue is a material one, one that matters in an outcome determinative sense. Simmons v. Thompson Mach., 631 So. 2d 798, 1994 Miss. LEXIS 51 (Miss. 1994).

Summary judgment in replevin action was improper, where defendant's affidavit, deposition, and documents in evidence demonstrated genuine issues of material fact within the context of his amended counterclaim. Simmons v. Thompson Mach., 631 So. 2d 798, 1994 Miss. LEXIS 51 (Miss. 1994).

Summary judgment in wrongful death action was inappropriate, where there was a disputed issue of fact over which contractor maintained responsibility for safety aspects of sand mining job. Hudgins v. Pensacola Constr. Co., 630 So. 2d 992, 1994 Miss. LEXIS 6 (Miss. 1994).

Defendant's purported inconsistent statements did not amount to a genuine issue of material fact necessitating trial, since a reasonable jury could not return a verdict for plaintiff, and gravamen of defendant's story remained the same among the different statements. Page v. Wiggins, 595 So. 2d 1291, 1992 Miss. LEXIS 43 (Miss. 1992).

Summary judgment was improper, where genuine issue of material fact existed as to correct interpretation of provision in contract between parties. Spartan Foods Systems, Inc. v. American Nat'l Ins. Co., 582 So. 2d 399, 1991 Miss. LEXIS 365 (Miss. 1991).

Limiting patient's testimony to that which a lay person without medical training could reasonably be expected to observe, understand and remember, patient's testimony in conflict with doctor's contemporaneous records created a genuine issue of material fact sufficient to defeat summary judgment in medical malpractice action. Kelley v. Frederic, 573 So. 2d 1385, 1990 Miss. LEXIS 841 (Miss. 1990).

Summary judgment was inappropriate, where question was whether individual who inherited property should be prohibited in equity from asserting his interest; record below did not establish absence of material factual issues, and estoppel and laches were affirmative defenses which were required to be pled and proven by party asserting them. Sumrall v. Doggett, 511 So. 2d 908, 1987 Miss. LEXIS 2612 (Miss. 1987).

Not all disputed issues of fact may be sufficient to defeat motion for summary judgment or to require trial on merits, only material issues of fact; if, viewing evidence in light most favorable to party against whom motion has been made, that party's claim or defense still fails as a matter of law, summary judgment generally ought to be granted, even though there may be disputes regarding non-material facts. Vickers v. First Mississippi Nat'l Bank, 458 So. 2d 1055, 1984 Miss. LEXIS 1967 (Miss. 1984).

Question whether cook injured at hospital was an employee, dual or otherwise, was a triable issue, because clear intention of hospital's contract with food services vendor was to preclude vendor's employees from being considered employees of hospital, and therefore summary judgment was not permitted. Russell v. Orr, 700 So. 2d 619, 1997 Miss. LEXIS 508 (Miss. 1997).

Issues of fact sufficient to require denial of motion for summary judgment are present where one party swears to one version of matter in issue and another says just the opposite; issues of fact also exist where there is more than one reasonable interpretation that may be given undisputed testimony, where materially differing but nevertheless reasonable inferences may be drawn from uncontradicted facts, or where purported establishment of facts has been sufficiently incomplete or inadequate that trial judge cannot say with reasonable confidence that full facts of the matter have been disclosed. Dennis v. Searle, 457 So. 2d 941, 1984 Miss. LEXIS 1949 (Miss. 1984).

**Multiple claims or multiple parties.**

Trial judge properly determined that the malpractice action against the hospital and several physicians was for the same injuries and damages she had incurred and presented to the jury in the first suit against a driver and his employer. In that first suit, damages were assessed by the jury and the jury also found she was paid in full for those damages, per a prior settlement with yet another driver and his employer; thus, she had obtained satisfaction of her claim, she was not entitled to a double recovery or additional damages against the hospital and the physicians, and summary judgment for the hospital and physicians was proper. Medlin v. Hazlehurst Emergency Physicians, 889 So. 2d 496, 2004 Miss. LEXIS 1196 (Miss. 2004).

Trial court erred as a matter of law when it denied defendant equipment manufacturer's motion for summary judgment; a wrongful death claim was not assignable by a wrongful death beneficiary to one tortfeasor to be asserted against another joint tortfeasor. Mississippi's wrongful death statute did not confer upon a tortfeasor the right of assignment of a plaintiff's wrongful death cause of action. Coleman Powermate, Inc. v. Rheem Mfg. Co., 880 So. 2d 329, 2004 Miss. LEXIS 1033 (Miss. 2004).

Supreme Court agreed that a physician in a medical malpractice suit raised an affirmative defense regarding the apportionment of damages, but failed to present sufficient evidence to create a genuine issue of material fact that would have attributed negligence to a third party. A partial summary judgment for the wife, who was the decedent's survivor, was proper. Eckman v. Moore, 876 So. 2d 975, 2004 Miss. LEXIS 287 (Miss. 2004).

Where the trial court dismissed the action as to one defendant, but other defendants remained in the action, and there was no subsection (b) certification, the order was not an appealable final judgment and the appeal would be dismissed. Owens v. Nasco Int'l, Inc., 744 So. 2d 772, 1999 Miss. LEXIS 227 (Miss. 1999).

**Notice.**

Dismissal of the claimant's petition for declaratory relief in an action involving the liquidation of an insurance company was improper pursuant to Miss. R. Civ. P. 12(c) and Miss. R. Civ. P. 56 where the trial judge erred in converting a motion for judgment on the pleadings into a motion for summary judgment without giving the claimants 10-days notice of that intention. Huff-Cook, Inc. v. Dale, 913 So. 2d 988, 2005 Miss. LEXIS 296 (Miss. 2005).

The trial court committed reversible error in granting summary judgment when the plaintiff was not given 10 days notice of the hearing on the motion following the conversion of the defendant's motion for dismissal into a motion for summary judgment. Jones v. Regency Toyota, Inc., 798 So. 2d 474, 2001 Miss. LEXIS 128 (Miss. 2001).

Grant of summary judgment was improper, where defendant failed to supply sufficient notice of hearing on its motion. Hurst v. Southwest Miss. Legal Servs. Corp., 610 So. 2d 374, 1992 Miss. LEXIS 751 (Miss. 1992), overruled, Rains v. Gardner, 731 So. 2d 1192, 1999 Miss. LEXIS 47 (Miss. 1999).

Trial court erred in entertaining defendant's summary judgment motion, made orally at hearing on summary judgment motions of co-parties, since defendant's motion was not filed at least ten days prior to hearing in compliance with subdivision (c) of this rule. Pope v. Schroeder, 512 So. 2d 905, 1987 Miss. LEXIS 2775 (Miss. 1987).

Trial court should not have heard summary judgment motion without full compliance with ten-day notice rule, but where ruling was withheld pending completion of discovery, violation of this rule's time requirement was harmless. Sherrod v. United States Fidelity & Guaranty Co., 518 So. 2d 640, 1987 Miss. LEXIS 2974 (Miss. 1987).

**Partial summary judgment.**

Order granting summary judgment was not a final appealable judgment under Miss. R. Civ. P. 54(b) because, by its terms, the trial court reserved ruling on other issues raised in the petition for damages and injunctive relief; at most, the order was a partial summary judgment under Miss. R. Civ. P. 56(d). Wiggins v. Perry, 989 So. 2d 419, 2008 Miss. App. LEXIS 433 (Miss. Ct. App. 2008).

Grant of partial summary judgment in favor of the individuals and against the corporation in an action involving prepaid legal services was proper where no valid, binding arbitration agreement existed in the prepaid legal expense agreement, Miss. Code Ann. § 83-49-1 et seq.; in essence, there was no clear showing that the parties had agreed to arbitration. Pre-Paid Legal Servs. v. Battle, 873 So. 2d 79, 2004 Miss. LEXIS 320 (Miss.), cert. denied, 543 U.S. 958, 125 S. Ct. 409, 160 L. Ed. 2d 321, 2004 U.S. LEXIS 7156 (U.S. 2004).

**Procedure.**

Parents' motion for a continuance for additional discovery was properly denied where they had several months to respond to the summary judgment motion and discovery requests, as well as months to schedule depositions and conduct discovery of their own. Bowers v. McIntire, 285 So. 3d 165, 2019 Miss. App. LEXIS 556 (Miss. Ct. App. 2019).

Summary judgment was properly granted in a medical malpractice suit, a patient's expert witness affidavit to support her claim was untimely filed nine days following the summary judgment hearing; discovery responses were to be supplemented seasonably pursuant to Miss. R. Civ. P. 26(f). Dotson v. Jackson, 8 So. 3d 230, 2008 Miss. App. LEXIS 656 (Miss. Ct. App. 2008), cert. denied, 12 So. 3d 531, 2009 Miss. LEXIS 212 (Miss. 2009).

In an action alleging defendants published slanderous statements against plaintiffs on a radio talk show program, the trial court's exclusion of the radio show transcript allowed the trial court to refine its review of a motion for summary judgment based only on the pleadings and dismiss the complaint pursuant to Miss. R. Civ. P. 12(b)(6). Chalk v. Bertholf, 980 So. 2d 290, 2007 Miss. App. LEXIS 468 (Miss. Ct. App. 2007).

In a medical malpractice suit where the court converted defendant's motions for dismissal into motions for summary judgment by considering matters outside the pleadings, plaintiff failed to take any action or move for a continuance to submit additional affidavits. Therefore, any objection plaintiff may have had to the way the court conducted the hearing on the motion for summary judgment was waived. Russell v. Williford, 907 So. 2d 362, 2004 Miss. App. LEXIS 1111 (Miss. Ct. App. 2004), cert. denied, 910 So. 2d 574, 2005 Miss. LEXIS 449 (Miss. 2005).

Summary judgment was properly granted in favor of the construction company and bank because the corporation failed to provide adequate notice containing information regarding the amount of payment claimed as required by Miss. Code Ann. § 31-5-51; to be sufficient, notice had to be given between the final work date and the expiration of the 90-day window, so that by failing to state an amount claimed, the corporation could not satisfy the statutory requirement that the written notice state with substantial accuracy the amount claimed, as required by Miss. Code Ann. § 31-5-51(3). Younge Mech., Inc. v. Max Foote Constr. Co., 869 So. 2d 1079, 2004 Miss. App. LEXIS 286 (Miss. Ct. App. 2004).

Denial of an oral hearing was not reversible error where there was no issue of material fact with regard to the requirement that a landowner connect to the sewer system and pay for the connection. Croke v. Southgate Sewer Dist., 857 So. 2d 774, 2003 Miss. LEXIS 557 (Miss. 2003).

Where a trial court granted summary judgment to a Mississippi attorney in proceedings by a Pennsylvania corporation to enroll in Mississippi a Pennsylvania judgment against the attorney, on appeal the appellate court reviewed the grant of summary judgment de novo. Global Oceanic Enters. v. Hynum, 857 So. 2d 659, 2003 Miss. LEXIS 362 (Miss. 2003).

The trial judge properly complied with Rule 12(b) and subsection (c) of this rule in treating a motion to dismiss filed by the defendants as a motion for summary judgment; the plaintiff and her counsel were made aware that the judge reviewed a videotape of the incident at issue and the judge postponed making his final ruling for over three months, granting ample time for the plaintiff to respond and gather additional discovery, notwithstanding that no specific decree regarding the conversion of the motion was made. Jones v. Jackson Pub. Sch., 760 So. 2d 730, 2000 Miss. LEXIS 121 (Miss. 2000).

This rule does not entitle a party to summary judgment by default where nonmoving party files no response; even in absence of a response, court may enter judgment only if appropriate, i.e., if no genuine issue of material fact exists. Hurst v. Southwest Miss. Legal Servs. Corp., 610 So. 2d 374, 1992 Miss. LEXIS 751 (Miss. 1992), overruled, Rains v. Gardner, 731 So. 2d 1192, 1999 Miss. LEXIS 47 (Miss. 1999).

Commencement of trial closes the season for granting motions for summary judgment; where trial has already begun, it is far preferable to allow plaintiff to present his case in chief and then, if plaintiff has failed to meet his burden of proof, direct a verdict in favor of defendant. Hurst v. Southwest Miss. Legal Servs. Corp., 610 So. 2d 374, 1992 Miss. LEXIS 751 (Miss. 1992), overruled, Rains v. Gardner, 731 So. 2d 1192, 1999 Miss. LEXIS 47 (Miss. 1999).

Trial court improperly granted summary judgment to defendant, where defendant had not filed a motion for or requested a hearing on summary judgment, and therefore plaintiff did not receive ten day notice as required by subdivision (c) of this rule. Palmer v. Biloxi Regional Medical Ctr., 649 So. 2d 179, 1994 Miss. LEXIS 546 (Miss. 1994).

Summary judgment for defendant in medical malpractice case was reversed, where parties' affidavits raised triable questions of fact which, but for imposition of improperly promulgated local rule governing summary judgment, would have resulted in jury trial. Koerner v. Crittenden, 635 So. 2d 833, 1994 Miss. LEXIS 184 (Miss. 1994).

This rule imposes no affirmative requirement on the nonmoving party to respond before the hearing on the motion for summary judgment. O'Cain v. Harvey Freeman & Sons, Inc., 603 So. 2d 824, 1991 Miss. LEXIS 975 (Miss. 1991).

Trial judge did not err in issuing protective order in favor or defendant, which stayed all discovery until disposition of question of defendant's immunity during summary judgment proceedings. McQueen v. Williams, 587 So. 2d 918, 1991 Miss. LEXIS 715 (Miss. 1991), overruled, Little v. Miss. DOT, 129 So. 3d 132, 2013 Miss. LEXIS 551 (Miss. 2013).

It was error to grant summary disposition based solely on plaintiff's failure to file a written response to defendant's motion for summary judgment. Allen v. Mayer, 587 So. 2d 255, 1991 Miss. LEXIS 673 (Miss. 1991).

Defendant/third party plaintiff was not entitled to reversal of summary judgment against him based on argument that his answer and third party complaint raised genuine issues of material fact; allegations in third party complaint were not sworn and thus were not eligible for consideration in opposition to summary judgment, and moreover they were not allegations to which plaintiff was required to respond, since they were defendant's complaint against the third party defendant, not plaintiff. Jones v. Ballard, 573 So. 2d 783, 1990 Miss. LEXIS 888 (Miss. 1990).

Chancellor had an obligation to consider untimely filed interrogatory answers, and had he done so he would have found a genuine issue of material fact.

Martin v. Simmons, 571 So. 2d 254, 1990 Miss. LEXIS 707 (Miss. 1990).

Dismissal under this rule can only be based on insufficiency of evidence, not on a party's violation of procedural rules governing discovery. Palmer v. Biloxi Regional Medical Ctr., 564 So. 2d 1346, 1990 Miss. LEXIS 239 (Miss. 1990).

Judge has as much power at summary judgment stage as he does at trial to resolve doubts as to qualifications of proffered experts. Palmer v. Biloxi Regional Medical Ctr., 564 So. 2d 1346, 1990 Miss. LEXIS 239 (Miss. 1990).

Circuit court did not abuse its discretion in disqualifying plaintiffs' expert witnesses, and absent expert testimony, record was devoid of significant, probative evidence from which a genuine issue of material fact could derive, and summary judgment for defendant was therefore proper. Palmer v. Biloxi Regional Medical Ctr., 564 So. 2d 1346, 1990 Miss. LEXIS 239 (Miss. 1990).

Trial court erred when, on its own motion, it refused to allow plaintiff an opportunity to cross-examine two admittedly hostile witnesses at summary judgment hearing, since this denied plaintiff a full and fair opportunity to oppose defendant's motion for summary judgment. Crain v. Cleveland Lodge 1532, Order of Moose, 560 So. 2d 142, 1990 Miss. LEXIS 29 (Miss. 1990).

The only unsworn matters available to a party opposing summary judgment are undenied allegations in his pleadings and admissions secured under M.R.C.P. Rule 36; to generate a genuine issue of material fact, any other documents, including but not limited to depositions, answers to interrogatories, or affidavits, must be sworn, be made upon personal knowledge, and show that party giving them is competent to testify. Magee v. Transcontinental Gas Pipe Line Corp., 551 So. 2d 182, 1989 Miss. LEXIS 365 (Miss. 1989).

Plaintiff should have been allowed time to file affidavits or other pertinent material in opposition to motion for summary judgment; since trial court considered "matters outside the pleadings" in ruling on defendant's motion for judgment on the pleadings, M.R.C.P. Rule 12(c) required that plaintiff be given an opportunity to present all pertinent material, and since plaintiff's request was timely made, it should have been allowed. Cunningham v. Lanier, 555 So. 2d 685, 1989 Miss. LEXIS 506 (Miss. 1989).

Fact that cross-motions for summary judgment have been filed does not, without more, empower court to dispense with trial and enter judgment summarily. Brown v. Credit Ctr., Inc., 444 So. 2d 358, 1983 Miss. LEXIS 3053 (Miss. 1983).

**Review.**

In a wrongful death action, the trial court erred, when considering defendant's summary judgment motion, in finding that plaintiff was not the decedent's common law wife because the trial court was not permitted to make such a factual determination at the summary judgment stage. Clark Sand Co. v. Kelly, 60 So. 3d 149, 2011 Miss. LEXIS 227 (Miss. 2011).

Appeal from the denial of a motion for summary judgment in a lease dispute was moot because a lessor did not file an interlocutory appeal under Miss. R. App. P. 5, and judgment was entered against him after a trial on the merits. Britton v. Am. Legion Post 58, 19 So. 3d 83, 2008 Miss. App. LEXIS 678 (Miss. Ct. App. 2008).

In a case alleging exposure to toxic mold and other substances, a higher standard of review was not required just because a motion for summary judgment was authored by defense counsel; the same de novo standard was required. Hosey v. Mediamolle, 963 So. 2d 1267, 2007 Miss. App. LEXIS 585 (Miss. Ct. App. 2007).

Apartment complex was properly granted summary judgment in the mother's wrongful death action for her son's shooting death because she failed to show that the apartment complex's failure to provide security proximately caused her son's death; the mother presented no evidence establishing that the shooter would have been prevented access to the apartment complex by security guards or a gated keypad entrance because there was undisputed evidence that the shooter and the son were seen socializing together peacefully prior to the shooting, and therefore it was reasonable to conclude that the shooter was on the premises as a guest. Davis v. Christian Bhd. Homes of Jackson, Miss., Inc., 957 So. 2d 390, 2007 Miss. App. LEXIS 310 (Miss. Ct. App. 2007).

When a trial court, after striking a responsive pleading, sua sponte entered a default judgment as to liability against a city under Miss. R. Civ. P. 55, which was akin to a summary judgment since the city was expressly foreclosed from presenting liability evidence at the trial of the case, the appellate court applied a de novo standard of review as to the trial court's entry of the default judgment as to liability against the city. City of Jackson v. Presley, 942 So. 2d 777, 2006 Miss. LEXIS 649 (Miss. 2006).

Grant of summary judgment against the decedent's husband and son was improper in part where a second landscaping company indicated, in its contract with the nursing home, that it was taking on express obligations concerning the duty to inspect and treat ant beds; the scope of its duty, the foreseeability of the event and the death in the presence of ants that had entered the building, as well as whether a breach of the landscaping company's duty caused the tragedy were proper questions for the trier of fact. Rein v. Benchmark Constr. Co., 865 So. 2d 1134, 2004 Miss. LEXIS 180 (Miss. 2004).

Because the summary judgment was not considered a final judgment, a board of education against which the judgment was entered was not procedurally barred from the appeal. Bd. of Educ. for the Holmes County Schs v. Fisher, 2003 Miss. App. LEXIS 823 (Miss. Ct. App. Sept. 9, 2003), op. withdrawn, sub. op., 874 So. 2d 1019, 2004 Miss. App. LEXIS 503 (Miss. Ct. App. 2004).

In an appeal from what was, in effect, a partial summary judgment, which resolved the ownership of the disputed life insurance policy as being owned by the decedent, the ultimate issue of who was the proper beneficiary, the decedent's former husband, or the decedent's child, was apparently reserved, there was no showing to justify a certification, and therefore, the appeal was an improper interlocutory appeal, and was dismissed. Evans v. Moore, 853 So. 2d 850, 2003 Miss. App. LEXIS 751 (Miss. Ct. App. 2003).

Standard of review in appeals where summary judgment has been granted is de novo; court reviews all evidence before lower court to determine if there were no genuine issues of material fact so that moving party was entitled to judgment as a matter of law. Mississippi Gaming Comm'n v. Treasured Arts, 699 So. 2d 936, 1997 Miss. LEXIS 383 (Miss. 1997).

When reviewing a decision to grant summary judgment, supreme court will conduct a de novo review, and evidentiary matters are viewed in a light most favorable to the non-moving party. Lamar Corp. v. State Highway Comm'n, 684 So. 2d 601, 1996 Miss. LEXIS 303 (Miss. 1996).

Due to extensive court filings, including interrogatory responses and other discovery tools, court considered that matters outside the pleadings had been presented and therefore action was reviewed as a summary judgment motion, despite plaintiff's assertions of error indicating that appeal was from a dismissal pursuant to M.R.C.P. 12(b)(6). Westbrook v. City of Jackson, 665 So. 2d 833, 1995 Miss. LEXIS 454 (Miss. 1995).

**Illustrative cases.**

Seller of a fall arrest system was properly granted summary judgment on the parents' product liability claim where Miss. Code Ann. § 11-1-63(h) did not require that the system come from a reputable manufacturer, and the parents' evidence about the seller's knowledge of the alleged defect was too speculative. Hinton v. Sportsman's Guide, Inc., 285 So. 3d 142, 2019 Miss. LEXIS 395 (Miss. 2019).

Circuit court did not err in granting a driver and his wife summary judgment on a negligence claim where the parents failed to prove that the driver and wife had any duty to control the conduct of the person who shot their son or had any knowledge to cause or anticipate that the person would shoot the son. Bowers v. McIntire, 285 So. 3d 165, 2019 Miss. App. LEXIS 556 (Miss. Ct. App. 2019).

Circuit court properly granted a county summary judgment on a negligence claim where the 16- to 18-foot open drainage channel into which the individual fell was an open and obvious danger, the sole proximate cause of the individual's injuries was his own negligence in walking directly into the channel at night without a flashlight. Campbell v. Harrison Cty. Bd. of Supervisors, 269 So. 3d 1269, 2018 Miss. App. LEXIS 574 (Miss. Ct. App. 2018), cert. denied, 268 So. 3d 1280, 2019 Miss. LEXIS 194 (Miss. 2019).

Decedent's estate failed to create a genuine issue of material fact as to an existing duty owed to the decedent and breached by the City where the residence where decedent fell and died as a result of his injuries was located within an historic district, as a result, Vicksburg, Miss., Code § 102.6 limited the applicability of the handrail requirement to the home, and thus, the estate failed to show that the City owed the decedent a duty as it related to the residence and failed to present an essential element of the prima facie claim for negligence. Horton v. City of Vicksburg, 268 So. 3d 504, 2018 Miss. LEXIS 238 (Miss. 2018).

Circuit court properly granted an insurance company and an investment company summary judgment on an investor's breach of contract and conversion claims where, although they provided the agent an office, business cards, and titles, none of those things provided a basis to assume that the agent had authority to bind the companies to the vague and highly unusual investment contracts the agent described, nor had the companies done anything to clothe the agent with apparent authority to accept cash or checks that were not made payable to either company. Morgan v. MML Inv'rs Servs., 226 So. 3d 590, 2017 Miss. App. LEXIS 504 (Miss. Ct. App. 2017).

Truck and trailer insurer was properly granted summary judgment on the boat insurer's claim for defense costs and expenses incurred after tendering defense where the truck and trailer had no duty to defend its insurer because the injured party never filed a lawsuit, and there was no evidence that the truck and trailer insurer refused to defend the claims. Cont'l Cas. Co. v. Allstate Prop. & Cas. Ins. Co., 235 So. 3d 40, 2017 Miss. LEXIS 340 (Miss. 2017).

Circuit court improperly granted a truck and trailer insurer summary judgment on an indemnity claim where the boat insurer's policy did not provide other collectible liability insurance, the truck and trailer policy's other provision clause was not triggered as a result, the boat insurer's excess provision thus controlled, making the truck and trailer insurer primary. Cont'l Cas. Co. v. Allstate Prop. & Cas. Ins. Co., 235 So. 3d 40, 2017 Miss. LEXIS 340 (Miss. 2017).

Race promoter was properly granted summary judgment on a driver's breach of contract and breach of the covenant of good faith and fair dealing claims where, consistent with the race's rules, the promoter took and tested tire samples after the driver won the race, taking the samples satisfied the rule's purpose of ensuring that no participant had an unfair advantage, and the driver's independent test results were not compared to the manufacturer's benchmark standard adopted in the race rules. Rasdon v. Thrash, 225 So. 3d 557, 2017 Miss. App. LEXIS 465 (Miss. Ct. App. 2017).

Circuit court properly granted the town and officials summary judgment on a former police chief's intentional infliction of emotional distress claim where the chief did not present any evidence of extreme and outrageous conduct required to demonstrate a prima facie claim of intentional infliction of emotional distress, but presented evidence of an ordinary employment dispute. Gray v. Town of Terry, 196 So. 3d 211, 2016 Miss. App. LEXIS 461 (Miss. Ct. App. 2016).

Circuit court properly granted the town and officials summary judgment on a former police chief's invasion of privacy claim where it was undisputed that the chief's resignation was a legitimate public concern, and the same was true regarding the fact that he would have been terminated if he had refused to resign. Gray v. Town of Terry, 196 So. 3d 211, 2016 Miss. App. LEXIS 461 (Miss. Ct. App. 2016).

Circuit court properly granted the town and officials summary judgment on a former police chief's defamation claim where it was undisputed that the chief resigned and executed the separation agreement to avoid being terminated, although the agreement provided the chief with seven days to opt out of it, he declined to do so, under these circumstances, it was reasonable to infer that the agreement's terms were mutual agreeable, and there was no evidence that the mayor's disclosure was malicious. Gray v. Town of Terry, 196 So. 3d 211, 2016 Miss. App. LEXIS 461 (Miss. Ct. App. 2016).

Circuit court properly granted the town and officials summary judgment on a former police chief's retaliatory discharge claim where the chief failed to provide any evidence that the mayor had asked him to take care of traffic tickets. Gray v. Town of Terry, 196 So. 3d 211, 2016 Miss. App. LEXIS 461 (Miss. Ct. App. 2016).

Although the agency agreement between the defendant agent and the plaintiff corporation contained termination provisions which, when read together, lacked clarity and were unharmonious, so as to create an ambiguity, even resolving the ambiguity to give the agent the most favorable interpretation did not end the inquiry. Interpreting the intent of the termination provisions required the examination of parol or extrinsic evidence, and therefore, the question of whether the corporation honored or breached the contract was a task for a jury, and thus the grant of summary judgment to the corporation was error. Dalton v. Cellular South, Inc., 20 So. 3d 1227, 2009 Miss. LEXIS 536 (Miss. 2009).

Church member's fraudulent concealment claim against her former pastor was properly dismissed on summary judgment because a fiduciary relationship did not exist between the member and the pastor where the member was not dependent upon the pastor and did not repose any trust or confidence in him. Mabus v. St. James Episcopal Church, 13 So. 3d 260, 2009 Miss. LEXIS 167 (Miss. 2009).

Mother's evidence that her two-year-old daughter was seriously injured by a blow to the face while attending a church preschool, along with medical testimony that the injury was not consistent with a fall, was sufficient to present a jury question as to whether the teacher, who did not see the incident, met the appropriate standard of care. Todd v. First Baptist Church, 993 So. 2d 827, 2008 Miss. LEXIS 546 (Miss. 2008).

Patient failed to make out a prima facie case of medical negligence, where a physician lacerated the patient's bladder during a laparoscopic hysterectomy, because the standard of care required that the physician anticipate possible bladder injury during the performance of a vaginal or abdominal hysterectomy; the physician filled the bladder with a blue solution to serve as a marger for inadvertent cystotomy. Dotson v. Jackson, 8 So. 3d 230, 2008 Miss. App. LEXIS 656 (Miss. Ct. App. 2008), cert. denied, 12 So. 3d 531, 2009 Miss. LEXIS 212 (Miss. 2009).

Trial court erred by denying a seller's motion for summary judgment in the parents' wrongful death action because their negligent entrustment claim was without merit, as once the purchase was completed, ownership and control of the motorcycle passed to the son and the accident occurred three days later; therefore, at the time of the accident, the son clearly owned, controlled, and was in possession of the motorcycle, with no right to control enjoyed by the seller. Laurel Yamaha, Inc. v. Freeman, 956 So. 2d 897, 2007 Miss. LEXIS 316 (Miss. 2007).

Trial court erred by denying a seller's motion for summary judgment in the parents' wrongful death action, as Mississippi law did not impose a duty on the seller, sufficient to support a negligence, claim, to restrict motor vehicle sales to licensed drivers or to determine the competence of drivers as part of the sale; the son was not required to have an "E" endorsement on his license to purchase the motorcycle, but only to drive the motorcycle on a highway. Laurel Yamaha, Inc. v. Freeman, 956 So. 2d 897, 2007 Miss. LEXIS 316 (Miss. 2007).

Doctor, who was employed by a university medical center which was operated under Miss. Code Ann. § 37-115-25, was entitled to summary judgment in a medical malpractice suit because he acted as a state employee, and not an independent contractor, when he treated the patient in question; the medical center had complete control over the doctor's income and had a financial interest in his earnings, and because he was a state employee he was immune from suit. Meeks v. Miller, 956 So. 2d 864, 2007 Miss. LEXIS 281 (Miss. 2007).

City was immune from liability under Miss. Code Ann. § 11-46-9(1)(c)for the decedent's death, and therefore it was properly granted summary judgment because the officer's conduct did not amount to reckless disregard for the safety of the traveling public; the officer notified his dispatcher of the condition of the highway and the dispatcher promptly notified the Mississippi Department of Transportation so that sand or salt could be applied to the ice patch. Willing v. Estate of Benz, 958 So. 2d 1240, 2007 Miss. App. LEXIS 191 (Miss. Ct. App.), cert. denied, 958 So. 2d 1232, 2007 Miss. LEXIS 340 (Miss. 2007).

City was immune from liability under Miss. Code Ann. § 11-46-9(1)(q) for the decedent's death, and therefore it was properly granted summary judgment because the ice was caused solely by the effect of weather, and the family did not point to any evidence that the city or the officer contributed to or were responsible for the formation of the ice patch. Willing v. Estate of Benz, 958 So. 2d 1240, 2007 Miss. App. LEXIS 191 (Miss. Ct. App.), cert. denied, 958 So. 2d 1232, 2007 Miss. LEXIS 340 (Miss. 2007).

Trial court erred by holding that the city was immune from liability under Miss. Code Ann. § 11-46-9(1)(d), and therefore it erred by granting the city summary judgment because the trial court failed to consider the second prong of the public policy test, which required that the choice involved social, economic, or political policy. Willing v. Estate of Benz, 958 So. 2d 1240, 2007 Miss. App. LEXIS 191 (Miss. Ct. App.), cert. denied, 958 So. 2d 1232, 2007 Miss. LEXIS 340 (Miss. 2007).

City was entitled to immunity under the police protection exemption under Miss. Code Ann. § 11-46-9(1)(c), and therefore the city's motion for summary judgment was properly granted in the party guest's personal injury action, because the officer's failure to remove the keys from and/or lock the doors of his patrol car did not show a reckless disregard for the safety of others, given that the party guest testified that there was a crowd of 15 or more angry teenagers who were wielding knives and throwing sticks, bricks, and other objects and who the party guest was convinced were intent on killing or seriously injuring him. Chapman v. City of Quitman, 954 So. 2d 468, 2007 Miss. App. LEXIS 176 (Miss. Ct. App. 2007).

City was entitled to immunity under the police protection exemption under Miss. Code Ann. § 11-46-9(1)(c), and therefore the city's motion for summary judgment was properly granted in the party guest's personal injury action, because the officer's failure to remove the keys from and/or lock the doors of his patrol car did not show a reckless disregard for the safety of others, given that the party guest testified that there was a crowd of 15 or more angry teenagers who were wielding knives and throwing sticks, bricks, and other objects and who the party guest was convinced were intent on killing or seriously injuring him. Chapman v. City of Quitman, 954 So. 2d 468, 2007 Miss. App. LEXIS 176 (Miss. Ct. App. 2007).

Trial court erred by granting the city summary judgment under the discretionary function exemption under Miss. Code Ann. § 11-46-9(1)(d) because the trial court applied only the first prong of the public policy function test rather than both prongs. Chapman v. City of Quitman, 954 So. 2d 468, 2007 Miss. App. LEXIS 176 (Miss. Ct. App. 2007).

Trial court improperly granted summary judgment, pursuant to Miss. R. Civ. P. 56, to a paint company with respect to a child's claims of injury resulting from ingestion of lead found in paint that the company manufactured because the child's claims were not barred by the three-year statute of limitations set forth in Miss. Code Ann. § 15-1-49, as the child was a minor when the claims accrued, and therefore the claims were subject to the savings statute, Miss. Code Ann. § 15-1-59; because the child's claims were improperly dismissed, he was denied his right to a jury trial as set forth in Miss. Const. Art. III, § 31, but the claims of the child's mother were properly dismissed as time-barred. Pollard v. Sherwin-Williams Co., 955 So. 2d 764, 2007 Miss. LEXIS 31 (Miss. 2007).

Trial court properly granted summary judgment to a county constable under Miss. R. Civ. P. 56 in a personal injury suit because the constable had immunity, under Miss. Code Ann. § 11-46-9(1)(c), for injuries to a father, which occurred when the constable's car collided with his four-wheeler, because there was significant evidence that the father was engaged in criminal activity that had a causal nexus to the accident; the father was driving on a suspended license and pled guilty to reckless driving, however summary judgment against the father's sons was improper because genuine issues of fact existed as to whether the sons were engaged in criminal activity, whether any criminal activity on the part of the sons had a causal nexus to the accident, and whether the constable acted with reckless disregard in his pursuit of appellants. Giles v. Brown, 962 So. 2d 612, 2006 Miss. App. LEXIS 930 (Miss. Ct. App. 2006), cert. denied, 962 So. 2d 38, 2007 Miss. LEXIS 477 (Miss. 2007).

Summary judgment was not appropriate on the employee's claim for negligent infliction of emotional distress against the employer, which was not governed by the one-year statute of limitations, because there was sufficient evidence to create a genuine issue of material fact as to whether the employer was liable for the supervisor's conduct where, inter alia: (1) the evidence indicated that when the employee would assert herself and tell the supervisor to leave her alone, she was denied certain privileges or given extra work; (2) the supervisor would call the employee into his office to train her on counseling her inferiors or on how to work, during which time he would harass her; and (3) the evidence was that the slot cards were placed in the supervisor's possession and that whenever the employee needed to get one, the supervisor would use the opportunity to grab her. Jones v. B.L. Dev. Corp., 940 So. 2d 961, 2006 Miss. App. LEXIS 792 (Miss. Ct. App. 2006).

Trial court properly granted summary judgment in favor of appellee company in a suit in which appellant company alleged that a mechanic for whom appellee was responsible negligently repaired an engine in one of appellant's trucks because the undisputed facts showed that appellee did not have the sufficient control over the repair company's operations to override independent contractors status. Kossuth Trucking, Inc. v. Caterpillar, Inc., 941 So. 2d 903, 2006 Miss. App. LEXIS 829 (Miss. Ct. App. 2006).

City was immune from liability under Miss. Code Ann. § 11-46-9(1)(c), and therefore it was properly granted summary judgment in the family's wrongful death action, because the officer's conduct did not amount to reckless disregard for the safety of the traveling public; the officer notified his dispatcher of the condition of the highway and the dispatcher promptly notified the Mississippi Department of Transportation so that sand or salt could be applied to the ice patch. Willing v. Benz, 2006 Miss. App. LEXIS 873 (Miss. Ct. App. Nov. 21, 2006), sub. op., op. withdrawn, 958 So. 2d 1240, 2007 Miss. App. LEXIS 191 (Miss. Ct. App. 2007).

City was immune from liability under Miss. Code Ann. § 11-46-9(1)(q), and therefore it was properly granted summary judgment in the family's wrongful death action, because the ice was caused solely by the effect of weather, and the family did not point to any evidence that the city or the officer contributed to or were responsible for the formation of the ice patch on the highway. Willing v. Benz, 2006 Miss. App. LEXIS 873 (Miss. Ct. App. Nov. 21, 2006), sub. op., op. withdrawn, 958 So. 2d 1240, 2007 Miss. App. LEXIS 191 (Miss. Ct. App. 2007).

In a wrongful death action filed by the parents of two passengers who were killed during a police pursuit of the driver of a stolen vehicle, a county and a city were properly granted summary judgment because neither were involved in the pursuit. McCoy v. City of Florence, 949 So. 2d 69, 2006 Miss. App. LEXIS 526 (Miss. Ct. App. 2006), cert. denied, 949 So. 2d 37, 2007 Miss. LEXIS 113 (Miss. 2007).

In a wrongful death action filed by the parents of two passengers who were killed during a police pursuit of the driver of a stolen vehicle, the trial court erred by granting the driver summary judgment because the record indicated that while he was personally served with a summons and complaint, he never filed an answer nor made an appearance, and did not file a motion for summary judgment. McCoy v. City of Florence, 949 So. 2d 69, 2006 Miss. App. LEXIS 526 (Miss. Ct. App. 2006), cert. denied, 949 So. 2d 37, 2007 Miss. LEXIS 113 (Miss. 2007).

In a wrongful death action filed by the parents of two passengers who were killed during a police pursuit of the driver of a stolen vehicle, a city was properly granted summary judgment because the court could not find that the officer recklessly disregarded the passengers' safety when considering the totality of the circumstances; evidence showed, inter alia, that: (1) the driver's flight from the police lasted for a matter of minutes over five miles; (2) the flight did not occur on a residential street or within a residential neighborhood; (3) there was little or no testimony regarding the characteristics of the streets on which the flight took place; (4) traffic was light; (5) the weather was sunny and clear; and (6) the driver was operating a stolen vehicle with a suspended license and the officer noticed him because of his excessive speed and reckless driving. McCoy v. City of Florence, 949 So. 2d 69, 2006 Miss. App. LEXIS 526 (Miss. Ct. App. 2006), cert. denied, 949 So. 2d 37, 2007 Miss. LEXIS 113 (Miss. 2007).

In a wrongful death action filed by the parents of two passengers who were killed during a police pursuit of the driver of a stolen vehicle, a city was properly granted summary judgment because the passengers were engaged in criminal activity, as there was no dispute that they knew that the car was stolen and that they encouraged the driver to flee from the police, in violation of Miss. Code Ann. § 97-35-7(2). McCoy v. City of Florence, 949 So. 2d 69, 2006 Miss. App. LEXIS 526 (Miss. Ct. App. 2006), cert. denied, 949 So. 2d 37, 2007 Miss. LEXIS 113 (Miss. 2007).

Circuit court properly granted summary judgment dismissing patient's medical malpractice suit against her doctors after her twins were stillborn; patient failed to identify a medical expert to substantiate her negligence claims. The trial judge did not abuse his discretion under Miss. R. Civ. P.56(f), by denying the patient's request for an additional thirty days to obtain a medical expert's affidavit. Stallworth v. Sanford, 921 So. 2d 340, 2006 Miss. LEXIS 91 (Miss. 2006).

Where the residuary clause of the decedent's will gave an undivided one-half interest of the remainder of his estate to his wife, and secondly, an undivided one-half interest, per stirpes, to his children (by an earlier marriage), and where the wife predeceased the husband by one week, the chancery court properly rejected the stepchildren's argument that either spouse intended for all six children (the decedent's children and the step children), to divide their estate equally, no matter which parent died first; because the writing was clear and spoke for itself, parol evidence was not admissible to alter the terms of the document, and the anti-lapse statute, Miss Code Ann. § 91-5-7, was clearly applicable, such that the failed devise to the wife passed to the decedent's natural children. Marlar v. Castillo-Ruiz (In re Will of Roland), 920 So. 2d 539, 2006 Miss. App. LEXIS 85 (Miss. Ct. App. 2006).

Letters did show that the father's attorney failed to serve notice of the subpoena immediately under Miss. R. Civ. P. 45, but the father's attorney's failure to follow correct procedure did not rise to the level of abuse of process. The trial court properly granted summary judgment in favor of the father and his attorney as to the abuse of process claim; moreover, the mother's argument that the father was required to hand deliver the notice to her attorney under Miss. R. Civ. P. 5(b) was without merit, as service was allowed by mail under the plain language of Miss. R. Civ. P. 5(b). Ayles v. Allen, 907 So. 2d 300, 2005 Miss. LEXIS 361 (Miss. 2005).

Clearly, more than 90 days after the first notice to creditors had elapsed when plaintiff (a surviving child), filed his claim against the estate, claiming he was entitled to all the insurance proceeds per the decedent's property settlement with a former wife. However, when the decedent died, plaintiff was a minor, and according to the terms of the decedent's will, the decedent's second and surviving spouse had been appointed testamentary guardian of plaintiff's person and estate; defendant was in a fiduciary relationship with plaintiff, and in that capacity, she not only had an obligation to initiate any and all claims which plaintiff may have had, but she had an obligation to initiate them timely, and therefore, the chancery court erred in granting defendant's Miss. R. Civ. P. 12(b) motion since a constructive trust was possibly at issue, but it did not err in denying plaintiff's motion for summary judgment. Thornhill v. Thornhill, 905 So. 2d 747, 2004 Miss. App. LEXIS 1083 (Miss. Ct. App. 2004).

Where a mother sued a local Girl Scouts council, and its troop leader, for negligence, due to injuries sustained when her child fell out of a bunk bed at scout camp, she presented no authority to substantiate her claim that the troop should not have been allowed to sleep on the beds without guard rails, or at least should have been made to sleep on the bottom bunks. Moreover, the trial court properly found that a bunk bed being used by a 13-year old without guard rails was not a dangerous instrumentality; thus, summary judgment for the troop leader and the council was proper. Buck v. Camp Wilkes, Inc., 906 So. 2d 778, 2004 Miss. App. LEXIS 1141 (Miss. Ct. App. 2004).

To survive a summary judgment in a slip-and-fall case, a plaintiff must show that the defendant creates an unreasonably dangerous condition, or he must show that the defendant has actual or constructive knowledge of a dangerous condition. Elston v. Circus Circus Miss., Inc., 908 So. 2d 771, 2005 Miss. App. LEXIS 127 (Miss. Ct. App.), cert. denied, 920 So. 2d 1008, 2005 Miss. LEXIS 519 (Miss. 2005).

Even though the procedures the casino used to maintain its lobby were adequate as to safety concerns, on the day of the accident, no one could testify as to the last time the casino's employees inspected the lobby, and no one disputed that the substance was water, the same substance that was used to wet the plants. The record showed that the plants were usually watered some time between 10 a.m. and 11 a.m. and the injured person's fall occurred between 1:45 p.m. and 2:45 p.m.; thus, on the evidence the injured person presented, a jury could have concluded that the casino was negligent, because it created a dangerous condition, and/or because it had constructive notice of the puddle of water upon which the injured person fell. Elston v. Circus Circus Miss., Inc., 908 So. 2d 771, 2005 Miss. App. LEXIS 127 (Miss. Ct. App.), cert. denied, 920 So. 2d 1008, 2005 Miss. LEXIS 519 (Miss. 2005).

Trial court did not err in granting summary judgment in favor of the homeowners association on their counterclaim to enforce liens against the owner's lots in a subdivision for failure to pay the homeowners association assessments because a landowner who willfully purchases property subject to the control of the association and derives benefits from membership in the association implies his consent to be charged assessments and dues common to all members. The assessments were covenants that ran with the land, which governed the remedy for failure to pay the dues, and they were not extinguished by the tax sale in which the owner purchased the lots. Alexander v. Wardlow, 910 So. 2d 1141, 2005 Miss. App. LEXIS 205 (Miss. Ct. App. 2005).

Miss. Code Ann. ch. II, tit. 37, and Miss. Code Ann. §§ 37-7-471 through 37-7-483, do not apply to sixteenth section lands. School districts do not hold title to sixteenth section lands, title resides in the State; where the record was insufficient as to whether the school district had title to a historical mansion on such land, which had been leased for decades to a foundation, and the record was also unclear as to whether there was adequate consideration for renewal of the lease, a remand was required for development of said issues, and summary judgment for the foundation, and against the State, was reversed. Clark v. Stephen D. Lee Found., 887 So. 2d 798, 2004 Miss. LEXIS 1413 (Miss. 2004).

Both company officers provided affidavits averring that the employee's employment was terminated because he failed to notify customers of insurance offered through the company in violation of company policy. The employee offered no proof to the contrary and since said officers were in privileged positions and the record contained absolutely no evidence of bad faith, the employee's claim of malicious interference with his employment contract was unfounded and summary judgment was properly granted for the employer. Hammons v. Fleetwood Homes of Miss., Inc., 907 So. 2d 357, 2004 Miss. App. LEXIS 1109 (Miss. Ct. App. 2004).

In an employment case, plaintiff who alleged he was fired for reporting defendants illegal acts failed to identify an illegality. In selling the mobile homes through promotional events. defendants' failure to credit customers for an original refrigerator, after customers opted for an upgrade, did not constitute an illegal act. As a result, there was no public policy exception to the employment at will doctrine, no issue was required for determination by a jury, and summary judgment as to plaintiff's wrongful discharge claim was properly granted. Hammons v. Fleetwood Homes of Miss., Inc., 907 So. 2d 357, 2004 Miss. App. LEXIS 1109 (Miss. Ct. App. 2004).

There was no indication that the decedent (an adult), was visibly intoxicated, as indicated in Miss. Code Ann. §§ 67-1-83(1), 67-3-53, and 67-3-73. The transcripts of the casino's security cameras evidenced that while she drank and gambled, she was ambulatory and conversational and there was nothing in the record to raise a question of fact as to the possibility that she was a habitual drunkard, or known to be insane or mentally defective, as indicated in Miss. Code Ann. §§ 67-1-83(1) and 67-3-53(b); accordingly, summary judgment for the casino was proper. Estate of White v. Rainbow Casino-Vicksburg P'ship, 910 So. 2d 713, 2005 Miss. App. LEXIS 192 (Miss. Ct. App. 2005).

Appellate court's reasoning in affirming summary judgment for the physician stemmed not from the fact that the patient failed to file his expert's designation one week late. The appellate court affirmed because the patient failed to respond to the physician's motion with an affidavit, submitted by an expert, that established the standard of acceptable professional practice, that the physician deviated from that standard, that such deviation was the proximate cause of the patient's injuries, and that the patient suffered damages as a result; the letter submitted by the patient's expert, even if had been in proper affidavit form, was merely a broad statement of general allegations and did not announce the applicable standard of care. Potter v. Hopper, 907 So. 2d 376, 2005 Miss. App. LEXIS 32 (Miss. Ct. App.), cert. dismissed, 910 So. 2d 574, 2005 Miss. LEXIS 455 (Miss. 2005).

Manager clearly believed that while the customer's partner pilfered sausages by placing them in her purse, that the customer acted as a decoy to distract watchful employees, and when the manager then requested that the customer and his partner accompany him to resolve the issue, the customer became belligerent, escorted his partner to his car, and drove away. Viewing the evidence in a light most favorable to the customer, the non-movant, it was clear that a fair-minded jury could not have concluded that the grocery store and its manager pursued criminal proceedings without probable cause or that the grocery store and its manager acted with malice; thus, summary judgment for the grocery store and its manager upon the customer's suit for malicious prosecution was proper. Williams v. Jitney Jungle, Inc., 910 So. 2d 39, 2005 Miss. App. LEXIS 53 (Miss. Ct. App. 2005).

Second member's buy-sell offer to a minority member was proper and valid as the second member (not a party on appeal), complied with the requirements of the limited liability company (LLC), operating agreement provision which governed buy-sell offers; therefore summary judgment was improperly granted to the minority member in litigation between said minority member and a third LLC member. KBL Props., LLC v. Bellin, 900 So. 2d 1160, 2005 Miss. LEXIS 211 (Miss. 2005).

Defendant correctly argued that under Miss. R. App. P. 10(f), the transcript pages attached to plaintiffs' brief were not part of the record in the chancery court, and therefore not considered by the chancellor when ruling on the summary judgment motions, and should not have been considered by the reviewing court. Consequently, the reviewing court granted defendant's motion to strike. KBL Props., LLC v. Bellin, 900 So. 2d 1160, 2005 Miss. LEXIS 211 (Miss. 2005).

Even if the language in the contract had been convincing enough to create a private entity and the county hospital had been deemed private, the injured person's claim remained one of premises liability. The agreement did not alter the fact that the county remained the owner of the physical property that comprised the hospital, and that includes the sidewalk outside the hospital where the injure person tripped and fell; thus, the trial court did not err in granting summary judgment in favor of the county hospital due to the injured person's claim being filed outside the one-year statute of limitations under Miss. Code Ann. Section 11-46-11(3). Allstadt v. Baptist Mem'l Hosp., 893 So. 2d 1083, 2005 Miss. App. LEXIS 133 (Miss. Ct. App. 2005).

Where defendant waited for twenty-seven years before suing doctors who negligently operated on his leg causing a misalignment of his femur, the doctors filed motions to dismiss the suit as barred by the statute of limitations. The circuit court considered some material outside of the pleadings, transformed the doctors' motions into a motion for summary judgment, and properly granted the motions. Russell v. Williford, 907 So. 2d 362, 2004 Miss. App. LEXIS 1111 (Miss. Ct. App. 2004), cert. denied, 910 So. 2d 574, 2005 Miss. LEXIS 449 (Miss. 2005).

In a medical malpractice case, the patient's late knowledge of the "specifics" of his injuries, based on information provided by a subsequent examining doctor, was insufficient to toll running of the two-year statute of limitation, where the record showed he had been well aware of pain, swelling, and numbness at the site of the surgery, and had failed to engage in due diligence to discover the causative relationship between injury and the operating physician's conduct. Thus, summary judgment for the physician was proper. Simpson v. Lovelace, 892 So. 2d 284, 2004 Miss. App. LEXIS 1007 (Miss. Ct. App. 2004).

Suspect in murder gave a videotaped statement indicating that the couple were present during the victim's murder, robbery having been the motive, and based on that information, the sheriff obtained an arrest warrant for the couple. When the aforementioned suspect recanted his allegation, and sheriff realized there was no longer probable cause to hold the couple, sovereign immunity applied in the couple's suit against the sheriff and the county for false arrest and malicious prosecution, under Miss. Code Ann. § 11-46-9(1)(c), and summary judgment for the sheriff and county was proper. Keen v. Simpson County, 904 So. 2d 1157, 2004 Miss. App. LEXIS 1039 (Miss. Ct. App. 2004).

Grant of summary judgment in favor of the trustee was proper where there was no conflict of interest with the transfer of stock. There was also no evidence that the trustee received any "reward" by transferring shares to any particular person; to the contrary, it appeared that the trustee did exactly what his mother wished him to do. Herring v. Herring, 891 So. 2d 143, 2004 Miss. LEXIS 1352 (Miss. 2004).

Once the lounge patron entered onto the roof terrace, he went "beyond the bounds of his invitation," and therefore lost his invitee status. He also lacked permission to enter the roof terrace and did not enjoy the status of a licensee; his status at the time of the incident was that of a trespasser, and therefore, the premises owner had no duty to keep the roof in a safe condition and the trial court correctly granted summary judgment dismissing the patron's claims. Leffler v. Sharp, 891 So. 2d 152, 2004 Miss. LEXIS 1353 (Miss. 2004).

In a family's suit following a car accident, summary judgment in favor of the department of transportation, the county, and the engineer was proper as the family failed to produce sufficient evidence to establish that the last inspection by the department was negligently performed, or that the county or the engineer had negligently inspected and maintained the culvert. Jenkins v. Miss. DOT, 904 So. 2d 1207, 2004 Miss. App. LEXIS 1050 (Miss. Ct. App. 2004).

Trial court properly granted summary judgment in lienholders' favor setting aside the tax conveyance to the property buyer as there was no evidence that the debt owed to the lienholders had been satisfied, and the evidence showed that the city had failed to give the lienholders sufficient notice as required by Miss. Code Ann. §§ 27-43-4, -5. Curtis v. Carter, 906 So. 2d 5, 2004 Miss. App. LEXIS 923 (Miss. Ct. App. 2004), aff'd in part and rev'd in part, 906 So. 2d 758, 2005 Miss. LEXIS 392 (Miss. 2005).

Grant of summary judgment against the insured, a school district, was proper where the insured's failure to comply with the Fair Labor Standards Act was neither a "wrongful act" or "wrongful employment act" within their legal liability policy. Noxubee County Sch. Dist. v. United Nat'l Ins. Co., 883 So. 2d 1159, 2004 Miss. LEXIS 1202 (Miss. 2004).

Court erred in awarding summary judgment to an employer, pursuant to Miss. R. Civ. P. 56(c), in an employee's action for negligence per se, because the employee asserted a claim of negligence per se that had outstanding questions of proximate causation; issue was inappropriate for summary judgment. Simpson v. Boyd, 880 So. 2d 1047, 2004 Miss. LEXIS 1095 (Miss. 2004).

Trial court did not err in granting a plumber a partial summary judgment as the plumber had been named as an interpleader defendant, it was not required to have sought statutory remedies for the outstanding balance on its contract under Miss. Code Ann. § 85-7-181, and the evidence was not disputed regarding the amounts to which the plumber was entitled. Noble House, Inc. v. W & W Plumbing & Heating, Inc., 881 So. 2d 377, 2004 Miss. App. LEXIS 880 (Miss. Ct. App. 2004).

Summary judgment in favor of business owners was affirmed; the business owners were not required to have removed snow from an area of the parking lot where an individual slipped and broke her leg as the area was not immediately adjacent to an exit or entrance to the business, and the icy conditions were ones that the individual could have expected to find in the parking lot. Lawrence v. Wright, 910 So. 2d 8, 2004 Miss. App. LEXIS 848 (Miss. Ct. App. 2004), cert. denied, 926 So. 2d 922, 2006 Miss. LEXIS 81 (Miss. 2006).

Trial court properly granted summary judgment in favor of county hospital where an individual did not file suit against the hospital until more than two years after tripping on its sidewalk; the hospital was still a community hospital under Miss. Code Ann. § 41-13110(c) even though it had contracted with a private management company to run the hospital. Allstadt v. Baptist Mem. Hosp., 2004 Miss. App. LEXIS 847 (Miss. Ct. App. Aug. 24, 2004), op. withdrawn, sub. op., 893 So. 2d 1083, 2005 Miss. App. LEXIS 133 (Miss. Ct. App. 2005).

Summary judgment was properly granted in favor of a bank in a negligence action brought by several investors because the bank did not have actual knowledge of a fraud being perpetrated after funds were wired from a trust account. Holifield v. BancorpSouth, Inc., 891 So. 2d 241, 2004 Miss. App. LEXIS 767 (Miss. Ct. App. 2004).

Trial court did not err in granting the insurance company's motion for summary judgment finding no coverage because the injured party was not a "resident" of her father's household and thus was not covered under his insurance policy since (1) although the injured party's father paid some of her bills, the injured party did not intend to live with her father and she maintained a separate household; (2) the injured party lived in a separate structure, approximately 100 yards away from her father, with a separate address, mailbox, utilities, and cable; (3) the injured party's house had all the necessities such as a stove, refrigerator, microwave, food, clothing, and toys; and (4) while the injured party went to her father's home daily and ate some meals and occasionally slept at his house, she nevertheless cooked meals in her house three to four days a week. Mercer v. Progressive Gulf Ins. Co., 885 So. 2d 61, 2004 Miss. LEXIS 971 (Miss. 2004).

Company, which was leasing the property that was taken by the Mississippi Transportation Commission, was not entitled to any of the condemnation award of the lessor because it had no leasehold interest as its leases had terminated. Thus, the special court properly granted the Commission's motion for partial summary judgment finding that (1) the company was only entitled to compensation for the value of the billboards on the property that was taken and (2) compensation could only be calculated using the cost analysis, which would provide the company with the new cost of its signs, less depreciation. Eller Media Co. v. Miss.

Transp. Comm'n, 882 So. 2d 198, 2004 Miss. LEXIS 973 (Miss. 2004).

In an eminent domain case, the special court properly granted the Mississippi Transportation Commission's motion for summary judgment awarding the company, which was leasing the property that was taken and on which it had placed three billboard signs, $ 57,700 for each billboard sign because the parties had entered into and filed a stipulation that the cost new, less depreciation, for each billboard on the property was $ 57,700. Eller Media Co. v. Miss. Transp. Comm'n, 882 So. 2d 198, 2004 Miss. LEXIS 973 (Miss. 2004).

Trial court erred in denying a summary judgment motion filed by a casino and its employee against the malicious prosecution claim filed by certain individuals. The individuals' first claim against the casino was dismissed for want of prosecution, and the savings clause in Miss. Code Ann. § 15-1-69 did not prevent the second claim, which was based on the same facts, from being barred by the statute of limitation in Miss. Code Ann. § 15-1-35. Jackpot Miss. Riverboat, Inc. v. Smith, 874 So. 2d 959, 2004 Miss. LEXIS 641 (Miss. 2004), overruled in part, Knight v. Knight, 85 So. 3d 832, 2012 Miss. LEXIS 24 (Miss. 2012).

Where teacher sued the school board over nonrenewal of an earlier contract without the required notice, the issue was whether the new contract was sufficiently different from the teacher's previous contract to constitute a nonrenewal. Fact issues as to the relative status of the two positions and whether the difference in pay was solely the result of the different number of days legitimately required remained unresolved; the ultimate consideration in determining whether there was a demotion centered not just on pay, but on responsibility, or other relevant factors, such as whether one of the positions was a lesser one, so that, because fact questions remained relating to whether the teacher had sustained a true demotion without the required statutory notice, summary judgment for the school board was improper. Bd. of Educ. v. Fisher, 874 So. 2d 1019, 2004 Miss. App. LEXIS 503 (Miss. Ct. App. 2004).

In the insureds action against the Mississippi Windstorm Underwriting Association (MWUA), in order to have effectively renewed the insurance policy, the insureds were obligated to pay the premium by the specified due date set forth in the policy. When the insureds failed to do so, the policy, by its express terms, expired and upon the expiration of the policy, the contract for insurance terminated, and the policy ceased to exist; thus, summary judgment for the MWUA was proper. Luedke v. Audubon Ins. Co., 874 So. 2d 1029, 2004 Miss. App. LEXIS 540 (Miss. Ct. App. 2004).

Where a 16-year-old driver got in an accident that killed a person after a notary had notarized the driver's father's forged signature on the driver's license application, the trial court erred in dismissing the beneficiaries' claim against the notary, as a question of fact existed as to whether the notary's act was a proximate cause of the accident. Gulledge v. Shaw, 880 So. 2d 288, 2004 Miss. LEXIS 777 (Miss. 2004).

Record established there was no genuine issue as to any material fact that would have precluded summary judgment in favor of the contractor on the ground of promissory estoppel where, in the plumbing contractor's answer, the plumbing contractor admitted to providing a verbal quote to the contractor in the amount of $ 92,000 for plumbing work on the building, and in the plumbing contractor's deposition, the plumbing contractor testified to having reviewed the plans for the building and to being satisfied with the price; the plumbing contractor also testified that the plumbing contractor intended that the contractor would rely on the quote. Hinson v. N&W Constr. Co., 890 So. 2d 65, 2004 Miss. App. LEXIS 620 (Miss. Ct. App. 2004).

Former Miss. Code Ann. § 63-1-21) did not impute the negligence of a permittee (under a learner's permit) to the licensed driver who was occupying the seat beside the permittee. Thus, in an action against the grandfather on grounds of negligent entrustment and supervision where the grandfather was allowing the grandson to drive, summary judgment for the grandfather was proper. Warren v. Glascoe, 880

So. 2d 1034, 2004 Miss. LEXIS 784 (Miss. 2004).

Where a passenger was injured, the passenger did not demonstrate that the insured driver was an underinsured motorist under the standard set forth by the Mississippi Supreme Court, which required a comparison of the tortfeasor's liability coverage and the personal coverage carried by, or available to the injured party, nor did the passenger demonstrated good reason to abandon that standard; thus, summary judgment for the insurer on the passenger's claim for underinsured motorist benefits was proper. Byrd v. Hutchinson, 876 So. 2d 1092, 2004 Miss. App. LEXIS 612 (Miss. Ct. App. 2004).

Structural damage to the insured's home had directly correlated with the unpredictable shrinking and swelling movements of clay; therefore, the exclusion in the homeowners' insurance policy for damages caused by "earth movements" applied. The trial court properly granted summary judgment in favor of the insurance company in the insured's action for breach of contract. Boteler v. State Farm Cas. Ins. Co., 876 So. 2d 1067, 2004 Miss. App. LEXIS 619 (Miss. Ct. App. 2004).

Where the victim was shot by her estranged husband after an arrest warrant was issued, but never delivered to the sheriff's department, there was ample probable cause to arrest through Miss. Code Ann. § 99-3-7(3), based upon Miss. Code Ann. § 97-35-15. However, reckless disregard required that the person knowingly or intentionally commit a wrongful act and even viewing the facts in a light most favorable to the victim, the victim showed no evidence that the sheriff's department knew that it could and/or was required to arrest the victim's estranged husband; the sheriff's department's conduct, even if negligent, could not be said to have risen to the level of reckless disregard, and therefore, Miss. Code Ann. § 11-46-9(c) did provide immunity based upon the sheriff's department's conduct, and summary judgment was proper as to the sheriff's department. Collins v. Tallahatchie County, 876 So. 2d 284, 2004 Miss. LEXIS 798 (Miss. 2004).

In the homeowner's action for damages related to an attempted foreclosure, summary judgment was improper, and a remand was required where the homeowner would bear the burden of proving that the note had in fact been paid in full, or if the note had not been paid in full, that he was not in default at the time foreclosure proceedings were initiated. The mere fact that the deed of trust had been "assigned" to the bank by the homeseller (the assignment was given as collateral security for the homeseller's loan) when the attempted cancellation (by the homeseller) occurred, did not preclude a finding that the indebtedness had in fact been paid in full; although the cancellation was certainly evidence that the indebtedness had been paid in full, that determination had to be made by a jury. McKinley v. Lamar Bank, 918 So. 2d 689, 2004 Miss. App. LEXIS 709 (Miss. Ct. App. 2004), rev'd, 2005 Miss. LEXIS 611 (Miss. Sept. 22, 2005).

Where the decedent's employer agreed under the subcontract with the contractor to provide workers' compensation coverage to the employees, and the employer did so, the contractor was entitled to summary judgment pursuant to Miss. R. Civ. P. 56 in the decedent's heirs' wrongful death action; construing Miss. Code Ann. § 71-3-7, relating to a contractor's obligation to provide workers' compensation coverage, and Miss. Code Ann. § 71-3-9, the workers' compensation exclusivity provision, together, it was determined that where the employer provided compensation coverage to its employees pursuant to the contract with the contractor, the contractor qualified as a statutory employer and was immune from tort liability claims by the heirs. Thornton v. W. E. Blain & Sons, Inc., 878 So. 2d 1082, 2004 Miss. App. LEXIS 715 (Miss. Ct. App. 2004).

Trial court properly granted a father summary judgment under Miss. R. Civ. P. 56 in the father's action seeking to terminate his child support obligation on the ground that the children had attained the age of majority; where, absent an agreement to the contrary, the father was not required to provide child support under Miss. Code Ann. §§ 93-5-23 and 93-11-65 after the children reached age 21, the father's obligation had ceased, as the children were at least 21, and there was no written agreement providing for post-emancipation child support payments. Little v. Little, 878 So. 2d 1086, 2004 Miss. App. LEXIS 713 (Miss. Ct. App. 2004).

Trial court properly granted summary judgment for plaintiff insurance company where the documentary evidence, when coupled with the insured's averments at deposition, overwhelmingly proved that the insured made material misrepresentations to the insurance company and the insurance company was entitled to rescission of the contract. Bullock v. Life Ins. Co., 872 So. 2d 658, 2004 Miss. LEXIS 465 (Miss. 2004).

Grant of summary judgment in favor of employee's employer was proper where the employer university was entitled to qualified immunity because the employee's termination was reasonable; employee also failed, under 42 U.S.C.S. §§ 1983, 1985 and 1986, to offer any evidence pointing to a conspiracy or agreement between the employer and others to cause employee to lose her job. Harris v. Miss. Valley State Univ., 873 So. 2d 970, 2004 Miss. LEXIS 492 (Miss. 2004).

"Time and materials" contract between a power company and an industrial coating company was based on a pay schedule with the power company having final control over the work, and the power company exercised its control and paid for all work completed by the industrial coating company; because of the latter facts, and because the written contract was clear and unambiguous, the industrial coating company's argument that it was given verbal assurances that it could take the entire project to completion was without merit, and summary judgment for the power company was proper. Dixie South Indus. Coating, Inc. v. Miss. Power Co., 872 So. 2d 769, 2004 Miss. App. LEXIS 437 (Miss. Ct. App. 2004).

Homeowner's claim that a public utility was negligent in reconnecting natural gas to her home, causing a fire, was properly dismissed on summary judgment because the utility lacked actual knowledge of a hazardous condition when service was reconnected, and its duty to the homeowner thus "terminated at the meter." . Hopkins v. Miss. Valley Gas Co., 866 So. 2d 514, 2003 Miss. App. LEXIS 1263 (Miss. Ct. App. 2003).

Plaintiff's negligent hiring and retention claim against his former employer was properly dismissed on summary judgment because he never made a formal complaint regarding alleged discriminatory comments by a co-worker until after he was terminated, and he had no evidence of incompetence on the part of another co-worker. Raiola v. Chevron U.S.A., Inc., 872 So. 2d 79, 2004 Miss. App. LEXIS 127 (Miss. Ct. App. 2004).

Mississippi Employment Security Commission (MESC) found that plaintiff was terminated for misconduct and denied him unemployment benefits; as plaintiff failed to appeal the MESC's ruling, he was precluded by collateral estoppel from arguing in a civil action that the employer's termination decision was illegal, and his claims were properly dismissed on summary judgment. Raiola v. Chevron U.S.A., Inc., 872 So. 2d 79, 2004 Miss. App. LEXIS 127 (Miss. Ct. App. 2004).

Former employee's defamation claims against his former co-workers were properly dismissed on summary judgment as (1) statements that the employee was a "thief" had been determined to be true in a hearing before the Mississippi Employment Security Commission (MESC); (2) the employer enjoyed a qualified privilege as to statements made against the employee that affects the latter's employment; (3) a co-worker enjoyed an absolute privilege for her statement, made during the MESC hearing. Raiola v. Chevron U.S.A., Inc., 872 So. 2d 79, 2004 Miss. App. LEXIS 127 (Miss. Ct. App. 2004).

That a co-worker made inappropriate remarks about defendant's Italian heritage; that he was terminated for reasons he did not think were adequate; and that co-workers called him a thief were insufficient to support his claim of intentional infliction of emotional distress, and it was properly dismissed on summary judgment, as he had been determined by the Mississippi Employment Security Commission to have been properly fired for receiving pay for time not worked, and none of the conduct rose to the level of "extreme and outrageous." Raiola v. Chevron U.S.A., Inc., 872 So. 2d 79, 2004 Miss. App. LEXIS 127 (Miss. Ct. App. 2004).

Plaintiff's breach of contract claim was properly dismissed on summary judgment as he presented no evidence of an employment contract, and his former employer's written policy stated that it could terminate employees without cause or notice at any time. Raiola v. Chevron U.S.A., Inc., 872 So. 2d 79, 2004 Miss. App. LEXIS 127 (Miss. Ct. App. 2004).

Plaintiff's tortious interference with employment contract claims against two former co-workers were properly dismissed on summary judgment as (1) one co-worker was responsible for employees for termination, and plaintiff showed no evidence of bad faith regarding his decision; (2) the other co-worker was acting within his authority when he investigated plaintiff's time reports, and any of his alleged comments were unrelated to plaintiff's termination. Raiola v. Chevron U.S.A., Inc., 872 So. 2d 79, 2004 Miss. App. LEXIS 127 (Miss. Ct. App. 2004).

Plaintiff's product's liability suit against a paintball gun manufacturer was properly dismissed on summary judgment, as plaintiff (1) did not prove that the paintball gun that allegedly injured him failed to function as expected; (2) offered no feasible design alternative that would have prevented the alleged injury; (2) knew that protective eyewear was available but chose not to buy any; and (3) was an active participant in shooting paintballs at other vehicles when he allegedly was injured. Clark v. Brass Eagle, Inc., 866 So. 2d 456, 2004 Miss. LEXIS 219 (Miss. 2004).

Summary judgment was properly granted in favor of the speedway owner in the patron's negligence action where the bare statements regarding the guardrail in the patron's complaint and response to the owner's motion for summary judgment were insufficient, standing alone, to insulate the owner from a summary judgment; the owner made the premises reasonably safe and even if he had a duty to warn the patron, the document the patron executed gave sufficient warnings of the possible dangers presented by the race, and the patron was charged with knowledge of those warnings. Massey v. Tingle, 867 So. 2d 235, 2004 Miss. LEXIS 241 (Miss. 2004).

Contractor's breach of contract suit against the State for terminating its contract due to the contractor's failure to complete a roof was properly dismissed on summary judgment as the contractor failed to show that completion of the roof was commercially impossible due to defective plans and specifications. Evan Johnson & Sons Constr., Inc. v. State, 877 So. 2d 360, 2004 Miss. LEXIS 243 (Miss. 2004).

As the summary judgment evidence showed a contractor had no defense to the State's termination of its contract for nonperformance, and as the contract provided for a per-day amount of liquidated damages due to delay, and the contractor did not rebut the State's evidence, the State was properly granted summary judgment as to liquidated damages owed by the contractor. Evan Johnson & Sons Constr., Inc. v. State, 877 So. 2d 360, 2004 Miss. LEXIS 243 (Miss. 2004).

Grant of summary judgment in favor of the company in a wrongful death action was proper where products liability law limited itself to imposing liability on entities engaged in the actual production or sale of goods, Miss. Code Ann. § 11-1-63(a); further, the beneficiaries abandoned their motion for leave to amend because they permitted over three and on-half months to pass without making any effort to pursue a ruling on the motion in face of knowledge that the trial court had taken the summary judgment motion filed against them under advisement, Miss. Unif. Cir. & County Ct. Prac. R. 4.03(1), 2.04. Harrison v. B.F. Goodrich Co., 881 So. 2d 288, 2004 Miss. App. LEXIS 173 (Miss. Ct. App.), cert. denied, 882 So. 2d 772, 2004 Miss. LEXIS 1111 (Miss. 2004).

Summary judgment was properly granted to tobacco companies on an asbestos company's claims in which the asbestos company sought to recover for settlements paid to asbestos claimants who were also smokers, because no direct injury was asserted; hence, the asbestos company could not show proximate cause under any of the legal theories of recovery asserted. Owens Corning v. R.J. Reynolds Tobacco Co., 868 So. 2d 331, 2004 Miss. LEXIS 270 (Miss. 2004).

Summary judgment was properly granted to tobacco companies on an asbestos company's claim for recovery of settlements paid to asbestos claimants who were also smokers under the antitrust law, Miss. Code Ann. § 75-21-9, because the asbestos company failed to allege an injury of the type the antitrust law was intended to redress. Owens Corning v. R.J. Reynolds Tobacco Co., 868 So. 2d 331, 2004 Miss. LEXIS 270 (Miss. 2004).

Mississippi Product Liability Act, Miss. Code Ann. § 11-1-63, precludes all tobacco cases against tobacco companies based on products liability; hence, summary judgment was properly granted to tobacco companies on an asbestos company's claim that smoking by asbestos claimants caused the damage to the asbestos claimants would have failed. Owens Corning v. R.J. Reynolds Tobacco Co., 868 So. 2d 331, 2004 Miss. LEXIS 270 (Miss. 2004).

In a declaratory judgment action filed by an insurer, as the policy unambiguously required that the premium payment had to be in the insurer's possession by a certain date, and it was undisputed that the insurer never received the payment (though appellant claimed it was sent), the trial court properly granted the insurer summary judgment and found there was no coverage. Lynch v. Miss. Farm Bureau Cas. Ins. Co., 880 So. 2d 1065, 2004 Miss. App. LEXIS 254 (Miss. Ct. App. 2004).

In a declaratory judgment action filed by an insurer alleging that there was no coverage because the insurer had not received a premium payment, appellants' estoppel defense, based on the insurer's alleged failure to send a termination notice, failed, and the insurer was properly granted summary judgment; appellant could not have relied on the insurer's previous notice of termination letters because her husband, who made the payments, testified that he was never late with a premium payment. Lynch v. Miss. Farm Bureau Cas. Ins. Co., 880 So. 2d 1065, 2004 Miss. App. LEXIS 254 (Miss. Ct. App. 2004).

Where an individual commissioner of a utility district filed motions for injunctive and declaratory relief, seeking to enjoin the enforcement of the chancery court's order approving the city's annexation of a utility district, summary judgment for the city based on res judicata was proper as the extensive record made by a separate chancellor in a prior proceeding showed the annexation was lawful, and the trial court was entitled to take judicial notice of those prior proceedings. Peden v. City of Gautier, 870 So. 2d 1185, 2004 Miss. LEXIS 318 (Miss. 2004).

Where the injured person collided with a front-end loader that was borrowed by a neighbor from a nearby business to pull a vehicle out of the ditch, the injured person's contentions could not, as a matter of law, support the proposition that the neighbor's unilateral act of removing the equipment without any effort to contact a company representative and without any evidence that same was a customary or accepted practice acquiesced to by the company, could have arguably been considered to be permissive; thus, summary judgment for the company and its president on the injured person's negligence claim was proper. Harrington v. L & B Wood, Inc., 883 So. 2d 591, 2004 Miss. App. LEXIS 368 (Miss. Ct. App.), cert. denied, 883 So. 2d 1180, 2004 Miss. LEXIS 1250 (Miss. 2004).

Injured person's letter of notice was not sent to the county, but rather to an attorney. In addition, the letter: (1) was not sent by registered mail or certified mail, nor was it delivered in person; (2) did not contain a short and plain statement of the facts with regard to circumstance of injury; (3) did not give the extent of injuries; (4) did not give the name of all persons involved; (5) did not list the damages sought; and (6) did not give the residence of the claimant. Because there was a bare attempt at "minimal compliance," and certainly not "substantial compliance," summary judgment for the county was proper. Fairley v. George County, 871 So. 2d 713, 2004 Miss. LEXIS 415 (Miss. 2004).

Where parents' child was severely and permanently injured after wandering onto a road adjacent to their home, and the father sued the mother for negligence, seeking coverage under a household liability policy, the appellate court, noting general policy concerns, declined to extend the holding of Glaskox By and Through Denton v. Glaskox, to allow a minor child to sue a parent for negligence not involving the operation of a motor vehicle, and summary judgment for the insurer was upheld. Pack v. Nationwide Mut. Fire Ins. Co., 878 So. 2d 177, 2004 Miss. App. LEXIS 117 (Miss. Ct. App.), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 981 (Miss. 2004).

As defendant manufacturer's cigarette lighter complied with an established federal safety standard for child resistance, plaintiffs' state law products liability claim was preempted by federal law, and the manufacturer was properly granted summary judgment. Frith v. BIC Corp., 863 So. 2d 960, 2004 Miss. LEXIS 14 (Miss. 2004).

Summary judgment was properly granted in favor of the guaranty association where the insurer's failure to settle within the policy limits when the offer was made, combined with its failure to inform its insured of such offer, automatically operated to extend the insurer's limits to the full amount of the judgment rendered; the insurer did not have standing to bring the suit since its policy limits were extended to cover the entire judgment against the corporation, and no subrogation would be allowed. Home Ins. Co. v. Miss. Ins. Guar. Ass'n, 904 So. 2d 95, 2004 Miss. LEXIS 13 (Miss. 2004).

As a security officer who hugged and kissed appellant after arresting her for driving under the influence had not been acting within the scope of the officer's employment with a water district, appellant's claims against the district were properly dismissed on summary judgment. Cockrell v. Pearl River Valley Water Supply Dist., 865 So. 2d 357, 2004 Miss. LEXIS 69 (Miss. 2004).

Summary judgment was properly granted by a trial court, and was improperly overturned on appeal by the court of appeals, where a bank customer was seeking punitive damages for a bank employee's fraudulent withdrawal of money from the customer's account. Because the bank promptly returned the erroneously withdrawn money, with interest, and there was only one teller involved in a single instance of mishandling of customers' money, there was no basis for punitive damages and summary judgment was properly granted on that issue. Wise v. Valley Bank, 861 So. 2d 1029, 2003 Miss. LEXIS 874 (Miss. 2003).

Trial court properly granted the employer's motion for summary judgment because the employer was not liable to the injured parties via respondeat superior for the trucker's negligence in causing the car accident because the trucker was an independent contractor and not an employee since the trucker (1) bought his own timber, cut it, and hauled it all himself; (2) decided his own work hours, which days he would work, and where he would work; (3) exclusively made decisions concerning harvest, sorting, loading, and transportation of the timber; and (4) owned all of the equipment needed for his operation and had never gotten a loan for his logging business. McCary v. Wade, 861 So. 2d 358, 2003 Miss. App. LEXIS 1186 (Miss. Ct. App. 2003).

Where a customer of a fingernail salon failed to present evidence of an applicable standard of care, the salon's breach of that standard, or causation, the salon was entitled to summary judgment with regard to the customer's claim that the salon's negligence caused the customer to develop a fingernail fungus. McIntosh v. Victoria Corp., 877 So. 2d 519, 2004 Miss. App. LEXIS 21 (Miss. Ct. App.), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 860 (Miss. 2004).

In a slip and fall case, the customer failed to produce any proof that the object that caused the customer's injury, a "cookie" on the floor, was the result of an affirmative act by the retailer or the employees, and the customer also failed to show that the retailer or the employees had actual or constructive knowledge of the dangerous condition; thus, summary judgment for the retailer and the subject employees was proper. Byrne v. Wal-Mart Stores, Inc., 877 So. 2d 462, 2003 Miss. App. LEXIS 1147 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66, 2004 Miss. LEXIS 866 (Miss. 2004).

Summary judgment was properly granted in favor of the sheriff's department and the employees in the inmate's tort claim where until the money was paid and all the bond paperwork completed, the former inmate's release was not imminent, and at the time of the incident in question, he was an inmate of the county jail; because a governmental entity was immune from all claims arising from claimants who were inmates at the time the claim arose, Miss. Code Ann. § 11-46-9(1)(m) of the Mississippi Torts Claims Act, Miss. Code Ann. § 11-46-1 et seq., did not apply to sheriff's department employees. Love v. Sunflower County Sheriff's Dep't, 860 So. 2d 797, 2003 Miss. LEXIS 756 (Miss. 2003).

Where the injured party asserted a products liability action pursuant to Miss. Code Ann. § 11-1-63 alleging that the manufacturer's defective water heater caused the injured party's burns, the manufacturer was entitled to summary judgment under Miss. R. Civ. P. 56; the injured party was unable to show that the manufacturer's hot water heater had caused the injured party's burns, because the hot water heater had to comply with all mandatory and voluntary government and industry standards, and housing and urban development inspected the water heater after the incident and found nothing wrong. Moore v. Miss. Valley Gas Co., 863 So. 2d 43, 2003 Miss. LEXIS 601 (Miss. 2003).

Where the injured party filed a products liability action alleging that the manufacturer's defective water heater had caused the injured party's burns, the manufacturer was entitled to summary judgment under Miss. R. Civ. P. 56; it was impossible to determine whether the water heater that caused the injuries was made by the manufacturer, as the water heater had been removed and discarded, no witness was able to identify the make, model, or manufacturer of the allegedly defective hot water heater, and the only evidence of any involvement by the manufacturer was a 1981 invoice, and it was unclear at what address the listed hot water heater was installed. Moore v. Miss. Valley Gas Co., 863 So. 2d 43, 2003 Miss. LEXIS 601 (Miss. 2003).

Grant of summary judgment in favor of the gas company in the homeowner's negligence action was proper where the gas company did not breach its duty to her to use the highest degree of care when supplying natural gas to her home; the fire that erupted was caused by the homeowner's grandson's placement of gasoline near the hot water heater. Hopkins v. Miss. Valley Gas Co., 2003 Miss. App. LEXIS 1116 (Miss. Ct. App. Nov. 25, 2003), sub. op., 866 So. 2d 514, 2003 Miss. App. LEXIS 1263 (Miss. Ct. App. 2003), op. withdrawn, 2004 Miss. App. LEXIS 218 (Miss. Ct. App. Feb. 24, 2004).

In a suit filed by a former employer against a former employee, the employment agreement that was presented to the chancery court was not a valid enforceable contract as it had lapsed by its own terms without renewal over a year before the lawsuit was filed. As it was simple contract law that a valid and enforceable contract was required to maintain an action for breach of contract or injunctive relief thereon, the chancery court did not err by granting a motion to dismiss. HeartSouth, PLLC v. Boyd, 865 So. 2d 1095, 2003 Miss. LEXIS 695 (Miss. 2003).

Primary issue was whether the physicians were acting as employees of the University of Mississippi Medical Center (UMMC), or were independent contractors for purposes of immunity or liability, and although the physicians did wear two hats, as they were entitled to engage in separate private practice, to an extent, the appellate court found the uncontroverted evidence was that the physicians were acting as employees of UMMC at the time of the subject surgery on the complaining patient, and pursuant to Mississippi's former sovereign immunity law, Miss. Code Ann. § 11-46-7(2) (Supp. 1991), the physicians were immune from liability, and summary judgment for the physicians was proper. Brown v. Warren, 858 So. 2d 168, 2003 Miss. App. LEXIS 965 (Miss. Ct. App. 2003).

Where a decedent had pointed a loaded gun at officers, had refused to lower the gun, had backed into his house, and had initiated fire at the officers, in the widow's subsequent civil rights claim under 42 U.S.C.S. § 1983, summary judgment was properly granted to an officer who was at the scene when the decedent was fatally shot by another officer, because nothing in the record indicated that the officer had ever used force against the decedent. Elkins v. McKenzie, 865 So. 2d 1065, 2003 Miss. LEXIS 582 (Miss. 2003).

Where a widow filed an action against a city, its police chief, and two police officers, arising from the shooting death of her husband in his home, the trial court erred in dismissing her amended complaint under the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq., as she had properly specified and separated the negligence-and-tort-based state law claims from the constitutional tort claims under 42 U.S.C.S. § 1983 in that amended complaint; the MTCA operated as the exclusive remedy for the state law civil claims against the city, the chief, and the officers, and Miss. R. Civ. P. 8(a) required no more than that notice of a claim be given. Elkins v. McKenzie, 865 So. 2d 1065, 2003 Miss. LEXIS 582 (Miss. 2003).

Where a decedent had pointed a loaded gun at officers, had refused to lower the gun, had backed into his house, and had initiated fire at the officers, the officer who fatally shot him was entitled to qualified immunity in the widow's subsequent civil rights claim filed under 42 U.S.C.S. § 1983 because the officer reasonably believed that his life and the lives of other officers at the scene were in imminent danger; therefore, the trial court improperly denied the officer's motion for summary judgment in the action. Elkins v. McKenzie, 865 So. 2d 1065, 2003 Miss. LEXIS 582 (Miss. 2003).

Where a decedent had pointed a loaded gun at officers, had refused to lower the gun, had backed into his house, and had initiated fire at the officers, summary judgment was properly granted to the city that employed the officer in the widow's subsequent civil rights claim under 42 U.S.C.S. § 1983 because the widow failed to show: (1) a facially invalid city policy, (2) that the city demonstrated any deliberate indifference to any known or obvious consequences that might have resulted in any constitutional deprivation, or any city policy or any persistent, widespread practice or custom; (3) or that causation existed between any city policy or custom and that such was the moving force for the shooting officer's actions. Elkins v. McKenzie, 865 So. 2d 1065, 2003 Miss. LEXIS 582 (Miss. 2003).

Where a decedent had pointed a loaded gun at officers, had refused to lower the gun, had backed into his house, and had initiated fire at the officers, summary judgment was properly granted to the city's chief of police in the widow's subsequent civil rights claim under 42 U.S.C.S. § 1983 because the widow failed to show that the chief failed to supervise or train the officer who fatally shot the decedent, that there was a causal connection between the alleged failure to supervise or train the officer and the alleged violation of the decedent's rights, and that the failure to supervise or train constituted deliberate indifference to the decedent's constitutional rights. Elkins v. McKenzie, 865 So. 2d 1065, 2003 Miss. LEXIS 582 (Miss. 2003).

Where appellant insurer put forth nothing but bare assertions that a minor tortfeasor's residence was with her mother (who was insured by appellee insurer), while appellee produced the admissions of appellant's own claims attorney as evidence that the child resided with her father (who was insured by appellant), the trial court properly ruled that the minor was a resident of the father's household under appellant's policy, and properly granted appellee summary judgment on its claim for contribution towards a settlement with the tort victims. Grange Mut. Cas. Co. v. United States Fid. & Guar. Co., 853 So. 2d 1187, 2003 Miss. LEXIS 396 (Miss. 2003).

Because a teacher was not provided written notice or otherwise informed within seven days of the nonrenewal of the teacher's 1999-2000 employment contract as required by Miss. Code Ann. § 37-9-105, the contract was automatically renewed for the 2000-2001 school term; thus, no genuine issue of fact existed and the teacher was entitled to summary judgment. Bd. of Educ. for the Holmes County Schs v. Fisher, 2003 Miss. App. LEXIS 823 (Miss. Ct. App. Sept. 9, 2003), op. withdrawn, sub. op., 874 So. 2d 1019, 2004 Miss. App. LEXIS 503 (Miss. Ct. App. 2004).

As wrongful death claims against a sheriff and county employees based on negligence were barred by Miss. Code Ann. § 11-46-9(1)(m) (the jail inmate exemption of the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 to 11-46-

23), and intentional tort claims were barred by the one-year statute of limitations, Miss. Code Ann. § 15-1-59 (Rev. 2003), dismissal of all wrongful death claims was proper. Lee v. Thompson, 859 So. 2d 981, 2003 Miss. LEXIS 407 (Miss. 2003).

Although a man, who fell under the definition of "employee" for purposes of Miss. Code Ann. § 11-46-1(f) of the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. §§ 11-46-1 to 11-46-23, caused an accident that injured an individual and then failed to disclose to the individual that the man was a county employee, the individual failed to establish that the county withheld information regarding the employee's work status, nor did the individual show that the county provided the individual with misleading or inaccurate information, and the individual did not exercise due diligence in determining the true parties of the lawsuit or in determining the man's work status; thus, the court affirmed the trial court's grant of summary judgment under Miss. R. Civ. P. 56(c) in favor of the county and the man on the grounds that the individual failed to substantially comply with the notice requirements of the MTCA, and, therefore, the statute of limitations had expired. Ray v. Keith, 859 So. 2d 995, 2003 Miss. LEXIS 409 (Miss. 2003).

Summary judgment was improperly granted in favor of the county where the exemptions provided under Miss. Code Ann. §§ 27-31-33, 27-31-34, and 27-35-155 applied to privately held leaseholds; therefore, the holder's privately held leasehold interest was exempt from ad valorem taxation and the county could not assess any back ad valorem taxes against the holder. In re Assessment of Ad Valorem Taxes on Leasehold Interest Held by Reed Mfg., Inc., 854 So. 2d 1066, 2003 Miss. LEXIS 472 (Miss. 2003).

As appellants were parties to an estate proceeding in which the rights to royalties from photos and music of a famous deceased musician had been determined, res judicata barred them from relitigating the issue of the ownership of the photos and music, and the trial court properly granted summary judgment to appellees. Anderson v. LaVere, 2003 Miss. LEXIS 527 (Miss. Oct. 16, 2003), op. withdrawn, sub. op., 895 So. 2d 828, 2004 Miss. LEXIS 1462 (Miss. 2004).

In a wrongful death suit, as testimony that a decedent's car was safely stopped at an intersection when a fire truck ran into him was disputed by numerous witnesses and was not supported by facts showing that the collision had occurred in the middle of the intersection, the testimony was not significantly probative and thus did not create a genuine issue of material fact. Estate of Williams v. City of Jackson, 844 So. 2d 1161, 2003 Miss. LEXIS 209 (Miss. 2003).

As a decedent was engaged in criminal activity (drunk driving) and there was a causal nexus between that activity and his death in a collision with a fire truck, the city was immune from a wrongful death suit under Miss. Code Ann. § 11-46-9(1)(c), and the city was properly granted summary judgment. Estate of Williams v. City of Jackson, 844 So. 2d 1161, 2003 Miss. LEXIS 209 (Miss. 2003).

Where a widow whose husband died while working for a general contractor sued the contractor based on its alleged failure to properly repair damaged bolts, the trial court properly granted summary judgment to the contractor as its conduct was at most gross negligence or reckless indifference, which, as a matter of law, did not defeat the exclusivity provision of the workers' compensation statutes. Bevis v. Linkous Constr. Co., 856 So. 2d 535, 2003 Miss. App. LEXIS 445 (Miss. Ct. App.), cert. denied, 860 So. 2d 1223, 2003 Miss. LEXIS 845 (Miss. 2003).

Trial court properly dismissed by summary judgment a claim alleging that a contractor's negligent construction of a nursing home had led to an ant infestation which in turn caused plaintiffs' decedent's death, as the contractor could not have reasonably foreseen the decedent's death from ant bites two years after it built the nursing home where the ant attack occurred. Rein v. Benchmark Constr. Co., 2003 Miss. LEXIS 282 (Miss. June 12, 2003), op. withdrawn, sub. op., 865 So. 2d 1134, 2004 Miss. LEXIS 180 (Miss. 2004).

Trial court properly dismissed by summary judgment a claim alleging that a first landscaping company had negligently failed to control ants, and that this negligence led to plaintiff decedent's death from ant bites, because the company, in its dealings with the nursing home where the ant attack occurred, had assumed no duty to control fire ants. Rein v. Benchmark Constr. Co., 2003 Miss. LEXIS 282 (Miss. June 12, 2003), op. withdrawn, sub. op., 865 So. 2d 1134, 2004 Miss. LEXIS 180 (Miss. 2004).

Trial court erred in dismissing on summary judgment a claim alleging that a second landscaping company had negligently failed to control fire ants on a nursing home's grounds, and that this negligence led to plaintiff decedent's death from fire ant bites; the company had contracted with the nursing home to provide fire ant control, and there were fact issues as to its negligence. Rein v. Benchmark Constr. Co., 2003 Miss. LEXIS 282 (Miss. June 12, 2003), op. withdrawn, sub. op., 865 So. 2d 1134, 2004 Miss. LEXIS 180 (Miss. 2004).

In an action alleging tortious interference with a contract and interference with a prospective advantage, summary judgment was properly entered in favor of a principal and its trustees because they had a contractual right to challenge an agent's proposed purchase of a competing hospital; moreover, a letter of intent between the agent and the hospital was not a final contract. King's Daughters & Sons Circle No. Two v. Delta Reg'l Med. Ctr., 856 So. 2d 600, 2003 Miss. App. LEXIS 560 (Miss. Ct. App. 2003).

In a suit by an auto accident victim against a tortfeasor's employer's insurer, which became insolvent, the trial court properly granted the Mississippi Insurance Guaranty Association summary judgment, as the policy at issue excluded coverage for injuries arising from an auto accident, and the fact that the victim pled theories of negligent hiring and failure to maintain adequate safety programs did not defeat the exclusion. Meyers v. Miss. Ins. Guar. Ass'n, 883 So. 2d 10, 2003 Miss. LEXIS 298 (Miss. 2003).

Grant of summary judgment in favor of an auto supply company pursuant to Miss. R. Civ. P. 56(c) in an action for breach of contract was proper where, upon the corporation's satisfaction of the bank's loan, the auto supply company had no further duty to buy back inventory from the corporation, as the corporation's business did not close during the initial financing period. JS, Inc. v. Brandon Auto Supply, Inc., 848 So. 2d 902, 2003 Miss. App. LEXIS 568 (Miss. Ct. App. 2003).

Where victim's expert concluded that but for the absence of a ramp, victim's injuries would not have happened, affidavit provided evidence to establish the question of negligence as a genuine issue of material fact. Wilkins v. Bloodsaw, 850 So. 2d 185, 2003 Miss. App. LEXIS 645 (Miss. Ct. App. 2003).

As defendant, the manufacturer of a liner installed in a lagoon where a worker drowned, gave a sufficient warning of the dangers of the liner in its contract with the general contractor, and the dangerous nature of the liner, in that it became slippery when wet, would have been known to the ordinary user, the trial court properly granted the manufacturer summary judgment on grounds that plaintiff failed to prove the manufacturer breached a duty to the deceased worker. Hobson v. Waggoner Eng'g, Inc., 878 So. 2d 68, 2003 Miss. App. LEXIS 681 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66, 2004 Miss. LEXIS 957 (Miss. 2004).

As a wrongful death plaintiff failed to prove that defendant – the manufacturer of a liner installed in a lagoon where a worker drowned – defectively designed the liner, having presented no evidence of industry standards or customs and no expert opinion showing the availablity of an alternate design that would have prevented the alleged harm without impairing the usefulness of the product, the trial court properly granted the manufacturer summary judgment. Hobson v. Waggoner Eng'g, Inc., 878 So. 2d 68, 2003 Miss. App. LEXIS 681 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66, 2004 Miss. LEXIS 957 (Miss. 2004).

Wrongful-death plaintiff failed to establish that defendant project engineer owed a duty to a deceased worker, since under the applicable contracts the general contractor, not the engineer, had responsibility for the supervision of the construction work and project safety; the engineer was

properly granted summary judgment. Hobson v. Waggoner Eng'g, Inc., 878 So. 2d 68, 2003 Miss. App. LEXIS 681 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66, 2004 Miss. LEXIS 957 (Miss. 2004).

Where plaintiff sued defendants for causing her to miscarry while she was five months pregnant, the trial court properly denied partial summary judgment to defendants on her wrongful death claims, as (1) under Miss. Code Ann. § 11-7-13, a nonviable, unborn child who was "quick" in the womb was a "person"; and (2) whether the child was "quick" was for the jury to decide. 66 Fed. Credit Union v. Tucker, 853 So. 2d 104, 2003 Miss. LEXIS 374 (Miss. 2003).

Summary judgment was properly granted in favor of the casino where the employee failed to prove that she was improperly terminated for filing a workers' compensation claim; any assertion by the employee that she was a contract employee of the casino was belied by her own signature on forms which clearly defined her status as an at-will employee, and she did not allege that she was terminated for refusing to participate in illegal acts at the request of the casino or that she was terminated for reporting illegal acts performed by the casino. Buchanan v. Ameristar Casino Vicksburg, Inc., 852 So. 2d 25, 2003 Miss. LEXIS 356 (Miss. 2003).

Summary judgment for a driver in a wrongful death action was affirmed because even if it were shown that the driver exceeded the speed limit by 10 miles per hour, there was no evidence of causation relating that negligence to a car accident. McFarland v. Leake, 864 So. 2d 959, 2003 Miss. App. LEXIS 795 (Miss. Ct. App. 2003), cert. denied, 2003 Miss. App. LEXIS 858 (Miss. Ct. App. Sept. 2, 2003), cert. denied, 864 So. 2d 282, 2004 Miss. LEXIS 51 (Miss. 2004).

Summary judgment was properly granted to defendant car driver, pursuant to Miss. R. Civ. P. 56, in a negligence action where even if the car driver had speeded, plaintiff estate did not prove that speed was the proximate cause of the collision that killed plaintiff's decedent; the trial judge did not abuse his discretion in finding no genuine issue of material fact existed such as would defeat the car driver's motion for summary judgment. McFarland v. Leake, 2003 Miss. App. LEXIS 84 (Miss. Ct. App. Feb. 18, 2003), op. withdrawn, sub. op., 864 So. 2d 959, 2003 Miss. App. LEXIS 795 (Miss. Ct. App. 2003).

Summary judgment was proper against a wrongful death claim brought against an apartment owner for the death of the estate's decedent when she was struck by a speeding car driven by a child that jumped a curb in a parking lot and hit the decedent while she sat talking to a friend in a common area outside the apartment; the court refused to extend to the case the holding in Carpenter v. Stop-n-Go Markets, Inc., 512 So. 2d 708 (Miss. 1987) that required the apartment owner to exercise reasonable care to protect against potential dangers in common areas inside an apartment building and to common areas outside the building. Heard v. Intervest Corp., 856 So. 2d 359, 2003 Miss. App. LEXIS 146 (Miss. Ct. App.), cert. denied, 860 So. 2d 1223, 2003 Miss. LEXIS 768 (Miss. 2003).

Patient's expert did not establish a causal connection between patient's alleged left leg nerve injury, and the alleged breaches in the nursing standard of care asserted against the hospital, and the patient failed to present any proof that the alleged injury was a kind of injury that did not ordinarily occur in the absence of negligence in a res ipsa loquitur claim. Thus, summary judgment for the hospital was proper. Powell v. Methodist Health Care-Jackson Hosps., 856 So. 2d 353, 2003 Miss. App. LEXIS 162 (Miss. Ct. App. 2003), aff'd, 876 So. 2d 347, 2004 Miss. LEXIS 779 (Miss. 2004).

Summary judgment was appropriate against an action brought by the buyers of a home for failure to make the statutory disclosures required under Miss. Code Ann. §§ 89-1-501 to 89-1-523, fraud and related claims where the home was 30 years old, had obvious structural problems, the buyers were made aware of the existence of subterrean termite damage, and a contract addendum indicated that the home was being sold "as is". Laird v. ERA Bayshore Realty, 841 So. 2d 178, 2003 Miss. App. LEXIS 231 (Miss. Ct. App. 2003).

Where an employee was exonerated of embezzlement on June 21, 2000, and filed her complaint on June 20, 2001, the employee's malicious prosecution claim was filed one day before it would have expired, and therefore, the trial court was in error in granting the employer's motion for summary judgment. Coleman v. Smith, 841 So. 2d 192, 2003 Miss. App. LEXIS 257 (Miss. Ct. App. 2003).

Where the employee relied on Mississippi Legal Forms that described malicious arrest, it could be logically inferred that the employee's intent was to allege malicious prosecution, therefore, the trial court was in error in granting the employer's motion for summary judgment. Coleman v. Smith, 841 So. 2d 192, 2003 Miss. App. LEXIS 257 (Miss. Ct. App. 2003).

The state field officer's decision not to revoke parole after the parolee failed to timely report was an exercise of discretion, and because (1) there was no evidence of a gross, reckless, or wanton failure in the State's supervision of the parolee, and (2) no sufficient causal connection or element of foreseeability existed between the alleged violated statutory duty and the injuries sustained by the victim when raped by the parolee, the State maintained the benefit of immunity under Miss. Code Ann. § 11-46-9(1) of the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 to 11-46-23, and the State was properly granted summary judgment in the victim's action for damages. Connell v. State, 841 So. 2d 1127, 2003 Miss. LEXIS 147 (Miss. 2003), op. withdrawn, 2003 Miss. LEXIS 625 (Miss. Nov. 6, 2003), sub. op., 859 So. 2d 350, 2003 Miss. LEXIS 603 (Miss. 2003).

Trial court did not err in granting summary judgment to an insurance adjuster the adjuster could not be held liable for a bad faith breach of contract because she was not a party to the contract between a patient and a health care provider. PDN, Inc. v. Loring, 843 So. 2d 685, 2003 Miss. LEXIS 198 (Miss. 2003).

Summary judgment was properly granted in favor of appellees where the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 to 11-46-23, limited recovery by the driver to $50,000 per occurrence. Allred v. Yarborough, 843 So. 2d 727, 2003 Miss. LEXIS 199 (Miss. 2003).

In a wrongful death suit against a town, the town was correctly granted summary judgment since there were no facts of record to support the allegation that the town acted with reckless disregard for the decedent's safety; only 13 minutes elapsed between the decedent's report to the police that he had been shot at and his fatal shooting, and the police acted responsibly and within their discretion. Titus v. Williams, 844 So. 2d 459, 2003 Miss. LEXIS 206 (Miss. 2003).

Decedent's actions in confronting a dangerous man, whom he knew had a gun that he was not afraid to use, was an intervening cause which relieved the store where the shooting occurred and the store's landlord of any liability for the decedent's wrongful death; the store and landlord were thus properly granted summary judgment. Titus v. Williams, 844 So. 2d 459, 2003 Miss. LEXIS 206 (Miss. 2003).

Summary judgment was properly granted in favor of the hospital and its parent corporation in the employee's breach of contract action where the corporate entities were not one and the same and the corporations' liability was not dependent upon the establishment of a hospital-corporation parent/subsidiary relationship; the employee exercised his right to terminate his employment relationship with the hospital and began employment with the corporation and by doing so, the employee relieved himself and the hospital of any obligations under the hospital agreement. Johnson v. Baptist Mem'l Hospital-Golden Triangle, Inc., 843 So. 2d 102, 2003 Miss. App. LEXIS 331 (Miss. Ct. App. 2003).

Summary judgment was appropriate for adjudging the deficiency to the bank on a note and security agreement where vehicles were pledged as collateral, and the mother's and daughter's relationship with the bank was one of mortgagor-mortgagee, and, as a matter of law not a fiduciary relationship; therefore, that issue for appeal had no merit, and the allegations of fraud and misrepresentation were not supported by sufficient specific evidence to survive the motion for summary judgment in favor of the bank. Burgess v. BankPlus, 830 So. 2d 1223, 2002 Miss. LEXIS 353 (Miss. 2002).

Summary judgment was proper against landowners' claim against an officer of a corporate developer for negligence in designing and constructing a surface water drainage system for a subdivision where the only evidence before the trial court was that the development was the sole responsibility of the corporation and provided no basis for piercing the corporate veil; the only evidence supporting the landowners' alter ego claim, a complaint filed by the officer in another action in which the officer allegedly stated that he had acted outside the corporation, was not properly before the appellate court and could not be considered in determining whether a genuine issue of fact existed. Hardy v. Brock, 826 So. 2d 71, 2002 Miss. LEXIS 282 (Miss. 2002).

Although the "interim" version of Miss. Code Ann. § 11-46-3 (Supp. 1993) was in effect at the time of the police officer's automobile accident with plaintiff, the immunity exception provided in subsection (3) of that section was inapplicable because the operation and maintenance of a police department was not a function of proprietary nature; thus, the city was entitled to summary judgment on the issue of sovereign immunity. Gale v. Thomas, 759 So. 2d 1150, 1999 Miss. LEXIS 379 (Miss. 1999), overruled in part, Stuart v. Univ. of Miss. Med. Ctr., 21 So. 3d 544, 2009 Miss. LEXIS 396 (Miss. 2009).

Plaintiff's claim should have been dismissed for lack of subject matter jurisdiction because he pled only those damages that would have been recoverable under the National Childhood Injury Act and in the Federal Claims Court; if plaintiff's petition in Federal Claims Court were dismissed as being time-barred, then he could be allowed to bring suit under state law. Cook v. Children's Med. Group, 756 So. 2d 734, 1999 Miss. LEXIS 378 (Miss. 1999).

Adult children were residents of their parents' households at time of automobile accident, and were thus eligible to collect uninsured motorist benefits under insurance policies issued to their parents, and therefore trial court improperly determined that insurer was entitled to summary judgment. Johnson v. Preferred Risk Auto. Ins. Co., 659 So. 2d 866, 1995 Miss. LEXIS 388 (Miss. 1995).

Openness and obviousness of a product's design is simply a factor to consider in determining whether a product is unreasonably dangerous, and is not a bar to recovery, and therefore summary judgment in such cases is not appropriate. Seymour v. Brunswick Corp., 655 So. 2d 892, 1995 Miss. LEXIS 313 (Miss. 1995).

Trial court erred in denying plaintiff leave to amend her complaint to include RICO claims arising out of the same series of events as her original complaint, and therefore court's grant of summary judgment was premature. Frank v. Dore, 635 So. 2d 1369, 1994 Miss. LEXIS 138 (Miss. 1994).

Relationship between defendant company and worker who caused accident was clearly that of independent contractor, and plaintiff's complaint, based solely on existence of a master/servant relationship, was therefore properly dismissed. Richardson v. APAC-Mississippi, 631 So. 2d 143, 1994 Miss. LEXIS 39 (Miss. 1994).

City's operation of public swimming pool was a proprietary function, and therefore city waived its sovereign immunity defense, requiring reversal of trial court's grant of summary judgment. Morgan v. City of Ruleville, 627 So. 2d 275, 1993 Miss. LEXIS 372 (Miss. 1993).

In view of notice pleading requirements of M.R.C.P. Rule 8, client's complaint against his former attorney stated at least one actionable cause upon which relief could be granted, and therefore summary judgment in favor of attorney was reversed. Owen v. Pringle, 621 So. 2d 668, 1993 Miss. LEXIS 291 (Miss. 1993).

Purchasers' acceptance of "as is" clause in real estate sales contract precluded them from maintaining action against sellers, who had transferred ownership and control of premises five months prior to accident, and therefore summary judgment was appropriate. Stonecipher v. Kornhaus, 623 So. 2d 955, 1993 Miss. LEXIS 252 (Miss., modified, (Miss. 1993), modified, 1993 Miss. LEXIS 461 (Miss. Oct. 7, 1993).

Trial court did not err in finding, as a matter of law, that grant of staff privileges to doctor in and of itself did not constitute a contract within meaning of state constitution. State by Mississippi Ethics Com. v.

Aseme, 583 So. 2d 955, 1991 Miss. LEXIS 425 (Miss. 1991).

Status of newspaper hauler as either independent contractor or employee, when fully fleshed out and in absence of genuine issues of material fact, was an issue of law appropriate for resolution on summary judgment. Webster v. Mississippi Publishers Corp., 571 So. 2d 946, 1990 Miss. LEXIS 699 (Miss. 1990).

State insurance guaranty association was a legislative creation designed to protect public from insolvency of insurers, with definite limitations on payments of covered claims, and therefore, as a matter of law, association could not be liable for punitive damages. Bobby Kitchens, Inc. v. Mississippi Ins. Guaranty Ass'n, 560 So. 2d 129, 1989 Miss. LEXIS 447 (Miss. 1989).

Trial court should not have granted summary judgment for plaintiff in an open account action, where defendant filed a general denial, a counter-affidavit in support thereof, and an affirmative defense that no account existed between the parties. Walker v. Cleveland Lumber Co., 512 So. 2d 695, 1987 Miss. LEXIS 2774 (Miss. 1987).

Where a contract is clear and unambiguous, its meaning and effect may be determined by the court, which may grant summary judgment based upon plain language of the contract. Shelton v. American Ins. Co., 507 So. 2d 894, 1987 Miss. LEXIS 2526 (Miss. 1987).

Trial court erred in holding that medical experts used by plaintiffs were not qualified to testify since they did not know standard of care in Mississippi, and on that basis alone sustaining motions for summary judgment. Brown v. McQuinn, 501 So. 2d 1093, 1986 Miss. LEXIS 2885 (Miss. 1986).

Reviewing court generally takes a dim view of the practice of resolving contract ambiguities via summary judgment, but where contract is without material ambiguity, the matter is often appropriate for summary disposition; this is so where provisions of contract are clear, even though not perfectly clear. Willis v. Mississippi Farm Bureau Mut. Ins. Co., 481 So. 2d 256, 1985 Miss. LEXIS 2423 (Miss. 1985).

Although practice of resolving contract ambiguities via summary judgment is disfavored, if terms of contract are clear, the question is one of law even though parties may disagree regarding meaning and import of those terms. Shaw v. Burchfield, 481 So. 2d 247, 1985 Miss. LEXIS 2376 (Miss. 1985).

Debtor's practical access to information was limited where all proof regarding term and termination date of credit insurance policy was within exclusive possession and control of creditor and insurer, and no policy was ever delivered to debtor, and where debtor was able to offer some evidence suggesting a fact issue, summary judgment on that issue should have been denied. Brown v. Credit Ctr., Inc., 444 So. 2d 358, 1983 Miss. LEXIS 3053 (Miss. 1983).

## Rule 57. Declaratory judgments.

(a) *Procedure.* — Courts of record within their respective jurisdictions may declare rights, status, and other legal relations regardless of whether further relief is or could be claimed. The court may refuse to render or enter a declaratory judgment where such judgment, if entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

The procedure for obtaining a declaratory judgment shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in actions where it is appropriate.

The court may order a speedy hearing of an action for declaratory judgment and may advance it on the calendar. The judgment in a declaratory relief action may be either affirmative or negative in form and effect.

(b) *When available.* —

(1) Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status or other legal relations thereunder.

(2) A contract may be construed either before or after there has been a breach thereof. Where an insurer has denied or indicated that it may deny that a contract covers a party's claim against an insured, that party may seek a declaratory judgment construing the contract to cover the claim.

(3) Any person interested as or through an executor, administrator, trustee guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust in the administration of a trust, or of the estate of a decedent, an infant, insolvent, or person under a legal disability, may have a declaration of rights or legal relations in respect thereto:

(A) to ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or,

(B) to direct the executors, administrators, or trustees, to do or abstain from doing any particular act in their judiciary capacity; or,

(C) to determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

(4) The enumeration in subdivisions (1), (2) and (3) of this rule does not limit or restrict the exercise of the general powers stated in paragraph (a) in any proceeding where declaratory relief is sought in which a judgment will terminate the controversy or remove an uncertainty.

**HISTORY: Amended effective July 27, 2000; Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

## ADVISORY COMMITTEE NOTE

A plaintiff may ask for a declaratory judgment either as sole relief or in addition or auxiliary to other relief, and a defendant may similarly counterclaim therefor. Thus the court is not limited only to remedial relief for acts already committed or losses already incurred; it may either substitute or add preventive and declaratory relief. It may be sought upon either legal or equitable claims and the right to jury trial is fully preserved as in civil actions generally.

Absent extraordinary circumstances, the failure to order separate trials in order to avoid putting the issue of insurance before the jury which tries liability and damages as between the insured and the injured party will be deemed an abuse of discretion.

## JUDICIAL DECISIONS

### ANALYSIS

In general.
Applicability.
Authority.
Jurisdiction.
Purpose.
Standing.
Illustrative cases.

**In general.**

Mississippi Municipality Liability Plan (MMLP) was not a proper party to the individuals' claim for declaratory relief related to a motor vehicle accident with a city police officer, as the MMLP had not denied coverage under a policy it issued to the city. Miss. Mun. Liab. Plan v. Jordan, 863 So. 2d 934, 2003 Miss. LEXIS 875 (Miss. 2003).

Under Miss. R. Civ. P. 57, an insurance company may be named as a party to an action for the purpose of seeking declaratory judgment on the question of coverage; indeed, this is precisely what certain defendants had done in their state lawsuit against a transport company and an insurer, and defendants' Fed. R.Civ. P. 12(b)(6) motion was therefore without merit. W. Side Transp., Inc. v. APAC Miss., Inc., 237 F. Supp. 2d 707, 2002 U.S. Dist. LEXIS 24944 (S.D. Miss. 2002).

While truck owner's claim to determine insurance coverage under Miss. R. Civ. P. 57(b)(2) was futile because the insurance company did not deny coverage, and dismissal as to that claim was proper, the trial court abused its discretion in denying the truck owner's motions to compel discovery, and for leave to file a first amended complaint, to add a claim of intentional infliction of emotional distress based on the plain language of Miss. R. Civ. P. 15(a). Poindexter v. S. United Fire Ins. Co., 838 So. 2d 964, 2003 Miss. LEXIS 86 (Miss. 2003).

An action for declaratory judgment involving multiple claims may be brought against multiple parties, particularly when insurance questions need to be resolved. State Farm Mut. Auto. Ins. Co. v. Eakins, 1998 Miss. LEXIS 593 (Miss. Dec. 10, 1998), op. withdrawn, sub. op., 748 So. 2d 765, 1999 Miss. LEXIS 321 (Miss. 1999).

Declaratory judgments are alternative procedures that permit adjudications of rights when actual controversies exist, but they have not reached the stage at which suits for damages or injunctive relief would normally be brought. Bowling v. Madison County Bd. of Supervisors, 724 So. 2d 431, 1998 Miss. App. LEXIS 952 (Miss. Ct. App. 1998).

No advance determination, that plaintiff is likely entitled to declaratory judgment he seeks, is necessary before trial court may properly proceed under this rule; that a plaintiff is entitled to no relief whatsoever in no way vitiates jurisdictional or procedural components of a declaratory judgment action. White v. Gautier Util. Dist., 465 So. 2d 1003 (Miss. 1985).

**Applicability.**

Trial court did not err when it dismissed the company's insurers from the customer's cause of action where there was no question as to whether coverage existed for the damages the customer claimed occurred as a result of the missing oil cap; a direct action may only be brought against an insurance company when there was an issue of coverage. Hudson v. Palmer, 977 So. 2d 369, 2007 Miss. App. LEXIS 580 (Miss. Ct. App. 2007), cert. denied, 977 So. 2d 343, 2008 Miss. LEXIS 95 (Miss. 2008).

Driver improperly joined the insurer as a defendant where the driver could not rely on Miss. R. Civ. P. 57 as the basis for bringing suit against the insurer where Rule 57 only allowed the driver to seek a declaratory judgment against an insurer when coverage was in doubt, and coverage was not in doubt; therefore, there would be no common question of law or fact litigated between all parties, making joinder of the insurer and employee as defendants improper. Mercer v. Moody, 918 So. 2d 664, 2005 Miss. LEXIS 365 (Miss. 2005).

Because Miss. Code Ann. § 99-39-3(2) of the Mississippi Uniform Post-Conviction Collateral Relief Act was defendant's exclusive remedy for postconviction relief (PCR), the trial court correctly treated defendant's complaint for declaratory judgment as a petition for PCR; the motion was properly denied as untimely pursuant to Miss. Code Ann. § 99-39-5 (Rev. 2000). Moore v. State, 859 So. 2d 1018, 2003 Miss. App. LEXIS 722 (Miss. Ct. App. 2003).

A Rule 57 declaratory judgment proceeding was not the appropriate means to determine the effect of two court orders, entered three days apart by two different courts. Luke Edwards & Reach, Inc. v. Roberts, 771 So. 2d 378, 2000 Miss. App. LEXIS 522 (Miss. Ct. App. 2000).

A declaratory judgment as to which newspaper was qualified to publish legal notices within a specific Judicial district was inappropriate since any coercive legal remedy would be against the public body contracting for the publication and not against the company that obtained the contract, but no such public body was a party to the action. S & F Publ. Co. v. Gulf Publ. Co., 760 So. 2d 38, 2000 Miss. App. LEXIS 198 (Miss. Ct. App. 2000).

Complaint seeking declaration that two paragraphs of settlement agreement were void and unenforceable as against public policy was appropriate for declaratory judgment, pursuant to this rule's purpose of adjudicating actual controversies when case is not yet ripe for a coercive remedy. McManus v. Howard, 569 So. 2d 1213, 1990 Miss. LEXIS 669 (Miss. 1990).

Administratrix had standing as an interested party to seek declaration as to validity of a legal services contract affecting estate, and validity of contract was susceptible to authoritative resolution, and therefore use of declaratory judgment was proper. Riley v. Moreland, 537 So. 2d 1348, 1989 Miss. LEXIS 6 (Miss. 1989).

**Authority.**

In light of the July 27, 2000, amendments to Miss. R. Civ. P. 57 that permitted an injured third party to maintain a direct declaratory judgment action against a liability insurer, where the insurer had indicated that it might deny coverage of the injured party's claim, a state court had full authority to litigate the coverage issues in a federal declaratory judgment case brought by an insurer; the motions to dismiss the federal case were granted because the federal district court saw no advantage to be gained by simultaneously litigating the issues in federal court. S.C. Ins. Co. v. McKee, 2005 U.S. Dist. LEXIS 45504 (N.D. Miss. June 9, 2005).

Trial court had power to declare whether residents were entitled under state's Administrative Procedures Law to offer comments before adoption of a Capacity Assurance Plan concerning siting of hazardous waste facility. Fordice v. Thomas, 649 So. 2d 835, 1995 Miss. LEXIS 34 (Miss. 1995), but see USPCI of Mississippi v. State ex rel. McGowan, 688 So. 2d 783, 1997 Miss. LEXIS 42 (Miss. 1997).

Court hearing declaratory judgment action involving contract dispute is not limited to accepting plaintiff's version of contract or dismissing action; rather, court should apply controlling principles of law to facts as developed and declare rights, status or other legal relations of parties as may be proper under circumstances. UHS-Qualicare, Inc. v. Gulf Coast Community Hospital, Inc., 525 So. 2d 746, 1987 Miss. LEXIS 2696 (Miss. 1987).

**Jurisdiction.**

Land company sought declaratory and injunctive relief against a county; the county alleged that it was entitled to damages because the land company violated ordinances. Jurisdiction was proper in the chancery court; if an ordinance applied to the land company, the issue of damages could be decided by the chancellor. Issaquena Warren Counties Land Co., LLC v. Warren County, 996 So. 2d 747, 2008 Miss. LEXIS 609 (Miss. 2008).

It was clear from language of this rule that a declaratory judgment action was contemplated as an action to be brought in the trial court, and supreme court was without subject matter jurisdiction to hear and issue declaratory judgment requested by Governor as an original civil action. In re Fordice, 691 So. 2d 429, 1997 Miss. LEXIS 104 (Miss. 1997).

Authorization of declaratory judgment procedure in this rule is jurisdictionally neutral, and a prayer for declaratory judgment is not per se cognizable only in equity as opposed to in an action at law. Tillotson v. Anders, 551 So. 2d 212, 1989 Miss. LEXIS 398 (Miss. 1989).

**Purpose.**

Landowner joined the timber company's insurer as a defendant under Miss. R. Civ. P. 57(b) for the limited purpose of obtaining a declaratory judgment on the issue of coverage; the chancellor abused his discretion in finding the insurer jointly and severally liable for damages to the landowner because the sole determination sought from the chancellor was that of determining between the timber company and the insurer who was responsible for coverage; although the insurer had paid the judgment, once the chancellor had determined the issue of coverage, the timber company might have pursued a bad faith or subrogation claim against the insurer for damages incurred over the policy limit. Capital City Ins. Co. v. Ringgold Timber Co., 898 So. 2d 680, 2004 Miss. App. LEXIS 960 (Miss. Ct. App. 2004), cert. denied, 898 So. 2d 679, 2005 Miss. LEXIS 239 (Miss. 2005).

Among the cases where a proceeding for declaratory judgment is most needed are those where there exists an actual dispute with respect to which the parties have a compelling need to know where they stand before entering a substantial financial undertaking. White v. Gautier Util. Dist., 465 So. 2d 1003 (Miss. 1985).

**Standing.**

The plaintiff in an action against a school district had standing to bring a declaratory judgment action against the school district's insurance company to determine whether coverage existed under the school district's insurance policy since the plaintiff's rights and status clearly were affected by the terms of the policy as, without the coverage afforded the school district by its liability policies, he had no recourse against the school district because of sovereign immunity. Titan Indem. Co. v. Williams, 743 So. 2d 1020, 1999 Miss. App. LEXIS 291 (Miss. Ct. App. 1999).

County was an "interested party" in dispute involving real estate development which violated county subdivision ordinance. Johnson v. Hinds County, 524 So. 2d 947, 1988 Miss. LEXIS 194 (Miss. 1988).

General law of standing is applicable to declaratory actions; if standing exists, trial judge should hear the case under this rule so long as one or more legal issues vital to the controversy is susceptible to authoritative resolution. Johnson v. Hinds County, 524 So. 2d 947, 1988 Miss. LEXIS 194 (Miss. 1988).

**Illustrative cases.**

Res judicata barred a son's claim that he did not have to pay funds received for a destroyed house mortgaged to his parents to his former wife, as ordered in a divorce, because (1) the divorce judgment was a final judgment, (2) facts underlying both cases were the same, and (3) identity of parties was shown, even though the parents were only parties to the declaratory relief claim, as the son made no claims against the parents, who never acted adversely to the son, and the former wife was a defendant in both cases. Sandrock v. Sandrock, 269 So. 3d 153, 2018 Miss. App. LEXIS 22 (Miss. Ct. App. 2018).

Chancellor properly granted the wife's motion for a declaratory judgment and rendered a finding that the decedent's predivorce will was revoked by implication as the chancellor's simultaneous grant of a declaratory judgment on the motion to sever the Tennessee farmland from the testate estate and entry of a final judgment, as to the validity of the decedent's will, terminated the controversy surrounding the decedent's estate. Chaney v. Chaney (In re Estate of Chaney), 235 So. 3d 120, 2017 Miss. App. LEXIS 278 (Miss. Ct. App. 2017), cert. denied, 2018 Miss. LEXIS 45 (Miss. Jan. 25, 2018).

Appellants were not entitled to attorney's fees under 42 U.S.C.S. § 1988, even though they correctly alleged that Miss. Code Ann. 27-70-5 (2010) violated the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, as they had an adequate remedy, which they invoked, declaratory relief under Miss. R. Civ. P. 57; under the Tax Injunction Act, 28 U.S.C.S. § 1341, the constitutionality of a state tax could not be challenged under 42 U.S.C.S. § 1983 in state court if an adequate remedy was available under state law. Commonwealth Brands v. Morgan, 110 So. 3d 752, 2013 Miss. LEXIS 141 (Miss. 2013).

Trial court's declaratory judgment establishing plaintiffs' ownership of shallow gas rights did not exceed the scope of the complaint's demand for relief, because plaintiffs could not recover damages on their conversion claim against defendants without first establishing lawful ownership of those rights. Tellus Operating Group, LLC v. Tex. Petroleum Inv. Co., 105 So. 3d 274, 2012 Miss. LEXIS 488 (Miss. 2012).

Where the parents of a child killed in a drunk driving accident sued the store that sold alcohol to the driver minor, the trial court's declaratory judgment stating that the store's insurance policy "does or may" cover the claims was contrary to the provisions of Miss. R. Civ. P. 57; the trial judge should have stated that the policy of insurance either did or did not cover the claims. S.C. Ins. Co. v. Keymon, 974 So. 2d 226, 2008 Miss. LEXIS 67 (Miss. 2008).

## Rule 58. Entry of judgment.

Every judgment shall be set forth on a separate document which bears the title of "Judgment." However, a judgment which fully adjudicates the claim as to all parties and which has been entered as provided in M.R.C.P. 79(a) shall, in the absence of prejudice to a party, have the force and finality of a judgment even if it is not properly titled. A judgment shall be effective only when entered as provided in M.R.C.P. 79(a).

**HISTORY: Amended effective July 1, 2001; amended effective May 27, 2004 to address finality of improperly titled judgment; Comments repealed and Advisory Committee Notes amended effective July 1, 2014; Advisory Committee Note amended effective January 16, 2020.**

### ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 1994, a new Rule 58 was adopted. 632-635 So.2d XXXII-XXXIII (West Miss.Cases 1994).

[Adopted August 21, 1996.]

### ADVISORY COMMITTEE NOTE

The "entry" of the judgment is the ministerial notation of the judgment by the clerk of the court pursuant to Rules 58 and 79(a); however, it is crucial to the effectiveness of the judgment and for measuring time periods for appeal and the filing of various motions.

The date of entry of judgment is significant because certain post-trial motions must be filed within 10 days after entry of judgment. They include: (i) a motion for j.n.o.v. pursuant to M.R.C.P. 50(b); (ii) a motion to amend findings or make additional findings of fact pursuant to M.R.C.P. 52(b); (iii) a motion for new trial pursuant to M.R.C.P. 59; and (iv) a motion to alter or amend the judgment pursuant to M.R.C.P. 59(e). The trial court may not extend the 10-day period in which to file these post-trial motions. M.R.C.P. 6 (b). The time in which certain Rule 60(b) motions must be made also begins after entry of judgment.

In addition, M.R.A.P. 4(a) provides that a notice of appeal from a final judgment in chancery court or circuit court (one that resolves all claims among all parties) shall be filed within 30 days after entry of judgment. If a party files: (i) a motion for j.n.o.v. pursuant to M.R.C.P. 50(b); (ii) a motion to amend findings or make additional findings of fact pursuant to M.R.C.P. 52(b); (iii) a motion for new trial pursuant to M.R.C.P. 59; (iv) a motion to alter or amend the judgment pursuant to M.R.C.P. 59(e); or (v) a motion for relief pursuant to M.R.C.P. 60 within 10 days after entry of judgment, the time for appeal runs from the entry of the order disposing of the last such outstanding motion rather than the entry of judgment. See M.R.A.P. 4(d).

[Advisory Committee Note adopted effective July 1, 2014, amended effective January 16, 2020.]

## JUDICIAL DECISIONS

### ANALYSIS

Construction.
Bench opinion.
Docket entry.
Final judgment.

**Construction.**

Appeal was timely filed because a chancellor's order entitled "Opinion and Order" was not a final, appealable judgment, and did not have the force and finality of a judgment. Therefore, the appeal was timely filed following a final judgment that was signed and entered and a motion for a new trial that was timely filed. Bray v. Wooten, 247 So. 3d 1283, 2017 Miss. App. LEXIS 475 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 69, 2018 Miss. LEXIS 240 (Miss. 2018).

Pursuant to Miss. R. Civ. P. 12(h)(1), certain defendants waived the defenses of insufficiency of service of process and insufficiency of process by omitting these defenses from their answer and motion to dismiss. Therefore, under Miss. R. Civ. P. 54(b) and 58, the order dismissing those defendants fully adjudicated the case as to all parties and it was a final, appealable judgment. Sauvage v. Meadowcrest Living Ctr., LLC, 28 So. 3d 589, 2010 Miss. LEXIS 93 (Miss. 2010).

Order granting summary judgment was not a final appealable judgment under Miss. R. Civ. P. 58 because, by its terms, the trial court reserved ruling on other issues raised in the petition for damages and injunctive relief; that the trial judge treated the order as a final judgment did not make it so. Wiggins v. Perry, 989 So. 2d 419, 2008 Miss. App. LEXIS 433 (Miss. Ct. App. 2008).

Where intervenor argued that a dismissal was not proper pursuant to Miss. R. Civ. P. 58 and Miss. R. Civ. P. 79, the supreme court, however, disagreed; while Rule 58 was important for establishing a date for computing post-trial motions and appeals, the supreme court did not interpret the rule to be the only means by which to effect a dismissal, especially where the parties have stipulated to dismiss a separate case, even though the stipulation was located in an order entered in a separate suit. Hayes v. Leflore County Bd. of Supervisors, 935 So. 2d 1015, 2006 Miss. LEXIS 445 (Miss. 2006).

Divorce case was remanded for the entry of a final judgment because no final judgment was rendered after amended findings were entered by a chancellor; however, the appeal was treated as procedurally proper based on the chancellor's assertion that a final judgment had been entered. Moody v. Moody, 2004 Miss. App. LEXIS 666 (Miss. Ct. App. July 13, 2004), op. withdrawn, sub. op., 883 So. 2d 1204, 2004 Miss. App. LEXIS 970 (Miss. Ct. App. 2004).

Under the Rule, all judgments have to bear the title "Judgment," as there is a need for parties to know the date of a final judgment so that they may proceed, under the Mississippi Rules of Civil Procedure for filing the various time-sensitive motions; where an order granting summary judgment was not styled "Judgment" or "Final Judgment," it was not a final appealable judgment, therefore, the party's case was still pending at the time she filed her motion for reconsideration. Thompson v. City of Vicksburg, 813 So. 2d 717, 2002 Miss. LEXIS 137 (Miss. 2002).

Appeal was reinstated where documents styled "Jury Verdict for Defendant" did not contain the word "judgment," were not delivered to plaintiff's counsel, were not in the court file, and were not entered on the docket; documents did not constitute a final judgment and were not intended to be a final judgment, and plaintiff's right to due process protected her from losing her right to appeal since she was not aware of the jury verdict forms and was not notified of their existence. Roberts v. Grafe Auto Co., 653 So. 2d 250, 1994 Miss. LEXIS 360 (Miss. 1994).

There was no entry of final judgment where there was no stamp, notation or other marking or anything else to indicate that judgment was ever delivered to clerk of court for filing, and appeal could not proceed until clerk corrected the clerical oversight. Sweet v. Luster, 492 So. 2d 983, 1986 Miss. LEXIS 2553 (Miss. 1986).

**Bench opinion.**

Because neither party objected to the

finality of the circuit court's findings of fact or conclusions of law as serving as the final judgment, and neither party raised the issue or asserted any prejudice, as provided in Miss. R. Civ. P. 58 and its comment, the circuit court's findings of fact and conclusions of law, which were entered with the language "so ordered and adjudged" were determined to have the force and finality of a judgment even if they were not properly titled. Woodkrest Custom Homes Inc. v. Cooper, 108 So. 3d 460, 2013 Miss. App. LEXIS 24 (Miss. Ct. App. 2013).

Wife's appeal was dismissed as the wife was appealing from the court's bench opinion and no final judgment had ever been entered. Hinson v. Hinson, 877 So. 2d 547, 2004 Miss. App. LEXIS 607 (Miss. Ct. App. 2004).

**Docket entry.**

Docket entry did not comply with Miss. R. Civ. P. 79(a) because no prior entry on the docket referenced any judgment being entered by the trial court, and the entry failed to contain the substance of the judgment; thus, the trial court did not abuse its discretion in finding that no judgment had been properly entered and in allowing a city to file its motion for new trial after the entry of judgment was properly recorded on the docket, and as such, the city's notice of appeal was timely. Cleveland Nursing & Rehab., LLC v. Estate of Gully, 206 So. 3d 516, 2016 Miss. LEXIS 436 (Miss. 2016).

**Final judgment.**

Chancellor abused her discretion in dismissing all pleadings filed subsequent to the signing of the final divorce decree on May 15, 2012, including the ex-husband's withdrawal of consent to the joint claim for divorce filed on August 23, 2013, because the final divorce decree signed by the chancellor was not final until it was entered by the chancery clerk on June 3, 2014; and the consent restriction in the irreconcilable-differences statute did not apply, and the husband was not required to obtain leave of court to withdraw his consent to the joint complaint for divorce as the parties did not invoke the irreconcilable-differences statute, and there were no issues upon which the parties did not agree. Arrington v. Arrington, 269 So. 3d 1265, 2018 Miss. App. LEXIS 441 (Miss. Ct. App. 2018).

Because a couple only raised an appeal after the circuit court's judgment against a nurse's employer finally adjudicated all the remaining claims among the parties, the nurse failed to address the provision in the rule that a judgment finally resolving all claims as to all parties constituted a final judgment when entered pursuant to Miss. R. Civ. P. 79(a), even if not properly titled. Havard v. Sumrall, 250 So. 3d 1282, 2017 Miss. App. LEXIS 634 (Miss. Ct. App. 2017), cert. denied, 250 So. 3d 1268, 2018 Miss. LEXIS 354 (Miss. 2018), cert. denied, 2018 Miss. LEXIS 351 (Miss. Aug. 9, 2018).

## Rule 59. New trials; amendment of judgments.

(a) *Grounds.* — A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of Mississippi; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of Mississippi.

On a motion for a new trial in an action without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) *Time for motion.* — A motion for a new trial shall be filed not later than ten days after the entry of judgment.

(c) *Time for serving affidavits.* — When a motion for new trial is based upon affidavits they shall be filed with the motion. The opposing party has ten days after service to file opposing affidavits, which period may be extended for up to twenty days either by the court for good cause shown or by the parties' written stipulation. The court may permit reply affidavits.

(d) *On initiative of court.* — Not later than ten days after entry of judgment the court may on its own initiative order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) *Motion to alter or amend a judgment.* — A motion to alter or amend the judgment shall be filed not later than ten days after entry of the judgment.

**HISTORY: Amended effective July 1, 1997; Comments repealed and Advisory Committee Notes amended effective July 1, 2014; Advisory Committee Note amended effective January 16, 2020.**

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 1997, Rule 59(b), (c) and (e) were amended to clarify that motions for a new trial and accompanying affidavits, and motions to alter or amend a judgment, must be filed not later that ten days after entry of judgment. 689 So. 2d XLIX (West Miss. Cases).

[Adopted effective July 1, 1997.]

## ADVISORY COMMITTEE NOTE

In jury trials, the trial court may grant a new trial based upon a prejudicial error by the court in the admission or exclusion of evidence, an error in the jury instructions, prejudicial comments by the judge or attorneys, a finding that the verdict is against the great weight of the evidence, a finding that the jury's verdict is the result of passion, prejudice or bias, or any grounds upon which new trials were granted in actions at law prior to the adoption of these rules. A trial court's ruling on a motion for new trial is reviewed for abuse of discretion.

Although "[i]t is clearly better practice to include all potential assignments of error in a motion for new trial,...when the assignment of error is based on an issue which has been decided by the trial court and duly recorded in the court reporter's transcript, such as the omission or exclusion of evidence, [the appellate court] may consider it regardless of whether it was raised in the motion for new trial." *See Kiddy v. Lipscomb,* 628 So. 2d 1355, 1359 (Miss. 1993).

The rule does not authorize a motion for reconsideration after entry of judgment. If a motion is mislabeled as a motion for reconsideration and was filed within ten days after the entry of judgment, the trial court should treat such motion as a post-trial motion to alter or amend the judgment pursuant to M.R.C.P. 59(e). *Boyles v. Schlumberger Tech. Corp.,* 792 So. 2d 262, 265 (Miss. 2001). A party moving to alter or amend the judgment "must show: (i) an intervening change in controlling law, (ii) availability of new evidence not previously available, or (iii) need to correct a clear error of law to prevent manifest injustice." *See Brooks v. Robertson,* 882 So. 2d 229, 233 (Miss. 2004). A motion to alter or amend the judgment is within the trial court's discretion. When a motion is mislabeled as a motion for reconsideration, does not state that it was brought pursuant to Rule 59, and was filed more than ten days after the entry of the final judgment in the case, the trial court should treat such motion as one for relief from a judgment pursuant to Rule 60(b). *See Carlisle v. Allen,* 40 So. 3d 1252, 1260 (Miss. 2010).

A motion for new trial or a motion to alter or amend the judgment made pursuant to M.R.C.P. 59 must be filed within 10 days after entry of the judgment. The trial court has no authority or discretion to extend the 10-day time period. M.R.C.P. 6(b). A timely Rule 59 motion for a new trial or to alter or amend the judgment tolls the time in which to file a notice of appeal; the thirty-day time period in which to file a notice of appeal runs from the entry of the order disposing of the post-trial motion. M.R.A.P. 4(c). If not filed within ten days after entry of the judgment, a Rule 59 motion for a new trial, to alter or amend the judgment, or for reconsideration does not toll the time period in which to file a notice of appeal. M.R.A.P. 4(d); but *see Wilburn v. Wilburn,* 991 So. 2d 1185, 1190-191 (Miss. 2008) (Court refused to address the timeliness of appellant's notice of appeal even though appellant filed a motion to reconsider more than ten days after entry of judgment and did not file a notice of appeal within thirty days after the entry of judgment, noting that the appellee did not object to the untimely motion to reconsider.)

In a case tried without a jury, a party may move the court to amend its findings of fact or make additional findings of fact pursuant to M.R.C.P. 52(b). The motion must be filed within ten days after entry of judgment. Upon a timely motion, the court may amend its findings or make additional findings and amend its judgment accordingly.

A motion for relief from a final judgment pursuant to M.R.C.P. 60(b) is different from a motion to alter or amend the judgment pursuant to M.R.C.P. 59(e) in that a change in the law after entry of final judgment is not an "extraordinary or compelling circumstance" warranting relief pursuant to M.R.C.P. 60(b). *See Regan v. S. Cent. Reg'l Med. Ctr.,* 47 So. 3d 651, 655 (Miss. 2010). Relief pursuant to Rule 60(b)(6) is reserved for cases involving "exceptional and compelling circumstances" in light of the desire to achieve finality in litigation. *See id.*

[Advisory Committee Note adopted effective July 1, 2014, amended effective January 16, 2020.]

## JUDICIAL DECISIONS

### ANALYSIS

In general.
Construction.
Applicability.
Limitations.
New trials.
Reconsideration.
Review.
Timeliness.
Illustrative cases.

**In general.**

Trial court did not abuse its discretion in denying a parent's motion for a new trial because the trial court applied the proper legal analysis in determining that there was no basis for a new trial. Warner v. Thomas, 281 So. 3d 216, 2019 Miss. App. LEXIS 108 (Miss. Ct. App. 2019).

Where appellant's road was used for decades by members of the community to access a creek and for property owners to access their timber, the chancery court's finding of a prescriptive easement was not against the weight of the evidence; the proper method to address appellant's concerns about the evidence was through a motion for a new trial pursuant to Miss. R. Civ. P. 59. Graves v. Dudley Maples, L.P., 950 So. 2d 1017, 2007 Miss. LEXIS 129 (Miss. 2007).

Trial court did not abuse its discretion under Miss. R. Civ. P. 59 by denying plaintiff's motion for new trial as conflicting evidence existed that could cause fair minded jurors to reach different conclusions as to whether the doctor caused the decedent's death through malpractice. Poole v. Avara, 908 So. 2d 716, 2005 Miss. LEXIS 486 (Miss. 2005).

Customers' motion to alter and amend judgment was properly denied where they had secured remand from federal court by explicitly asserting to the federal district judge that they had no intentions of relying upon federal law in state court; however, all of their assignments of error relied, in whole or in part, upon construction of federal law; therefore, their arguments were barred by the doctrine of judicial estoppel. Rankin v. Am. Gen. Fin., Inc., 912 So. 2d 725, 2005 Miss. LEXIS 148 (Miss. 2005).

Daughter offered nothing in her brief to demonstrate an abuse of discretion by the trial court in denying her motions to alter the judgment; she showed neither an intervening change in controlling law, availability of new evidence not previously available, nor the need to correct a clear error of law or to prevent manifest injustice, and while the trial judge erred in the computing the 10-day period following entry of judgment wherein a party could move to alter or amend a judgment pursuant to Miss. R. Civ. P. 59(e), the denial of the motions was not an abuse of discretion. Brooks v. Roberts, 882 So. 2d 229, 2004 Miss. LEXIS 1170 (Miss. 2004).

Divorce case was remanded for the entry of a final judgment because no final judgment was rendered after amended findings were entered by a chancellor; however, the appeal was treated as procedurally proper based on the chancellor's assertion that a final judgment had been entered. Moody v. Moody, 2004 Miss. App. LEXIS 666 (Miss. Ct. App. July 13, 2004), op. withdrawn, sub. op., 883 So. 2d 1204, 2004 Miss. App. LEXIS 970 (Miss. Ct. App. 2004).

Defendant's motions for a directed verdict, for judgment notwithstanding the verdict, or for a new trial operated as challenges to the weight and sufficiency of the evidence supporting the verdict. Because the evidence in defendant's wire fraud trial was sufficient to support the jury's finding, defendant's motions were properly denied. McGee v. State, 853 So. 2d 125, 2003 Miss. App. LEXIS 159 (Miss. Ct. App.), cert. denied, 852 So. 2d 577, 2003 Miss. App. LEXIS 834 (Miss. Ct. App. 2003).

The court could, on its own initiative, enter an order granting a new trial within ten days of the final judgment, but it was still required to act within ten days, give notice to the parties, give the parties an opportunity to be heard, and specify in the order the grounds therefor. Ford v. Ford, 795 So. 2d 600, 2001 Miss. App. LEXIS 371 (Miss. Ct. App. 2001).

Trial court erred in considering the city's Motion for Clarification and Relief from Judgment under Miss. R. Civ. P. 59(e) as that rule required the motion be filed within a 10-day time limit after a judgment was rendered and the city's filing 12 days after judgment indicated that the motion was supposed to be under Miss. R. Civ. P. 60(b). City of Jackson v. Jackson Oaks, L.P., 792 So. 2d 983, 2001 Miss. LEXIS 201 (Miss. 2001).

Although the rule imposes a ten day limit for a motion for new trials or to amend judgments, it does not apply to a discovery order which is not final. Trilogy Communs., Inc. v. Thomas Truck Lease, Inc., 733 So. 2d 313, 1998 Miss. App. LEXIS 1056 (Miss. Ct. App. 1998).

A lesser showing is required for new trial than that necessary to grant a motion for j.n.o.v.; reason behind this rule is that a motion for j.n.o.v. challenges legal sufficiency of evidence to support the verdict, whereas motion for new trial challenges weight of the evidence. James v. Mabus, 574 So. 2d 596, 1990 Miss. LEXIS 794 (Miss. 1990).

Trial court has the power and duty to set aside a verdict and order a new trial whenever, in its sound judgment, such action is required. Motorola Communications & Electronics, Inc. v. Wilkerson, 555 So. 2d 713, 1989 Miss. LEXIS 517 (Miss. 1989).

**Construction.**

Time limit for serving a M.R.C.P. Rule 59 motion for reconsideration is 10 days after judgment, and that period may not be enlarged except by request made within time period provided and such request being granted by the court. Wright v. White, 693 So. 2d 898, 1997 Miss. LEXIS 160 (Miss. 1997), overruled in part, E. Miss. State Hosp. v. Callens, 892 So. 2d 800, 2004 Miss. LEXIS 361 (Miss. 2004).

Where a motion calls into question the correctness of all or any part of a judgment, even though corrections sought be fairly characterized as clarifying or technical only, and where the motion is filed within time allowed by M.R.C.P. Rule 59, the court will presume the motion has been filed under Rule 59 rather than Rule 60, regardless of how it may be styled. Bruce v. Bruce, 587 So. 2d 898, 1991 Miss. LEXIS 692 (Miss. 1991).

Regardless of how it might have been styled, motion seeking relief from dismissal of complaint was a M.R.C.P. Rule

60(b)(6) motion, for it was difficult to see how one could have a Rule 59 motion for a new trial when there had never been a trial. Cunningham v. Mitchell, 549 So. 2d 955, 1989 Miss. LEXIS 442 (Miss. 1989).

Ten day time limit set forth in M.R.C.P. Rule 59(b) is jurisdictional and mandatory, and Rule 6(b) gives trial judge no discretion to enlarge this time period. Telford v. Aloway, 530 So. 2d 179, 1988 Miss. LEXIS 413 (Miss. 1988).

**Applicability.**

Motion for clarification under Miss. R. Civ. P. 59(e) was actually a Miss. R. Civ. P. 60(b) motion as it sought to attack the final judgment. Jackson v. Baldwin Sand & Gravel, 288 So. 3d 339, 2019 Miss. App. LEXIS 231 (Miss. Ct. App. 2019), cert. denied, 287 So. 3d 217, 2020 Miss. LEXIS 28 (Miss. 2020), cert. denied, — So. 3d —, 2020 Miss. LEXIS 199 (Miss. 2020).

Motion to set aside or reconsider an order granting summary judgment will be treated as a motion under Miss. R. Civ. P. 59(e). The movant must show: (i) an intervening change in controlling law; (ii) availability of new evidence not previously available; or (iii) need to correct a clear error of law or to prevent manifest injustice. Cattenhead v. Brantley, 119 So. 3d 1136, 2013 Miss. App. LEXIS 475 (Miss. Ct. App. 2013).

As an insured who prevailed in a negligence suit against his insurer had no postjudgment right to attorney's fees because the jury did not award punitive damages, and neither a statutory nor contractual provision authorized such fees, attorney's fees were not judgment-derivative and his postjudgment request for such fees fell within the scope of Miss. R. Civ. P. 59(e); as he failed to meet the requirements of Rule 59(e), his motion was properly denied. Fulton v. Miss. Farm Bureau Cas. Ins. Co., 105 So. 3d 284, 2012 Miss. LEXIS 505 (Miss. 2012).

Defendant's motion to amend was properly dismissed by the trial court not only because it was not timely filed, but also because its reliance on Miss. R. Civ. P. 59(e) was misplaced; that rule involved motions for new trial and did not apply to defendant's attempt to amend his pleadings because defendant never had a trial, and, instead, pled guilty. Faye v. State, 859 So. 2d 393, 2003 Miss. App. LEXIS 905 (Miss. Ct. App. 2003).

Where loose wording of final judgment contradicted ultimate holding of lower court, and judgment was not yet final, judgment could properly be amended to reflect the original memorandum. Griffin v. Tall Timbers Dev., 681 So. 2d 546, 1996 Miss. LEXIS 516 (Miss. 1996).

Defendant was not attempting to alter or amend judgment against her, but was simply trying to have court make judgment conform to what was originally pronounced at conclusion of trial, and therefore M.R.C.P. Rule 60(b) applied rather than Rule 59(e). Fultz v. Doss, 507 So. 2d 891, 1987 Miss. LEXIS 2530 (Miss. 1987).

**Limitations.**

When, following dismissal of an insured's complaint against its insurer without prejudice, the insured filed a timely motion to alter or amend under Miss. R. Civ. P. 59(e), which the trial court did not rule on for five months, the statute of limitations applicable to the insured's claim was tolled during the pendency of the Rule 59(e) motion. Sweet Valley Missionary Baptist Church v. Alfa Ins. Corp., 124 So. 3d 643, 2013 Miss. LEXIS 574 (Miss. 2013).

Trial court erred in dismissing insured's refiled suit as time-barred, because the insured had filed a Miss. R. Civ. P. 59(e) motion to alter or amend the judgment dismissing its original suit, and the filing of that motion not only tolled the time for appeal and the enforceability of the judgment, it also tolled the statute of limitations until the trial court ruled on the motion. Sweet Valley Missionary Baptist Church v. Alfa Ins. Corp., 124 So. 3d 683, 2013 Miss. App. LEXIS 109 (Miss. Ct. App.), aff'd, 124 So. 3d 643, 2013 Miss. LEXIS 574 (Miss. 2013).

Where the trial court, pursuant to Miss. R. Civ. P. 59, entered an order altering the divorce judgment by changing the division of the property, as this order impermissibly broadened and amended the previous judgment after the filing of the former husband's notice of appeal, the order was null and void. Strickland v. Strickland, 102 So. 3d 1216, 2012 Miss. App. LEXIS 537 (Miss. Ct. App. 2012).

In a case in which a circuit court dismissed a company's amended complaint against a city as being time-barred, the company was procedurally barred from challenging the dismissal of its complaint. The company lost its right to pursue an appeal of the merits of the court's dismissal of its amended complaint when it failed to file either a timely Miss. R. Civ. P. 59 motion or a notice of appeal within 30 days of the entry of the order of dismissal, as required by Miss. R. App. P. 4(a). Finicky Pet Foods, Inc. v. City of Ocean Springs, 18 So. 3d 331, 2009 Miss. App. LEXIS 641 (Miss. Ct. App. 2009).

In a divorce case, a former husband's appeal was time-barred because it was not perfected within 10 days of a final judgment entered in January 2007; the husband's post-trial motions were untimely under Miss. R. Civ. P. 52 and Miss. R. Civ. P. 59, and a chancellor did not have the authority to extend the time for such. The January 2007 judgment was final because it attended to all of the issues before the chancellor, including the support of two minor children, the equitable distribution of marital assets and liabilities, whether to award a former wife alimony, and whether to award the former wife attorney's fees. Anderson v. Anderson, 8 So. 3d 264, 2009 Miss. App. LEXIS 195 (Miss. Ct. App. 2009).

In a divorce case, a former husband's motion to reconsider was time-barred because it was filed more than 10 days after the entry of a judgment. Anderson v. Anderson, 8 So. 3d 264, 2009 Miss. App. LEXIS 195 (Miss. Ct. App. 2009).

Buyer's appeal was dismissed where, had the buyer's motion for a new trial pursuant to Miss. R. Civ. P. 59 been timely filed, then under Miss. R. App. P. 4(d), his appeal would have been timely filed; however, since the buyer's Rule 59 motion was untimely, the appellate court lacked jurisdiction in the matter. Gober v. Lee, 8 So. 3d 912, 2009 Miss. App. LEXIS 141 (Miss. Ct. App. 2009).

Defendant's motion for reconsideration needed to be filed within ten days of September 27, 2006, in order to be timely; however, it was filed on July 2, 2007, nearly ten months after the court's denial of his petition for post-conviction relief; even if it would have been proper to consider defendant's motion under Miss. R. Civ. P. 60(b) instead of Miss. R. Civ. P. 59, the motion also would have been untimely because it was not filed within six months as required by Rule 60(b). Henry v. State, 999 So. 2d 867, 2008 Miss. App. LEXIS 418 (Miss. Ct. App. 2008), cert. denied, 999 So. 2d 852, 2009 Miss. LEXIS 24 (Miss. 2009).

Chancellor properly denied a lessee's motion to clarify a judgment declaring a farm lease void where the motion to clarify, filed approximately 18 months after the lessee's motion for reconsideration was denied, was untimely under Miss. R. Civ. P. 59(e); because the motion to clarify was untimely, the lessee's appeal was untimely under Miss. R. App. P. 4(d). Brand v. Barr, 980 So. 2d 962, 2008 Miss. App. LEXIS 242 (Miss. Ct. App. 2008).

Motion for post-judgment interest in a negligence action was not governed by the 10-day time period in Miss. R. Civ. P. 59(e) because the right to post-judgment interest was a statutory right governed by Miss. Code Ann. § 75-17-7; therefore, a motion filed 58 days after judgment was timely under Miss. R. Civ. P. 60(a). Miss. Dep't of Mental Health v. Hall, 936 So. 2d 917, 2006 Miss. LEXIS 462 (Miss. 2006).

Because husband's motion to re-open divorce case was under M.R.C.P. Rule 60 rather than Rule 59, it did not toll wife's time to file her notice of appeal, and since wife's notice of appeal was not timely, supreme court did not have jurisdiction to address wife's assignment of error. Michael v. Michael, 650 So. 2d 469, 1995 Miss. LEXIS 18 (Miss. 1995).

Wife's post-trial motion in divorce action was a motion under M.R.C.P. Rule 59 rather than Rule 60, and since it was filed within ten legal days after entry of judgment it operated to stay running of time for perfecting appeal, and therefore husband's previously-filed notice of appeal was premature and ineffective to perfect appeal. Bruce v. Bruce, 587 So. 2d 898, 1991 Miss. LEXIS 692 (Miss. 1991).

**New trials.**

Trial court did not err in denying the landowners' motion for JNOV or new trial where the jury was free to accept or reject any or all of the testimony and evidence presented by Mississippi Transportation Commission (MTC) and the landowners; the jury accepted the testimony and evidence that supported MTC and rendered a verdict in its favor. Adcock v. Miss. Transp. Comm'n, 981 So. 2d 942, 2008 Miss. LEXIS 145 (Miss. 2008).

Chancellor was instructed by the supreme court in its previous opinion to provide more detailed reasoning on the record as to each indicium of reasonableness for the annexation of three areas in the county into the city and to enter a judgment in accordance with those findings and conclusions, and the supreme court did not require the chancellor to conduct a new annexation hearing; the landowners who objected to the annexation had notice of the original hearing and had the opportunity to have counsel with them at that hearing, and thus the chancellor did not err in denying a landowners' motion for a new trial or to reopen the case and take additional testimony, and make new findings and a judgment. Hale v. City of Clinton (In re Enlargement & Extension of Mun. Boundaries), 955 So. 2d 307, 2007 Miss. LEXIS 256 (Miss. 2007).

Termination of the mother's parental rights was improper because the county's Miss. R. Civ. P. 60(b)(3) motion was not supported by newly discovered evidence; none of the evidence was either newly discovered or of the sort that it could not have been discovered in time to have moved for a new trial under Miss. R. Civ. P. 59(b). In re V.M.S., 938 So. 2d 829, 2006 Miss. LEXIS 530 (Miss. 2006).

Appellate court affirmed the grant of the insurer's motion for a new trial pursuant to Miss. R. Civ. P. 59 as the evidence at trial was overwhelmingly in favor of the insurer such that the jury verdict had to be the result of bias or prejudice. Blossman Gas, Inc. v. Shelter Mut. Gen. Ins. Co., 920 So. 2d 422, 2006 Miss. LEXIS 44 (Miss. 2006).

Trial court appropriately denied the Mississippi Transportation Commission's motion for a new trial because the jury verdict of $60,000 in favor of the landowners was not excessive; the jury verdict was between the values offered by the experts, and the verdict did not evidence bias, passion, or prejudice. Miss. Transp. Comm'n v. Williamson, 908 So. 2d 154, 2005 Miss. App. LEXIS 230 (Miss. Ct. App.), cert. denied, 920 So. 2d 1008, 2005 Miss. LEXIS 477 (Miss. 2005).

New trial was not warranted in a daughter's unsuccessful negligence suit against a nursing home on behalf of her bedridden mother who had been assaulted by a male resident who was known for this type of sexual behavior. There was substantial evidence in support of the jury's verdict in favor of the home, notably, the Department of Human Services' investigation into the incident found that the home was not negligent; furthermore, although the home had made several attempts to have the male resident transferred, only a doctor had the power to restrain or transfer him and a doctor had not done so. Dupree v. Plantation Pointe, L.P., 892 So. 2d 228, 2004 Miss. LEXIS 1460 (Miss. 2004).

Judge did not err in granting a trucking company's motion for a new trial in a wrongful death suit because a verdict in favor of the deceased's heirs was against the overwhelming weight of the evidence; there was no evidence of damage to the truck as there would have been if it had struck the deceased. White v. Yellow Freight Sys., 905 So. 2d 506, 2004 Miss. LEXIS 1489 (Miss. 2004).

Defendant's motion for a new trial was properly denied where there was no evidence other than the witness's testimony that he and his boss trimmed or cut a tree on the country club's property that implicated the club in the husband's wife's death; there was no evidence that another witness testified falsely because of the threat that he might be arrested, and since the witness testified anyway, there was no prejudice to the husband. Kindred v. Columbus Country Club, Inc., 918 So. 2d 719, 2004 Miss. App. LEXIS 1008 (Miss. Ct. App. 2004), aff'd, 918 So. 2d 1281, 2005 Miss. LEXIS 551 (Miss. 2005).

In a wrongful death action, in the wife's strict liability claim against the tobacco company, because there was evidence that there existed no safe cigarette and that the tobacco company constantly did research to provide the safest, consumer-desirable cigarette possible, that the wife was not aware that her husband had ever tried to quit smoking and, therefore, would have avoided any danger from the product, and that the wife put on evidence only to support the unreasonably dangerous aspect of the case and failed to provide evidence of any type of defect, the trial court did not err in refusing to grant a judgment notwithstanding the verdict or, in the alternative, a new trial. Nunnally v. R.J. Reynolds Tobacco Co., 869 So. 2d 373, 2004 Miss. LEXIS 283 (Miss. 2004).

Chancellor did not abuse his discretion in granting the husband's motion for a new trial where the wife had a full opportunity to be heard and present evidence; the stated reason for granting a new trial was that an injustice would result from allowing the judgment to stand, and the wife offered no argument as to why this constituted an abuse of discretion. Franklin v. Franklin, 864 So. 2d 970, 2003 Miss. App. LEXIS 1113 (Miss. Ct. App. 2003).

Trial judge was correct in denying defendant's motion for a new trial because defendant's motion was filed almost two years after the entry of judgment. Wilson v. State, 853 So. 2d 822, 2003 Miss. App. LEXIS 586 (Miss. Ct. App. 2003).

Although there was ample evidence for a jury to award damages to a customer for an injured knee, there was a lack of any evidence of a head injury; therefore, the lower court's failure to grant a new trial was an abuse of discretion. Sutherlands Lumber & Home Ctr., Inc. v. Whittington, 878 So. 2d 80, 2003 Miss. App. LEXIS 719 (Miss. Ct. App. 2003).

Because conflicting facts were presented by the driver and the injury victim as to an automobile accident that caused the injury victim's damages, the entire case hinged on the jury's determinations, therefore, trial court did not err in denying the injury victim's motion for a new trial. Hopkins v. Schaeffer, 840 So. 2d 737, 2003 Miss. App. LEXIS 212 (Miss. Ct. App. 2003).

Plaintiff in action arising from automobile accident was not entitled to new trial, where she offered no proof of bias, passion or prejudice toward her, save that jury did not find in her favor, and there was more than sufficient testimony on which to base jury's verdict that defendant was not negligent. Shields v. Easterling, 676 So. 2d 293, 1996 Miss. LEXIS 307 (Miss. 1996).

New trial may be granted when verdict is against overwhelming weight of evidence, or when jury has been confused by faulty jury instructions, or when jury has departed from its oath and its verdict is a result of bias, passion, and prejudice. Shields v. Easterling, 676 So. 2d 293, 1996 Miss. LEXIS 307 (Miss. 1996).

Plaintiff was not entitled to new trial or judgment notwithstanding the verdict in action against department store for slander, assault, and battery in connection with shop-lifting incident, where, based on evidence, reasonable and fairminded jurors could have reached the conclusion that they did. Daniels by Glass v. Wal-Mart Stores, 634 So. 2d 88, 1993 Miss. LEXIS 564 (Miss. 1993), limited, Sample v. State, 643 So. 2d 524, 1994 Miss. LEXIS 466 (Miss. 1994), limited, Mask v. Elrod (In re Estate of Mask), 703 So. 2d 852, 1997 Miss. LEXIS 752 (Miss. 1997).

When an assignment of error is based on an issue which has been decided by the trial court and duly recorded in the court reporter's transcript, such as the admission or omission of evidence, court on appeal may consider it regardless of whether it was raised in the party's motion for new trial. Kiddy v. Lipscomb, 628 So. 2d 1355, 1993 Miss. LEXIS 445 (Miss. 1993).

Trial courts have authority to set aside a jury verdict where, in exercise of their sound discretion, they regard such a verdict as being contrary to the substantial weight of the evidence. C & C Trucking Co. v. Smith, 612 So. 2d 1092, 1992 Miss. LEXIS 800 (Miss. 1992).

If court finds damage award to be excessive or inadequate because jury or trier of facts was influenced by bias, prejudice, or passion, or that damages awarded were contrary to overwhelming weight of credible evidence, motion for new trial still may be overruled upon condition of additur or remittitur. Odom v. Roberts, 606 So. 2d 114, 1992 Miss. LEXIS 559 (Miss. 1992), overruled, Dedeaux v. Pellerin Laundry, Inc., 947 So. 2d 900, 2007 Miss. LEXIS 14 (Miss. 2007).

Trial court did not abuse its discretion in ruling on motion for new trial before it, and refusing plaintiff's ore tenus request for hearing to determine if jury was improperly influenced, where issue was not contained in the motion or demonstrable on the record. Brake v. Speed, 605 So. 2d 28, 1992 Miss. LEXIS 418 (Miss. 1992).

Trial court did not abuse its discretion in granting new trial on all issues, on grounds that jury must have been confused, as it found for plaintiff but awarded no damages despite uncontroverted evidence of such, and that improperly prejudicial evidence was allowed to go to jury. Clark v. Viniard, 548 So. 2d 987, 1989 Miss. LEXIS 423 (Miss. 1989).

Motions for new trial are addressed to sound discretion of trial court, and require a lesser showing before they can be sustained than does the motion for j.n.o.v. Investors Property Management, Ltd. v. Watkins, Pitts, Hill & Associates, 511 So. 2d 1379, 1987 Miss. LEXIS 2699 (Miss. 1987).

Since motion for remittitur was a species of motion for new trial, proper course for circuit court to have taken, if it had merely considered jury verdict excessive, would have been to grant defendant's motion for new trial, conditioned upon right of plaintiffs to accept a remittitur. Investors Property Management, Ltd. v. Watkins, Pitts, Hill & Associates, 511 So. 2d 1379, 1987 Miss. LEXIS 2699 (Miss. 1987).

Although circuit court's order referred to reduction in damages as a "remittitur" and as being "in lieu of a new trial," correct reading of order was that it was a judgment notwithstanding the verdict. Investors Property Management, Ltd. v. Watkins, Pitts, Hill & Associates, 511 So. 2d 1379, 1987 Miss. LEXIS 2699 (Miss. 1987).

In ruling on a motion for new trial, credible evidence must be viewed in light most favorable to non-moving party, and credible evidence supporting claims or defenses of non-moving party should generally be taken as true; when evidence is so viewed, motion should be granted only when upon review of entire record the trial judge is left with a firm and definite conviction that verdict, if allowed to stand, would work a miscarriage of justice. Clark v. Columbus & G. R. Co., 473 So. 2d 947, 1985 Miss. LEXIS 2162 (Miss. 1985).

Grant or denial of a motion for new trial is a matter largely within sound discretion of trial judge. Clark v. Columbus & G. R. Co., 473 So. 2d 947, 1985 Miss. LEXIS 2162 (Miss. 1985).

**Reconsideration.**

Chancery court did not abuse its discretion by reconsidering its initial credibility determinations after one parent in a child custody matter contended that the parent had newly discovered evidence that the other parent had made numerous false statements at a hearing relating to the other parent's employment, living situation, and drug use. Pevey v. Pevey, 270 So. 3d 250, 2018 Miss. App. LEXIS 406 (Miss. Ct. App. 2018).

Chancery court did not exceed its authority by entering a revised opinion and amended final judgment because the father's filing of a timely motion to alter or amend the judgment suspended the finality of the judgment and permitted the chancery court to consider the various issues in the case "e novo, if not ab initio; at that point, the chancery court had the power and jurisdiction to amend the judgment for any reason, and it was not limited to the ground set forth in the motion itself. Dixon v. Dixon, 238 So. 3d 1191, 2018 Miss. App. LEXIS 57 (Miss. Ct. App. 2018).

Father misinterpreted the case's procedural history and the chancery court's rulings because his "Motion for Reconsideration" primarily sought to alter or amend the judgment in various respects since the father sought to change the final judgment based on the evidence already presented, not a "new trial"; the motion's prayer for relief did not even mention a "new trial." Dixon v. Dixon, 238 So. 3d 1191, 2018 Miss. App. LEXIS 57 (Miss. Ct. App. 2018).

Wife's motion to reconsider did not specify that it was brought pursuant to Miss. R. Civ. P. 59, and it was filed more than 10 days after the entry of the order to quash; therefore, it should have been considered a motion for relief under Miss. R. Civ. P. 60. The chancellor did not abuse his discretion under Rule 60(b)(6). Carlisle v.

Allen, 40 So. 3d 1252, 2010 Miss. LEXIS 391 (Miss. 2010).

In an eminent domain proceeding in which it was clear that the Mississippi Transportation Commission is entitled to a judgment in the amount of its excess deposit, the trial court abused its discretion in denying a trustee's and a bank's Miss. R. Civ. P. 59(e) motion to amend the judgment or, alternatively, for relief from the judgment under Miss. Civ. P. 60(b)(6). Due to the considerable delay between the time the funds were disbursed and the time of trial, which was almost 10 years, it was prejudicial and inequitable for the trial court to hold that the trustee and the bank failed to appear and defend their interests. Harrison v. Miss. Transp. Comm'n, 57 So. 3d 648, 2010 Miss. App. LEXIS 91 (Miss. Ct. App. 2010), aff'd on other grounds, 57 So. 3d 622, 2011 Miss. LEXIS 127 (Miss. 2011).

In an eminent domain proceeding in which it was clear that the Mississippi Transportation Commission is entitled to a judgment in the amount of its excess deposit, the trial court abused its discretion in denying a trustee's and a bank's Miss. R. Civ. P. 59(e) motion to amend the judgment or, alternatively, for relief from the judgment under Miss. Civ. P. 60(b)(6); to hold them responsible for the judgment almost 10 years after the money was disbursed to the landowner and applied to the landowner's mortgage constituted manifest injustice. Harrison v. Miss. Transp. Comm'n, 57 So. 3d 648, 2010 Miss. App. LEXIS 91 (Miss. Ct. App. 2010), aff'd on other grounds, 57 So. 3d 622, 2011 Miss. LEXIS 127 (Miss. 2011).

Chancellor did not err in refusing to reconsider findings on the issue of whether an employee's acquisition of the business lease prior to his termination where the evidence was not newly discovered and it could have been discovered in time for trial. Cooper v. Winnie Gilder & Cooper Gilder, Inc., 156 So. 3d 262, 2009 Miss. App. LEXIS 219 (Miss. Ct. App. 2009), dismissed, 2010 Miss. LEXIS 264 (Miss. May 27, 2010).

In a divorce case, a chancellor acted within his discretion in granting the wife's Miss. R. Civ. P. 59 motion to reopen the issue of custody because, though not expressly stated in his order, it was clear from the record that the chancellor granted the motion based on a mistake in law, that is, that the original custody determination was made without consideration of the applicable Albright factors. Wade v. Wade, 967 So. 2d 682, 2007 Miss. App. LEXIS 727 (Miss. Ct. App. 2007).

Chancellor did not err in hearing the husband's motion for reconsideration under Miss. R. Civ. P. 59(e) in an action dealing with divorce, alimony, and child custody because it was timely filed after the chancellor's rendition of her bench opinion, though before the final judgment was entered. Street v. Street, 936 So. 2d 1002, 2006 Miss. App. LEXIS 636 (Miss. Ct. App. 2006).

Husband argued that it was beyond the discretion of the trial court to clarify, pursuant to a motion for reconsideration, that the lump sum alimony awarded to the wife in the divorce decree was for support and not part of the property settlement; however it was within the scope of Miss. R. Civ. P. 60(a) for the judge to clarify what his decision in the divorce decree in fact was. Seymour v. Seymour, 869 So. 2d 1035, 2004 Miss. App. LEXIS 220 (Miss. Ct. App. 2004).

Client's motion for reconsideration was void as it was not timely filed; under Miss. R. Civ. P. 59(e), a motion for reconsideration was treated as a motion to amend judgment and had to be filed within 10 days from the entry of judgment sought to be amended. Curry v. Walls, 871 So. 2d 762, 2004 Miss. App. LEXIS 324 (Miss. Ct. App. 2004).

A motion for reconsideration is treated as a motion to amend judgment pursuant to Miss. R. Civ. P. 59(e). Boyles v. Schlumberger Tech. Corp., 792 So. 2d 262, 2001 Miss. LEXIS 200 (Miss. 2001).

While "reconsideration" is not mentioned in the Mississippi Rules of Civil Procedure, a motion seeking that relief is authorized under Miss. R. Civ. P. 59(e). Brame v. Brame, 796 So. 2d 970, 2001 Miss. LEXIS 154 (Miss. 2001).

A trial court cannot itself entertain its own reconsideration under subsection (d). Luke Edwards & Reach, Inc. v. Roberts, 771 So. 2d 378, 2000 Miss. App. LEXIS 522 (Miss. Ct. App. 2000).

**Review.**

Notice of appeal filed by one of the parties in a divorce proceeding only became effective once the chancellor entered an order granting the other party's motion to correct the judgment, or, in the alternative, motion to correct or amend the amended judgment. Dauenhauer v. Dauenhauer, 271 So. 3d 589, 2018 Miss. App. LEXIS 570 (Miss. Ct. App. 2018).

Because the issue of child custody was clearly decided by the chancery court at trial, the appellate court found any failure to raise the issue in a parent's motion to alter or amend the judgment did not bar the issue from review on appeal. Baumbach v. Baumbach, 242 So. 3d 193, 2018 Miss. App. LEXIS 158 (Miss. Ct. App. 2018).

In a personal injury action by guests against a casino, an appeal of the denial of the guests' motion to reconsider was time-barred where, following the denial of their reconsideration motion, the guests filed a recusal motion instead of filing a notice of appeal. The time for appeal commenced under Miss. R. App. P. 4(d) when the reconsideration motion was denied and the guests' failure to perfect a notice of appeal within 30 days subjected the appeal to dismissal. Doll v. BSL, Inc., 41 So. 3d 664, 2010 Miss. LEXIS 300 (Miss. 2010).

Errors relating to the admission or exclusion of evidence were preserved for appellate review in a negligence case even though they were not raised in a motion for a new trial, because the assignments of error were based on issues that had been decided by the trial court and duly recorded in a court reporter's transcript. Alexander v. Greer, 959 So. 2d 586, 2007 Miss. App. LEXIS 436 (Miss. Ct. App. 2007).

Trial court did not abuse its discretion in denying the patient's motion for a new trial following the jury's verdict in favor of the doctor in the patient's medical malpractice suit, because the evidence was such that the jury could reasonably find that the patient failed to prove by a preponderance of the evidence that the doctor had damaged the patient during a surgical procedure. Griffin v. McKenney, 877 So. 2d 425, 2003 Miss. App. LEXIS 942 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 867 (Miss. 2004).

Reversal for failure to grant new trial will occur only if it is clear that trial court abused its discretion; court on appeal is to view credible evidence in light most favorable to non-moving party. Chisolm v. Eakes, 573 So. 2d 764, 1990 Miss. LEXIS 793 (Miss. 1990).

Reviewing court will reverse trial judge's denial of a request for new trial only when such denial amounts to an abuse of that judge's discretion. Bobby Kitchens, Inc. v. Mississippi Ins. Guaranty Ass'n, 560 So. 2d 129, 1989 Miss. LEXIS 447 (Miss. 1989).

Reversal for failure to grant a new trial is proper only when it is manifest that trial judge's denial constitutes an abuse of discretion. Thornhill v. Wilson, 504 So. 2d 1205, 1987 Miss. LEXIS 2446 (Miss. 1987).

Order granting a new trial is not a final judgment and thus is ordinarily not appealable. Shelton v. Puckett, 483 So. 2d 354, 1986 Miss. LEXIS 2399 (Miss. 1986).

Discretion vested in trial judge with respect to motion for new trial is quite broad, and reversal is limited to those cases where trial judge has abused his discretion. Shelton v. Puckett, 483 So. 2d 354, 1986 Miss. LEXIS 2399 (Miss. 1986).

**Timeliness.**

Parent's motion to alter or amend the judgment was untimely because the motion was filed twenty-two days after the judgment in the child custody matter was entered. Barbaro v. Smith, 282 So. 3d 578, 2019 Miss. App. LEXIS 322 (Miss. Ct. App. 2019).

Because the appellants' motion to clarify was not filed within ten days of the judgment, it did not stay the appeal. Smith v. Coldwell Banker Graham & Assocs., 271 So. 3d 489, 2018 Miss. App. LEXIS 439 (Miss. Ct. App. 2018), cert. denied, 268 So. 3d 1281, 2019 Miss. LEXIS 208 (Miss. 2019).

Since the father failed to object to the mother's supplemental motion, the issue of timeliness was waived; the mother timely filed the motion, and following the dismissal of the motion, she timely filed an appeal, and thus the supplement to a timely filed motion for new trial did not affect the appellate court's jurisdiction in this case. Carter v. Carter, 204 So. 3d 747, 2016 Miss. LEXIS 489 (Miss. 2016).

Mississippi Supreme Court adopts the approach of the Fifth and Eleventh Circuits allowing judges in their discretion to consider new grounds raised in amendments to timely filed motions for new trial; in this case, the mother filed her original motion for a new trial within the 10-day period, then filed an unopposed supplement to that motion 67 days later, raising a new ground not contained in the original motion, and the issue was properly before the court. Carter v. Carter, 204 So. 3d 747, 2016 Miss. LEXIS 489 (Miss. 2016).

Rule does not permit a request for a 30-day extension. Davis v. Vance, 138 So. 3d 961, 2014 Miss. App. LEXIS 264 (Miss. Ct. App. 2014).

Where the debtor sued the bank for negligent and fraudulent misrepresentation, breach of fiduciary duty and breach of covenants of good faith and fair dealing, the trial court entered an order on March 3, 2006, denying the bank's motion for summary judgment; the bank's petition for an interlocutory appeal was denied on March 29, 2006. On March 20, 2007, a specially appointed judge entered an order setting the case for trial on March 3, 2008, and the bank, on July 19, 2007, filed a motion asking the trial court to reconsider the order denying summary judgment; the trial court acted within its authority in deeming the motion timely filed pursuant to Miss. R. Civ. P. 59. Holland v. Peoples Bank & Trust Co., 3 So. 3d 94, 2008 Miss. LEXIS 596 (Miss. 2008).

**Illustrative cases.**

Grant custody to the father was improper under Miss. R. Civ. P. 59(a)(2) because the chancellor error by denying the mother's motion to reconsider his Albright analysis. Over two years had passed since this custody hearing and the chancellor was directed to conduct a new Albright analysis to determine the child's best interest and to consider fully the present circumstances of the mother, the father, and the biological father when determining custody and visitation rights. Smullins v. Smullins, 2011 Miss. App. LEXIS 56 (Miss. Ct. App. Feb. 1, 2011), op. withdrawn, sub. op., 77 So. 3d 119, 2011 Miss. App. LEXIS 725 (Miss. Ct. App. 2011).

Trial court's denial of a wife's motion under Miss. R. Civ. P. 59 to set aside an order granting summary judgment in favor of a logging company did not result in manifest injustice because the trial court did not abuse its discretion in denying the wife's request for an order of continuance pursuant to Miss. R. Civ. P. 56(f) on the ground that her request was untimely under Rule 3(b) of the Local Rules for the Fifth Circuit Court District; almost two years passed between the filing of the wife's complaint and the filing of the company's motion for summary judgment, affording both parties ample time in which to conduct discovery in the case, and any information that the wife sought to "discover" was largely available to her immediately after the injury occurred. Moore v. M & M Logging, Inc., 51 So. 3d 216, 2010 Miss. App. LEXIS 213 (Miss. Ct. App. 2010), cert. denied, 50 So. 3d 1003, 2011 Miss. LEXIS 22 (Miss. 2011).

Trial court did not abuse its discretion by refusing to consider a wife's affidavit, which was attached to her motion to set aside an order granting a logging company summary judgment, because the wife failed to submit an affidavit in support of her claims in her response to the company's motion for summary judgment, and the wife admitted that the sworn affidavit attached to her motion to set aside summary judgment contained alleged admissions made to her by her husband on the day of the accident; thus, that information was available and known to the wife when the company's motion for summary judgment was filed, that affidavit was later withdrawn by the wife, and since the wife's substitute affidavit was not sworn testimony, it was not admissible as evidence. Moore v. M & M Logging, Inc., 51 So. 3d 216, 2010 Miss. App. LEXIS 213 (Miss. Ct. App. 2010), cert. denied, 50 So. 3d 1003, 2011 Miss. LEXIS 22 (Miss. 2011).

Trial court did not err in denying a motion to alter or amend a judgment dismissing a hospital from a medical malpractice suit on the ground that there was a need for a deceased patient's family to correct a clear error of law or to prevent manifest injustice. Lucas v. Baptist Mem. Hosp. - N. Miss., Inc., 997 So. 2d 226, 2008 Miss. App. LEXIS 720 (Miss. Ct. App. 2008).

Motion for a new trial was properly denied in a medical malpractice suit against a physician and medical clinic because the physician did not meet his duty of care by requesting lab results to rule out a life-threatening infection, and his failure to follow up with the lab proximately caused the patient's persistent vegetative state and eventual death. Estate of Jones v. Phillips, 992 So. 2d 1131, 2008 Miss. LEXIS 420 (Miss. 2008).

Where a decedent suffering from Alzheimer's, dementia, and other problems signed a will naming the decedent's recently-married widow as the sole beneficiary, sufficient evidence supported a jury's verdict against the widow and it was not error to deny the widow's post-trial motion because a confidential relationship existed and a presumption of undue influence arose which the widow failed to rebut since the decedent was dependent on the widow and the attorney did not question the decedent as to the decedent's understanding that the decedent was leaving the decedent's daughters nothing. Pope v. White (In re Estate of Pope), 5 So. 3d 427, 2008 Miss. App. LEXIS 316 (Miss. Ct. App. 2008), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 132 (Miss. 2009).

In a dissolution of marriage case, the court erred in granting a stay of the final judgment of divorce and it lacked authority to reinstate its temporary order because the court lost jurisdiction ten days after the court entered its final judgment of divorce because the wife failed to file a posttrial motion under Miss. R. Civ. P. 59(e). McIntosh v. McIntosh, 977 So. 2d 1257, 2008 Miss. App. LEXIS 184 (Miss. Ct. App. 2008).

In a breach of contract case, a chancellor did not err by refusing to grant a new trial under Miss. R. Civ. P. 59(a)(2) because the decision was supported by the weight of the evidence where a renter testified that he failed to maintain insurance on property, as agreed upon by the parties to a rental contract; the chancellor was entitled to accept the version of events that he found most credible in determining whether or not the renter attempted to make a timely balloon payment under the terms of the contract. Kendrix v. Huckaby, 955 So. 2d 950, 2007 Miss. App. LEXIS 278 (Miss. Ct. App. 2007).

In a personal injury case, the court did not err by denying plaintiff's request for a new trial because the jury's award was not so low as to shock the conscience or evince bias on the part of the jury; each theory expounded by plaintiff's expert witnesses was contradicted by the testimony of other expert witnesses, and evidence indicated that after the accident plaintiff did well in school and was able to perform light work. Walker v. Gann, 955 So. 2d 920, 2007 Miss. App. LEXIS 290 (Miss. Ct. App. 2007).

Where an employee was mounting a moving locomotive when a foot slipped due to mud, causing the employee to fall and sustain serious leg injuries, the railroad was liable to the employee for damages under the Federal Employer's Liability Act, 45 U.S.C. § 51; the trial court was correct in denying the railroad's motion for a new trial, and the evidence showed the railroad was warned of the slippery conditions, but did nothing to remedy the potential hazard. Canadian Nat'l/Ill. Cent. R.R. v. Hall, 953 So. 2d 1084, 2007 Miss. LEXIS 208 (Miss. 2007).

Neighbors' argument that the chancellor abused his discretion by denying their Miss. R. Civ. P. 59(e) motion was without merit because the appellate court was unable to see how the new language in the covenants was relevant to any of the parties in the action that sought to have fences removed; likewise, even if the other neighbors who instituted the action had voted for the amendment, an equitable estoppel theory was inapplicable to the argument. Journeay v. Berry, 953 So. 2d 1145, 2007 Miss. App. LEXIS 228 (Miss. Ct. App. 2007).

Plaintiff driver was entitled to a new personal injury trial because the verdict was against the overwhelming weight of the credible evidence; the evidence that defendant driver was at fault was overwhelming because plaintiff's expert testified that her excessive speeding was a proximate cause of the accident, and the investigator officer's opinion on the accident report that defendant had committed no traffic violation was entitled to little weight in comparison to the expert's opinion because there was no evidence that the officer's opinion was reliable. Fleming v. Floyd, 969 So. 2d 881, 2006 Miss. App. LEXIS 717 (Miss. Ct. App. 2006), rev'd, 969 So. 2d 868, 2007 Miss. LEXIS 651 (Miss. 2007).

In a tort action arising from an incident in a retail store, a family's motion for judgment notwithstanding the verdict or a motion for a new trial were properly denied as there were two versions of events; the evidence was not overwhelming in favor of the family where the store offered evidence that one member was removed due to loud and disruptive behavior and an attempt to conceal merchandise. Anderson v. McRae's, Inc., 931 So. 2d 674, 2006 Miss. App. LEXIS 464 (Miss. Ct. App. 2006).

In a negligence case, an owner's motion for a new trial under Miss. R. Civ. P. 59 should have been granted because the evidence showed the owner did not exercise substantial control over a worksite, despite having control over safety and specifying a daily or hourly rate; moreover, it was undisputed that the injured party's actions were negligent for comparative negligence purposes. Coho Res., Inc. v. Chapman, 913 So. 2d 899, 2005 Miss. LEXIS 266 (Miss. 2005).

Trial court erred in awarding $ 975,000 in damages to a limited partner in an action for negligent misrepresentation, fraud, and breach of contract against his former partners; the limited partner failed to prove that his former partners had made a fraudulent statement, intending to induce him to sell his interest in the partnership, and the former partners' promise to bid on his property at a foreclosure sale could not form the basis for negligent misrepresentation, because it involved future conduct. There was no breach of contract, because the foreclosure sale did not occur within the time specified by the contract; the trial court erred by denying the former partners' motion for remittitur. Moran v. Fairley, 908 So. 2d 805, 2005 Miss. App. LEXIS 312 (Miss. Ct. App.), sub. op., 919 So. 2d 969, 2005 Miss. App. LEXIS 1044 (Miss. Ct. App. 2005).

Trial court did not err in denying a motion to amend or alter a judgment, filed by a developer and a contractor, as the developer and the contractor had drafted their their settlement agreement to preclude a plumber, who had already prevailed on a partial summary judgment motion entitling him to interpled funds, from recovering any of the interpled funds. Noble House, Inc. v. W & W Plumbing & Heating, Inc., 881 So. 2d 377, 2004 Miss. App. LEXIS 880 (Miss. Ct. App. 2004).

Driver was awarded a new trial solely on the issue of damages where the jury verdict awarding zero dollars to the driver in his personal injury action was against the overwhelming weight of the evidence; it was clear from the evidence presented at trial that the driver suffered some injury from the accident. Knight v. Brooks, 881 So. 2d 294, 2004 Miss. App. LEXIS 203 (Miss. Ct. App.), cert. denied, 882 So. 2d 772, 2004 Miss. LEXIS 1110 (Miss. 2004).

In an inmate's appeal from the denial of postconviction relief, the trial court did not err in denying the inmate's motion under Miss. R. Civ. P. 59(e), because, despite an erroneous conclusion that the motion was untimely, the motion was without merit because the inmate did not show the need to correct a clear error of law or to correct a manifest injustice. Sheffield v. State, 881 So. 2d 249, 2003 Miss. App. LEXIS 998 (Miss. Ct. App. 2003), cert. dismissed, 2005 Miss. LEXIS 87 (Miss. Feb. 3, 2005).

Nursing home resident who was sexually abused by another resident should have received a new trial after a jury verdict for the nursing home. The evidence was uncontradicted that the assailant was known to be abusive and that the victim was unable to protect herself. Dupree v. Plantation Pointe, L.P., 881 So. 2d 832, 2003 Miss. App. LEXIS 820 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 892 So. 2d 228, 2004 Miss. LEXIS 1460 (Miss. 2004).

In a medical malpractice action, the grant of a new trial by the appeals court was affirmed because the jury instruction on the standard of care misstated the law by providing for the doctors to choose between proper alternatives "in the exercise of their best judgment." Those words together amounted to a subjective jury instruction. Bickham v. Grant, 861 So. 2d 299, 2003 Miss. LEXIS 406 (Miss. 2003).

Where a medical malpractice defendant's interrogatory response negligently identified an expert as a urologist rather than an expert in infectious diseases, but adequately described the proposed substance of the testimony, the trial court did not abuse its discretion in allowing the testimony, or in denying the patient's surviving relatives' motions for directed verdict, judgment notwithstanding the verdict, and a new trial. Buskirk v. Elliott, 856 So. 2d 255, 2003 Miss. LEXIS 354 (Miss. 2003).

The defendant was not entitled to a new trial, even though the testimony given by a witness was discovered after the trial and probably could not have been discovered with due diligence prior to the commencement of the trial, where such testimony was merely cumulative or impeaching of prior testimony presented to the jury during the trial. Williams v. State, 754 So. 2d 591, 2000 Miss. App. LEXIS 32 (Miss. Ct. App. 2000).

Trial court had authority to grant a new trial on all issues, despite passage of more than ten days from entry of judgment, where plaintiff's post-trial motion was pending and undecided at time court expanded it into its own motion for a new trial on all issues. Clark v. Viniard, 548 So. 2d 987, 1989 Miss. LEXIS 423 (Miss. 1989).

Divorce defendant was not entitled to have default judgment set aside or amended, where he failed to offer any defense to merits of claim for divorce, and his only excuse for failure to answer timely was that he was without funds to employ a lawyer and did not know that he could appear and answer without one. Mayoza v. Mayoza, 526 So. 2d 547, 1988 Miss. LEXIS 306 (Miss. 1988).

## Rule 60. Relief from judgment or order.

(a) *Clerical mistakes.* — Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders up until the time the record is transmitted by the clerk of the trial court to the appellate court and the action remains pending therein. Thereafter, such mistakes may be so corrected only with leave of the appellate court.

(b) *Mistakes; inadvertence; newly discovered evidence; fraud, etc.* — On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) fraud, misrepresentation, or other misconduct of an adverse party;

(2) accident or mistake;

(3) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(6) any other reason justifying relief from the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than six months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. Leave to make the motion need not be obtained from the appellate court unless the record has been transmitted to the appellate court and the action remains pending therein. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram nobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action and not otherwise.

(c) *Reconsideration of transfer order.* — An order transferring a case to another court will become effective ten (10) days following the date of entry of the order. Any motion for reconsideration of the transfer order must be filed prior to the expiration of the 10-day period, for which no extensions may be granted. If a motion for reconsideration is filed, all proceedings will be stayed until such time as the motion is ruled upon; however, if the transferor court fails to rule on the motion for reconsideration within thirty (30) days of the date of filing, the motion shall be deemed denied.

**HISTORY: Amended effective July 1, 2008, to provide for reconsideration of transfer orders entered on or after that date; Comments repealed and Advisory Committee Notes amended effective July 1, 2014; Advisory Committee Note amended effective January 16, 2020.**

## ADVISORY COMMITTEE NOTE

The trial court may grant relief from a judgment or order to correct clerical errors pursuant to Rule 60(a), or for other reasons enumerated in Rule 60(b). The trial court may correct clerical errors at any time, but if the case is on appeal and the trial court clerk has transmitted the record to the appellate court, the trial court must obtain leave from the appellate court before correcting any clerical mistakes. Motions for relief from a judgment or order based upon one of the reasons enumerated in Rule 60(b) must be made within a reasonable time, and in some cases, not more than six months after the judgment or order was entered.

Rule 60(a) only authorizes the trial court to correct clerical errors; it does not authorize any changes to the judgment that are substantive and change the effect or intent of the original judgment. *See Whitney Nat'l Bank v. Smith,* 613 So. 2d 312, 316 (Miss. 1993).

When ruling upon a Rule 60(b) motion, the trial court should balance the litigant's interest in a resolution on the merits of the motion with the desire to achieve finality in litigation. *See Stringfellow v. Stringfellow,* 451 So. 2d 219, 221 (Miss. 1984). Rule 60(b) motions that attempt to merely relitigate the case should be denied. Id.

A party moving for relief pursuant to Rule 60(b)(1) based upon fraud, misrepresentation or other misconduct of an adverse party must do so within six months after entry of the judgment and must prove the fraud, misrepresentation or other misconduct by clear and convincing evidence. *See Stringfellow,* 451 So. 2d at 221. Relief from a final judgment based upon fraud upon the court may be sought pursuant to Rule 60(b)(6). *See In re Estate of Pearson,* 25 So. 3d 392, 395 (Miss. Ct. App. 2009). "[R]elief based on 'fraud upon the court' is reserved for only the most egregious misconduct, and requires a showing of 'an unconscionable plan or scheme which is designed to improperly influence the court in its decision.'" *Id.* (citing *Wilson v. Johns-Manville Sales Corp.,* 873 F.2d 869, 872 (5th Cir. 1989)).

A party moving for relief pursuant to Rule 60(b)(2) based upon accident or mistake must do so within six months after entry of the judgment. A Rule 60(b)(2) motion will only be granted upon a showing of exceptional circumstances. Generally, "neither ignorance nor carelessness on the part of an attorney will provide grounds for relief." *See Stringfellow,* 451 So. 2d at 221.

A party may move to set aside a default judgment pursuant to Rule 60(b)(2). When ruling on such a motion, the trial court may consider: (1) whether the default was caused by excusable neglect or a bona fide technical error; (2) whether the claimant will suffer prejudice if the default judgment is set aside; and (3) whether the defaulting party has a colorable defense to the merits. *See State Highway Comm'n of Miss. v. Hyman,* 592 So. 2d 952, 955 (Miss. 1991).

A party moving for relief pursuant to Rule 60(b)(3) based upon newly discovered evidence must do so within six months after entry of the judgment. To justify relief, the evidence: (i) must have been in existence at the time of trial; (ii) could not have been discovered by due diligence prior to the expiration of the ten-day period in which a Rule 59 motion for new trial could have been filed; (iii) must be material and not cumulative; and (iv) must be of such character as to probably produce a different result in the event of a new trial or be of such character as to require a different ruling on summary judgment. *See January v. Barnes,* 621 So. 2d 915, 920 (Miss. 1992).

A party may move to set aside a void judgment pursuant to Rule 60(b)(4) more than six months after entry of the judgment if the delay in moving for relief was reasonable. *See Ladner v. Logan,* 857 So. 2d 764, 770 (Miss. 2003). A judgment is void if the trial court lacked jurisdiction over the subject matter or the parties or acted in a manner inconsistent with due process of law. *See Bryant, Inc. v. Walters,* 493 So. 2d 933, 938 (Miss. 1986).

A party may move to set aside the judgment pursuant to Rule 60(b)(5) if the judgment has been satisfied, released or discharged or a prior judgment upon which it is based has been reversed or otherwise vacated. Rule 60(b)(5), however, "does not authorize relief from a judgment on the ground that the law applied by the court in making its adjudication has been subsequently overruled or declared erroneous in another and unrelated proceeding." *See Regan v. S. Cent. Reg'l Med. Ctr.,* 47 So. 3d 651, 655 (Miss. 2010).

A party may move to set aside the judgment pursuant to Rule 60(b)(6) if there are "extraordinary and compelling" circumstances justifying relief. When ruling on a Rule 60(b)(6) motion, the trial court may consider the following factors: "(1) [t]hat final judgments should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5) [omitted factor relevant only to default judgments]; (6) whether if the judgment was rendered after a trial on the merits-the movant had a fair opportunity to present his claim or defense; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack." *See Carpenter v. Berry,* 58 So. 3d 1158, 1162 (Miss. 2011).

The trial court has discretion to grant or deny a Rule 60(b) motion, unless the judgment is void, in which case the court is required to set aside the judgment. *See Sartain v. White,* 588 So. 2d 204, 211 (Miss. 1991).

Motions for relief under this rule are filed in the original action, rather than as an independent action.

Rule 60 motions for relief from a judgment filed no later than ten days after entry of judgment toll the time period in which an appeal may be taken. M.R.A.P. 4(d). Rule 60 motions filed more than ten days after entry of judgment do not toll the time period in which an appeal may be taken. A Rule 60(b) motion for relief from a judgment does not automatically stay execution upon the judgment. The trial court has discretion to stay execution upon the judgment while a Rule 60(b) motion is pending. M.R.C.P. 62(b).

Ordinarily, the filing of a notice of appeal transfers jurisdiction from the trial court to the appellate court. Rule 60, however, confers limited concurrent jurisdiction to the trial court to grant relief under Rule 60(a) and (b) even if a notice of appeal has been filed. If the record on appeal has been transmitted to the appellate court, then leave must be obtained from the appellate court to make corrections to a judgment or order pursuant to Rule 60(a) or to move for relief under Rule 60(b). *McNeese v, McNeese,* 129 So. 3d 125, 128 (Miss. 2013); *Griffin v. Armana* 679 So. 2d 1049, 1050 (Miss. 1996); *Ward v. Foster,* 517 So. 2d 513 (Miss. 1987).

[Advisory Committee Note adopted effective July 1, 2014, amended effective January 16, 2020.]

## JUDICIAL DECISIONS

### ANALYSIS

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**In general.**

Mother was not constrained by the six-month timeline for action seeking to set aside a judgment on the basis of fraud where the father's actions perpetrated a fraud upon the court, and he manipulated and intimidated the mother throughout the process of obtaining the orders and judgments that the mother sought to set aside. Roberts v. Lopez, 148 So. 3d 393, 2014 Miss. App. LEXIS 520 (Miss. Ct. App. 2014).

County court may not prevent the farmer from proceeding with collection of a judgment he obtained in the circuit court – a judgment which was affirmed by the supreme court on appeal, and was not attacked in the circuit court that rendered the judgment; the record did not say anything of a Miss. R. Civ. P. 60(b) motion, and neither party raised it on appeal, such that the supreme court proceeded to address the issues raised. Deere & Co. v. First Nat'l Bank of Clarksdale, 12 So. 3d 516, 2009 Miss. LEXIS 276 (Miss. 2009).

Trial court did not abuse its discretion by denying the beneficiaries' Miss. R. Civ. P. 60 motion for relief from the judgment of dismissal where the trial court noted a lack of diligence by the beneficiaries in moving the case forward. Hasty v. Yoshinobu Namihira, 986 So. 2d 1036, 2008 Miss. App. LEXIS 49 (Miss. Ct. App.), cert. denied, 987 So. 2d 451, 2008 Miss. LEXIS 370 (Miss. 2008).

Trial court did not err in granting the restaurant's Miss. R. Civ. P. 60(b) motion and dismissing the couple's personal injury suit where the trial court correctly applied a prior case and application of the prior case did not implicate the contracts clause of Miss. Const. Art. 3, § 16; with regard to the trial court's decision to include the restaurant delivery driver in the dismissal, the dismissal was proper as a matter of law although not properly done. Whitaker v. T & M Foods, Ltd., 7 So. 3d 946, 2007 Miss. App. LEXIS 634 (Miss. Ct. App. 2007), rev'd, 2008 Miss. LEXIS 486 (Miss. Oct. 2, 2008), rev'd, 7 So. 3d 893, 2009 Miss. LEXIS 166 (Miss. 2009).

Trial court denied wife's motion for relief from a divorce judgment under Miss. R. Civ. P. 60(b) based upon its erroneous application of law because a showing that an agreement was overreaching did not require a showing of fraud, and the settlement agreement that the wife signed without an attorney was clearly one-sided and unfair with the wife giving up custody of the children and all her marital property. Further, the court could not say that the agreement was in the best interests of the children because it gave the children no specific visitation period with their mother, formerly the primary caregiver of the children, and thus it did not meet the requirements of Miss.Code Ann. § 93-5-2. Lowrey v. Lowrey, 919 So. 2d 1112, 2005 Miss. App. LEXIS 522 (Miss. Ct. App. 2005), cert. denied, 921 So. 2d 1279, 2006 Miss. LEXIS 33 (Miss. 2006).

In a postconviction action, the trial court did not err in refusing to treat defendant's motion as a Miss. R. Civ. P. 60 motion where he was merely attempting to relitigate the case. Trotter v. State, 907 So. 2d 397, 2005 Miss. App. LEXIS 129 (Miss. Ct. App.), cert. denied, 910 So. 2d 574, 2005 Miss. LEXIS 456 (Miss. 2005).

Wife's Miss. R. Civ. P. 60(b)(1) motion for relief from the judgment on the grounds that it was the product of fraud and misrepresentation was properly denied where the Jackson County, Mississippi, chancery court continued to have jurisdiction in what originally was the separate maintenance case, but which converted to one for alimony and other claims compatible with divorce actions, after the date of the foreign divorce; the consent of the parties gave the chancellor the authority and jurisdiction to adjudicate issues relating to division of the marital property, without requiring the parties to amend their pleadings. Chapel v. Chapel, 876 So. 2d 290, 2004 Miss. LEXIS 759 (Miss. 2004).

City's motion for relief from judgment pursuant to Miss. R. Civ. P. 60(b) was properly denied where the issue of credit for the insurer's settlement was moot and, although the chancellor incorrectly found that the city failed to renew its previously filed motion for summary judgment, the chancellor had previously denied this motion after hearing argument on the merits. City of Jackson v. Jackson Oaks L.P., 860 So. 2d 309, 2003 Miss. LEXIS 246 (Miss. 2003).

Trial court should have considered the city's Motion for Clarification and Relief from Judgment under Miss. R. Civ. P. 60(b), which required that motion be filed within a reasonable time following judgment, rather than Miss. R. Civ. P. 59(e), which had a 10-day time limit after entry of judgment since the city's motion was filed 12 days after judgment was rendered and it was reasonable to conclude that the city intended that the motion be considered as having been filed within a reasonable time rather than being time barred. City of Jackson v. Jackson Oaks, L.P., 792 So. 2d 983, 2001 Miss. LEXIS 201 (Miss. 2001).

Since Miss. R. Civ. P. 60 motion was filed and disposed of within the time allowed for appeal from the underlying judgment and the notice of appeal spoke to the judgment and the order disposing of the motion, one notice of appeal was sufficient to bring to the Mississippi Supreme Court both the judgment and the Rule 60 order. Brame v. Brame, 796 So. 2d 970, 2001 Miss. LEXIS 154 (Miss. 2001).

There is a more liberal standard for setting aside a default than for setting aside a default judgment. King v. Sigrest, 641 So. 2d 1158, 1994 Miss. LEXIS 377 (Miss. 1994).

Decision to grant or set aside a default judgment is addressed to the sound discretion of the trial court; this discretion must be exercised in accordance with rules set forth in M.R.C.P. 55(c) and 60(b). Williams v. Kilgore, 618 So. 2d 51, 1992 Miss. LEXIS 787 (Miss. 1992).

Relief from judgment under subdivision (b) of this rule will not be granted unless a three-pronged balancing test is satisfied: court must determine (1) whether movant's basis for requesting relief is legitimate, (2) whether movant has a colorable defense to the merits of the adjudged case, and (3) whether non-movant will be unduly prejudiced if relief is granted. Rich by Brown v. Nevels, 578 So. 2d 609, 1991 Miss. LEXIS 111 (Miss. 1991).

Adoption of Mississippi Rules of Civil Procedure alters prior practice and gives trial courts authority, in certain specified circumstances, to correct judgments even though an appeal has been perfected. Ward v. Foster, 517 So. 2d 513, 1987 Miss. LEXIS 2870 (Miss. 1987).

**Construction.**

Wife's motion to reconsider did not specify that it was brought pursuant to Miss. R. Civ. P. 59, and it was filed more than 10 days after the entry of the order to quash; therefore, it should have been considered a motion for relief under Miss. R. Civ. P. 60. The chancellor did not abuse his discretion under Rule 60(b)(6). Carlisle v. Allen, 40 So. 3d 1252, 2010 Miss. LEXIS 391 (Miss. 2010).

Default is not treated as a general admission or an absolute confession. Similarly, a general denial is not sufficient to set aside a default judgment; a meritorious defense is one that is demonstrated through an affidavit or sworn form of testimony and conclusions and unsubstantiated allegations will not suffice. Leach v. Shelter Ins. Co., 909 So. 2d 1283, 2005 Miss. App. LEXIS 128 (Miss. Ct. App. 2005).

Where a motion calls into question the correctness of all or any part of a judgment, even though corrections sought be fairly characterized as clarifying or technical only, and where the motion is filed within time allowed by M.R.C.P. Rule 59, court will presume the motion has been filed under Rule 59 rather than Rule 60, regardless of how it may be styled. Bruce v. Bruce, 587 So. 2d 898, 1991 Miss. LEXIS 692 (Miss. 1991).

Regardless of how it might have been styled, motion seeking relief from dismissal of complaint was a M.R.C.P. Rule 60(b)(6) motion, for it was difficult to see how one could have a Rule 59 motion for a new trial when there had never been a trial. Cunningham v. Mitchell, 549 So. 2d 955, 1989 Miss. LEXIS 442 (Miss. 1989).

**Applicability.**

Because the county's motion was filed 11 days after entry of the circuit court's judgment, the motion had to be considered a M.R.C.P. 60(b) motion (motions filed more than 10 days after judgment) rather than a M.R.C.P. 59(e) motion (motions filed within 10 days), and as such does not toll the time to appeal. DeSoto Cty. v. Std. Constr. Co., 283 So. 3d 102, 2019 Miss. LEXIS 323 (Miss. 2019).

Since a father was not made a party defendant and did not file a consent to the adoption of his son, Miss. R. Civ. P. 60(b) was not applicable to the father's subsequent petition to set aside the adoption of his son. In re Adoption of a Minor Child v. M.J.W., 111 So. 3d 1243, 2013 Miss. App. LEXIS 150 (Miss. Ct. App. 2013).

In a medical negligence action, a patient's Miss. R. Civ. P. 60(b) motion to set aside a judgment was properly denied, as a postjudgment change in law in an unrelated case did not meet the definition of an extraordinary and compelling circumstance because the judgment at issue had become final. Regan v. S. Cent. Reg'l Med. Ctr., 47 So. 3d 651, 2010 Miss. LEXIS 568 (Miss. 2010).

In a personal injury action by guests, the trial court did not abuse its discretion in denying the guests' motions for relief from judgment and to set aside order because Miss. R. Civ. P. 60 was not a substitute for appeal and the relief sought was nothing more than an escape hatch after failing to timely pursue other available procedural remedies. Doll v. BSL, Inc., 41 So. 3d 664, 2010 Miss. LEXIS 300 (Miss. 2010).

When a former husband ceased to make alimony payments to his former wife and also sued her in federal court for wiretapping based on tape recordings she had made of his conversations, the wife was not entitled to double recovery in the form of a federal jury award for her lost alimony payments and a chancery court award of her lost alimony; if the federal appellate court were to uphold the federal jury award, the chancery court would be obliged to provide relief to the husband pursuant to Miss. R. Civ. P. 60(b).

Client's motion for reconsideration would have been denied if it were considered a motion for relief from judgment under Miss. R. Civ. P. 60, as none of the grounds for a Rule 60 motion were present. Curry v. Walls, 871 So. 2d 762, 2004 Miss. App. LEXIS 324 (Miss. Ct. App. 2004).

Evidence proved beyond a reasonable doubt that the father was not the child's biological father and that the previous paternity and child support order was incorrect; there existed a special situation in which relief was justified under Rule 60(b)(6) because a manifest injustice would result if the father was required to continue making child support payments for a child which unquestionably was not his. M.A.S. v. Miss. Dep't of Human Servs., 842 So. 2d 527, 2003 Miss. LEXIS 2 (Miss. 2003).

The rule was not applicable to writs of garnishment in aid of collection of judgments, as the writs were governed by garnishment statutes. Bechtel Power Corp. v. MMC Materials, Inc., 830 So. 2d 672, 2002 Miss. App. LEXIS 299 (Miss. Ct. App.), cert. denied, 830 So. 2d 1251, 2002 Miss. App. LEXIS 731 (Miss. Ct. App. 2002).

A motion under subsection (b) of this rule for a new trial was not the appropriate method for a property owner to seek compensation for damages arising from a contractor's demolition of more property than was condemned. Checkers Drive-In Restaurants, Inc. v. Mississippi Transp. Comm'n, 755 So. 2d 1238, 2000 Miss. App. LEXIS 22 (Miss. Ct. App. 2000).

Although partial in nature, default resulted in a default judgment, which was more than the mere entry of default by the clerk, and therefore trial judge committed no error in addressing defendant's request for relief under M.R.C.P. Rule 60(b) instead of Rule 55(c). Pointer v. Huffman, 509 So. 2d 870, 1987 Miss. LEXIS 2583 (Miss. 1987).

Defendant was not attempting to alter or amend judgment against her, but was simply trying to have court make judgment conform to what was originally pronounced at conclusion of trial, and therefore M.R.C.P. Rule 60(b) applied rather than Rule 59(e). Fultz v. Doss, 507 So. 2d 891, 1987 Miss. LEXIS 2530 (Miss. 1987).

**Accident or mistake.**

Subsection (b) provides that a court may relieve a party from a final judgment, and the language undoubtedly vests a court with a permissive rather than a mandatory instruction; a chancellor's grant of relief from a judgment is not automatic upon assertion of an accident or mistake. Simmons v. Harrison Cty. Dep't of Human Servs., 228 So. 3d 347, 2017 Miss. App. LEXIS 582 (Miss. Ct. App. 2017).

Insurers did not show that they were justified in failing to avoid the mistake or inadvertence that led to a default for purposes of Miss. R. Civ. P. 60(b)(2) where they provided no explanation for their failure to make a simple determination of whether or not they had been served with the injured driver's complaint, and they waited four months to file an answer and more than four-and-a-half months to file a motion to set aside the default judgment. Am. States Ins. Co. v. Rogillio, 10 So. 3d 463, 2009 Miss. LEXIS 269 (Miss. 2009).

The procedural missteps by defendant-company, which were grounds for finding against them in the first factor in the default analysis set out in Chassaniol v. Bank of Kilmichael, 626 So. 2d 127, 135 (Miss. 1993), were not sufficient by themselves to permit the upholding of the trial court's denial of the motion to set aside the default. American Cable Corp. v. Trilogy Communs., Inc., 754 So. 2d 545, 2000 Miss. App. LEXIS 5 (Miss. Ct. App. 2000).

**Affidavits.**

To avail himself of assertion that he has a colorable defense to merits of plaintiff's claim, a defaulted defendant must set forth in affidavit form the nature and substance of his defense. H & W Transfer & Cartage Service, Inc. v. Griffin, 511 So. 2d 895, 1987 Miss. LEXIS 2610 (Miss. 1987).

**Clerical mistake.**

Appellant property owner's assertion that the chancellor committed manifest error by incorrectly describing the parties' new boundary line was without citation to legal authority and therefore, the appellate court was under no obligation to consider the assignment of error. However, pursuant to Miss. R. Civ. P. 60(a), the appellate court granted leave to the chancery court to correct, if necessary, any clerical errors that might be found in the boundary-line description contained in the judgment. Conliff v. Hudson, 60 So. 3d 203, 2011 Miss. App. LEXIS 194 (Miss. Ct. App. 2011).

Denial of the husband's motion for modification of the parties' divorce decree where the chancellor's correction of the scrivener's error in the decree did not violate Miss. R. Civ. P. 60; the chancellor found that the language in the memorandum opinion was the correct finding for determination of equitable distribution of marital assets between the parties and that the final divorce decree misstated the intent of the court and contained improper wording. Townsend v. Townsend, 859 So. 2d 370, 2003 Miss. LEXIS 656 (Miss. 2003).

Under subsection (a), a court cannot on its own initiative change its mind and decide that it should have granted a motion for judgment notwithstanding verdict, instead of denying it. Luke Edwards & Reach, Inc. v. Roberts, 771 So. 2d 378, 2000 Miss. App. LEXIS 522 (Miss. Ct. App. 2000).

Trial court's ex parte amendment of its previous order, from dismissal of plaintiff's claim without prejudice to dismissal with prejudice, violated due process as it constituted a change in legal substance of original judgment and not merely correction of a clerical error. Whitney Nat'l Bank v. Smith, 613 So. 2d 312, 1993 Miss. LEXIS 53 (Miss. 1993).

Notice of motion to dismiss for want of prosecution was not given to plaintiffs or even to their last attorney of record, as required by rule; due to clerk's mistake, lower court should have allowed case to be reinstated. Walker v. Parnell, 566 So. 2d 1213, 1990 Miss. LEXIS 442 (Miss. 1990).

**Colorable defense.**

Car dealership's former business manager's affidavit did not present a meritorious defense to the default judgment since the cancellation worksheet was inadmissible hearsay pursuant to Miss. R. Evid. 802; the manager failed to qualify the cancellation worksheet as an exception to the hearsay rule pursuant to Miss. R. Evid. 803(6), or authenticate the worksheet pursuant to Miss. R. Evid. 902; and because the dealership failed to assert a meritorious defense, its motion to set aside default judgment under Miss. R. Civ. P. 60(b)(6) was properly denied. Greater Canton Ford Mercury, Inc. v. Lane, 997 So. 2d 198, 2008 Miss. LEXIS 517 (Miss. 2008).

Although the attorney argued that he had a colorable defense to his default judgment, specifically, that it was impossible to determine if the fees he had charged the client were excessive without further evidence, the attorney's contradiction concerning the billing illuminated the fact that the attorney had no defense at all, and he could not defend the billing because by the very terms of the contract with the client it was unreasonable. Goeldner v. Miss. Bar, 891 So. 2d 130, 2004 Miss. LEXIS 758 (Miss. 2004).

The defendant failed to present a colorable defense to the plaintiff's claim for payment for goods ordered and delivered to the defendant where the defendant made unsubstantiated allegations that another party might have ordered and received some of the goods in question. American Cable Corp. v. Trilogy Communs., Inc., 1999 Miss. App. LEXIS 566 (Miss. Ct. App. Sept. 14, 1999), op. withdrawn, sub. op., different results reached on reh'g, 754 So. 2d 545, 2000 Miss. App. LEXIS 5 (Miss. Ct. App. 2000).

**Coram nobis.**

A coram nobis motion is of no effect given that such petitions were abolished in Mississippi by the adoption of this rule; further, this civil rule applies even where a petitioner seeks review of a criminal judgment since the writ commenced a new action by the petitioner. Hester v. State, 749 So. 2d 1221, 1999 Miss. App. LEXIS 569 (Miss. Ct. App. 1999).

**Correction of judgment.**

Chancery court did not abuse its discretion in denying a Miss. R. Civ. P. 59(e) motion for clarification because the motion was actually a Miss. R. Civ. P. 60(b) motion that sought to attack the final judgment and the appellants' effort was an attempt to relitigate a prior final judgment. Because the appeal from the denial the motion brought up for review only the order of denial itself, and not the underlying judgment, the appellate court did not need to consider the underlying issues of the final judgment. Jackson v. Baldwin Sand & Gravel, 288 So. 3d 339, 2019 Miss. App. LEXIS 231 (Miss. Ct. App. 2019), cert. denied, 287 So. 3d 217, 2020 Miss. LEXIS 28 (Miss. 2020), cert. denied, — So. 3d —, 2020 Miss. LEXIS 199 (Miss. 2020).

Revising an order terminating the decedent's parental rights to remove the disinheritance language pursuant to Miss. R. Civ. P. 60(b)(6) was appropriate as there was no legitimate basis to terminate the minor's inheritance rights, the court had simply failed to catch the language in the draft order, and the correction protected the minor and occurred within a year of the decedent's death. Mitchell v. Moore, 237 So. 3d 681, 2017 Miss. LEXIS 446 (Miss. 2017).

Revising an order terminating the decedent's parental rights pursuant to Miss. R. Civ. P. 60(a) was error where the correction involved a substantial change in the minor's inheritance rights, and thus, correction under Miss. R. Civ. P. 60(b) was more appropriate. Mitchell v. Moore, 237 So. 3d 681, 2017 Miss. LEXIS 446 (Miss. 2017).

Because a wife's motion to correct was filed more than ten days after the chanceyr court entered its amended order regarding motions to reconsider, it had to be treated as a Miss. R. Civ. P. 60 motion. Marter v. Marter, 95 So. 3d 733, 2012 Miss. App. LEXIS 491 (Miss. Ct. App. 2012).

Because a wife's motion to correct was filed more than ten days after the chanceyr court entered its amended order regarding motions to reconsider, it had to be treated as a Miss. R. Civ. P. 60 motion. Marter v. Marter, 95 So. 3d 733, 2012 Miss. App. LEXIS 491 (Miss. Ct. App. 2012).

As a trial court judge, prior to recusal, had the authority under Miss. R. Civ. P. 60(a) to clarify his judgment in parties' divorce proceeding, a successor judge who was appointed after trial had the authority under Miss. R. Civ. P. 63(b) to perform the same duties. Jones v. Mayo, 53 So. 3d 832, 2011 Miss. App. LEXIS 57 (Miss. Ct. App. 2011).

Husband argued that it was beyond the discretion of the trial court to clarify that the lump sum alimony awarded to the wife in the divorce decree was for support and not part of the property settlement; however it was within the scope of Miss. R. Civ. P. 60(a) for the judge to clarify what his decision in the divorce decree in fact was. Seymour v. Seymour, 869 So. 2d 1035, 2004 Miss. App. LEXIS 220 (Miss. Ct. App. 2004).

Where county court at conclusion of trial pronounced defendant liable for "negligence" but its judgment referred to "willful and malicious" action, and circuit court changed judgment to conform to pleadings by reciting "reckless" action, both courts were in error, requiring reversal and remand for correction of judgment to reflect original pronouncement of trial judge. Fultz v. Doss, 507 So. 2d 891, 1987 Miss. LEXIS 2530 (Miss. 1987).

**Equitable considerations.**

In an eminent domain proceeding in which it was clear that the Mississippi Transportation Commission is entitled to a judgment in the amount of its excess deposit, the trial court abused its discretion in denying a trustee's and a bank's Miss. R. Civ. P. 59(e) motion to amend the judgment or, alternatively, for relief from the judgment under Miss. Civ. P. 60(b)(6). Due to the considerable delay between the time the funds were disbursed and the time of trial, which was almost 10 years, it was prejudicial and inequitable for the trial court to hold that the trustee and the bank failed to appear and defend their interests. Harrison v. Miss. Transp. Comm'n, 57 So. 3d 648, 2010 Miss. App. LEXIS 91 (Miss. Ct. App. 2010), aff'd on other grounds, 57 So. 3d 622, 2011 Miss. LEXIS 127 (Miss. 2011).

Pursuant to Miss. R. Civ. P. 60(b)(6), the insurers had not demonstrated an exceptional or compelling reason to set aside a default judgment entered against it where it claimed that its failure to file an answer in response to the injured driver's complaint was a simple mistake or inadvertent clerical error, but that excuse failed to explain its carelessness and lack of diligence that caused it to default. Am. States Ins. Co. v. Rogillio, 10 So. 3d 463, 2009 Miss. LEXIS 269 (Miss. 2009).

When a city proposing the annexation of certain real property had previously agreed with a neighboring city that this property was in the neighboring city's path of growth, the city proposing the annexation was not judicially estopped from annexing the property because the prior agreement was not in the form of a consent decree, and, even if it had been, the city proposing the annexation would, most likely, have been relieved of its prior agreement, under Miss. R. Civ. P. 60(b)(5), because a prior city administration entered into the agreement, and one city administration could not bind its successor. In re Enlargement & Extension of the Municipal Boundaries v. City of Southaven, 864 So. 2d 912, 2003 Miss. LEXIS 692 (Miss. 2003).

Although defendants lacked a sufficient explanation for not avoiding mistake contained in order or seeking its correction sooner, chancellor's granting relief from order was not an abuse of discretion in view of equitable purpose of this rule. Accredited Surety & Casualty Co. v. Bolles, 535 So. 2d 56, 1988 Miss. LEXIS 574 (Miss. 1988).

**Fraud.**

Chancellor had authority to rule on a father's petition to set aside an adoption based on fraud upon the court because the petition was an independent action; the father was not trying to establish his right to notice or object to ongoing adoption proceedings, but he was arguing to set aside a final adoption obtained through fraud. Doe v. Smith, 200 So. 3d 1028, 2016 Miss. LEXIS 397 (Miss. 2016).

Chancellor did not abuse its discretion in denying relief to a former husband who sought to set aside a divorce decree, due to alleged fraud by the husband's former wife in filing a false financial statement, because substantial evidence supported the chancellor's ruling that the wife did not knowingly make a false representation to the court in that the wife did not consider the property which the wife did not list on a financial statement as being the wife's own property, but the property of the wife's late father and the wife's mother. Betts v. Betts, 224 So. 3d 94, 2016 Miss. App. LEXIS 599 (Miss. Ct. App. 2016), cert. denied, 220 So. 3d 976, 2017 Miss. LEXIS 226 (Miss. 2017).

Mother did not show by clear and convincing evidence that a father committed a fraud upon the court for Miss. R. Civ. P. 60(b)(1) purposes as the father did not testify at the rehearing, and the motivation for his move with the children one month after being awarded custody was unclear; the chancery court did not identify what it relied upon in its award of custody to the father, and it could not be discerned whether the circumstances of the move would have made a difference in the chancellor's decision. Parra v. Parra, 65 So. 3d 872, 2011 Miss. App. LEXIS 359 (Miss. Ct. App. 2011).

In divorce in which the parties entered a written consent for divorce on the ground of irreconcilable differences, it was signed by both parties and by their respective counsel, and neither party was granted leave of court to withdraw his or her consent to the divorce based on irreconcilable differences, the ex-wife argued unsuccessfully that the judgment of divorce was void because neither party had ever withdrawn the fault-based grounds asserted in their respective complaint and counter-complaint, as required by Miss. Code Ann. § 93-5-2(5). Section 93-5-2(3) operated as a cancellation and withdrawal of the contests or denials referenced in § 93-5-2(5). O'Neal v. O'Neal, 17 So. 3d 572, 2009 Miss. LEXIS 428 (Miss. 2009).

Trial court did not abuse its discretion in denying a motion for relief from judgment, under Miss. R. Civ. P. 60(b), because it was untimely; where a church member had knowledge of the alleged fraudulent concealment by her pastor before the trial court's ruling, which was more than six months prior. Mabus v. St. James Episcopal Church, 13 So. 3d 260, 2009 Miss. LEXIS 167 (Miss. 2009).

Where a mother was appointed the administratrix of her deceased minor child's estate, she petitioned for a determination of the child's heirs at law, and she stated in her petition that the child's father was unknown to her but was believed to be deceased, that no man ever claimed to be the father of the child, and that she alone supported the child, the chancery court's order vacating its prior judgment on the basis of fraud was supported by the record, which established that the father was listed as the child's biological father when the mother applied for state aid, the father had been adjudicated the child's father and ordered to pay child support, and the father visited the child at the hospital shortly before she died, attended her funeral, and was identified as the child's father in her obituary. In re Estate of Pearson, 25 So. 3d 392, 2009 Miss. App. LEXIS 396 (Miss. Ct. App. 2009), cert. denied, 24 So. 3d 1038, 2010 Miss. LEXIS 9 (Miss. 2010).

Where a mother was appointed the administratrix of her deceased minor child's estate, she petitioned for a determination of the child's heirs at law, and she stated in her petition that the child's father was unknown to her but was believed to be deceased, that no man ever claimed to be the father of the child, and that she alone supported the child, the court rejected the mother's claim that her failure to disclose the identity of the child's father did not constitute a fraud upon the court because an administratrix's violation of her affirmative duty to inform the chancery court of potential heirs and claimants could, as a matter of law, constitute fraud upon the chancery court. In re Estate of Pearson, 25 So. 3d 392, 2009 Miss. App. LEXIS 396 (Miss. Ct. App. 2009), cert. denied, 24 So. 3d 1038, 2010 Miss. LEXIS 9 (Miss. 2010).

Miss. R. Civ. P. 60(b)(1) provided no relief to the patron, as the store supervisor was not an adverse party to the litigation, nor sufficiently high in rank so as to equate his actions with the store's actions. Cuffee v. Wal-Mart Stores, Inc., 977 So. 2d 1187, 2007 Miss. App. LEXIS 555 (Miss. Ct. App. 2007).

Chancellor's 2004 decision to vacate a 1999 judgment issuing an immigrant a delayed birth certificate was supported by the savings clause of Miss. R. Civ. P. 60(b) and 60(b)(6) because the immigrant's conduct was egregious; he committed a fraud upon the court when he and his two other witnesses committed perjury by claiming that he had been born in Mississippi and had used the certificate to attempt to obtain a United States passport in California. Tirouda v. State, 919 So. 2d 211, 2005 Miss. App. LEXIS 413 (Miss. Ct. App. 2005).

In a divorce case, while a potion of a document regarding land owned by a trust of which the ex-wife and her brothers were beneficiaries was redacted, there was insufficient evidence of deceit; thus, the ex-husband's motion to vacate the trial court's judgment, Miss. R. Civ. P. 60(b)(1), was properly denied. Brennan v. Ebel, 880 So. 2d 1058, 2004 Miss. App. LEXIS 233 (Miss. Ct. App.), cert. denied, 882 So. 2d 234, 2004 Miss. LEXIS 1084 (Miss. 2004).

An employer was adverse to the creditor of its debtor-employee and refused to garner the debtor's wages, stating the debtor was not an employee. Creditor obtained judgment. On appeal, the employer-appellant did not appear at the hearing and the judgment was set aside since Miss. R. Civ. P. 60(b)(1) requires that the adverse party have committed the fraud, which was not the case with the creditor. Sabal Corp. v. Howell, 853 So. 2d 122, 2003 Miss. App. LEXIS 130 (Miss. Ct. App. 2003).

Where disbarred attorney forged the signature of a licensed associate on settlement documents to disguise his ruse, consent decree was set aside since fraud was the controlling factor in effectuating the settlement agreement. Tel. Man Inc. v. Hinds County, 791 So. 2d 208, 2001 Miss. LEXIS 189 (Miss. 2001).

Rule 60(b) does not mandate that a district attorney or a conservator file a chancery court civil motion in lieu of presenting a criminal indictment to a grand jury; the authority for a Rule 60(b) motion in chancery court alleging fraud, misrepresentation or other misconduct does not mean that the higher burden of proving the civil action precludes a district attorney from using the familiar "probable cause" necessary for a conspiracy indictment and is simply a non-exclusive civil remedy available to private persons in addition to the criminal powers of the state. Farris v. State, 764 So. 2d 411, 2000 Miss. LEXIS 141 (Miss. 2000).

Trial judge committed manifest error by not ruling on plaintiff's motion to vacate judgment due to defendant's alleged fraud; since plaintiff complied with requirements of subdivision (b) of this rule, perfection of his appeal did not divest trial judge of authority to vacate judgment. Griffin v. Armana, 679 So. 2d 1049, 1996 Miss. LEXIS 298 (Miss. 1996).

Although loan papers showed that plaintiff and her husband both signed promissory note, contrary to her assertions that she alone signed note, bank was unable to prove all elements necessary to show fraud or misrepresentation, and therefore there was no error in trial court's denial of bank's motion for new trial. Iuka Guar. Bank v. Beard, 658 So. 2d 1367, 1995 Miss. LEXIS 334 (Miss. 1995).

**Good cause.**

Trial court did not err in denying the car dealership's motion to set aside default judgment, Miss. R. Civ. P. 60(b)(6), as the dealership did not put forth evidence of good cause and the patron put forth sufficient evidence of prejudice that would result if the motion was granted. Greater

Canton Ford Mercury, Inc. v. Lane, 997 So. 2d 198, 2008 Miss. LEXIS 517 (Miss. 2008).

In a doctor's action against a medical malpractice insurer for the insurer's decision not to renew the doctor's medical malpractice insurance, because it was the insurer's decision not to renew the insurance policy that was the alleged cause of the doctor's injuries, every substantial act, omission, or injury-causing event occurred in the county where the insurer was located and made the decision, and venue under Miss. Code Ann. § 11-11-3 was proper in that county; therefore, the chancery court improperly granted, pursuant to Miss. R. Civ. P. 60(b)(6), the doctor's motion to reconsider the chancery court's original order transferring the case to the proper county, as there were no extraordinary circumstances compelling relief from the original order. Medical Assur. Co. v. Myers, 956 So. 2d 213, 2007 Miss. LEXIS 275 (Miss. 2007).

Court properly denied defendant's Miss. R. Civ. P. 60(b) motion for relief from a default judgment in plaintiff's action to recover damages for timber that was cut from land because defendant failed to show any excuse for cause and plaintiff's case would be prejudiced. Record was devoid of any finding other than the findings of the trial court that the excuse that defendant offered for default lacked good cause. Hood v. Mordecai, 900 So. 2d 370, 2004 Miss. App. LEXIS 873 (Miss. Ct. App. 2004), cert. denied, 898 So. 2d 679, 2005 Miss. LEXIS 278 (Miss. 2005).

The defendant failed to show good cause for default where it asserted that it forwarded the summons and complaint to its attorney and assumed that he was representing it on the matter. American Cable Corp. v. Trilogy Communs., Inc., 1999 Miss. App. LEXIS 566 (Miss. Ct. App. Sept. 14, 1999), op. withdrawn, sub. op., different results reached on reh'g, 754 So. 2d 545, 2000 Miss. App. LEXIS 5 (Miss. Ct. App. 2000).

**Illness of counsel.**

Plaintiffs were not entitled to relief from an order of dismissal entered after their counsel failed to answer discovery, respond to the defendant's notice of deposition, or appear at the hearing on the defendant's motion to dismiss, notwithstanding that their counsel experienced various medical and personal problems during the discovery phase of the case since those difficulties did not rise to the level of "exceptional circumstances" to warrant setting aside the judgment. Palmer v. Grand Casinos of Miss., Inc., 744 So. 2d 745, 1999 Miss. LEXIS 197 (Miss. 1999).

**Incapacity.**

Where attorney continued to practice law in spite of sanctions imposed, and responded to complaint with a notice of appeal on his original disbarment, and stated that he knew there was a bar complaint against him and that it required an answer, he was not entitled to relief from default judgment, on his original disbarment, on grounds of personal incapacity. Carter v. Mississippi Bar, 654 So. 2d 505, 1995 Miss. LEXIS 194 (Miss. 1995).

**Limitations.**

Even if a husband in divorce proceedings acted fraudulently in misrepresenting the value of certain stock, any motion by his ex-wife to set aside their judgment of divorce and property settlement agreement had to be filed within six months; where the ex-wife filed her motion more than four years after the judgment of divorce was entered, the presiding chancellor erred in granting relief and in failing to find the motion untimely. Although chancellors have great equitable powers, it was not within the chancellor's authority to circumvent the mandate of firmly established case law by calling the parties' contract by another name or by trying to mold a claim so that it would fit within the parameters of a different rule. Trim v. Trim, 33 So. 3d 480, 2009 Miss. App. LEXIS 218 (Miss. Ct. App. 2009), rev'd, 33 So. 3d 471, 2010 Miss. LEXIS 223 (Miss. 2010).

Defendant's motion for reconsideration needed to be filed within ten days of September 27, 2006, in order to be timely; however, it was filed on July 2, 2007, nearly ten months after the court's denial of his petition for post-conviction relief;

even if it would have been proper to consider defendant's motion under Miss. R. Civ. P. 60(b) instead of Miss. R. Civ. P. 59, the motion also would have been untimely because it was not filed within six months as required by Rule 60(b). Henry v. State, 999 So. 2d 867, 2008 Miss. App. LEXIS 418 (Miss. Ct. App. 2008), cert. denied, 999 So. 2d 852, 2009 Miss. LEXIS 24 (Miss. 2009).

A motion for relief from final judgment under subsections (b)(2), (3), (5), and (6) was untimely where the motion was not brought until two years and nine months after the final judgment of the trial court. Jenkins v. Jenkins, 757 So. 2d 339, 2000 Miss. App. LEXIS 172 (Miss. Ct. App. 2000).

A motion under subsection (b) was untimely where it was not brought until more than six years after the appeal was perfected. Trilogy Communs., Inc. v. Thomas Truck Lease, Inc., 733 So. 2d 313, 1998 Miss. App. LEXIS 1056 (Miss. Ct. App. 1998).

The motion to vacate order allocating settlement amounts in a wrongful death action was brought by the successor administratrix within a reasonable time, notwithstanding a three year delay from the date of the order, since the time from which the inquiry began was the date that the successor administratrix had legal standing to challenge the order. Briney v. United States Fid. & Guar. Co., 714 So. 2d 962, 1998 Miss. LEXIS 274 (Miss. 1998).

Because husband's motion to re-open divorce case was under M.R.C.P. Rule 60 rather than Rule 59, it did not toll wife's time to file her notice of appeal, and since wife's notice of appeal was not timely, supreme court did not have jurisdiction to address wife's assignment of error. Michael v. Michael, 650 So. 2d 469, 1995 Miss. LEXIS 18 (Miss. 1995).

Trial court did not abuse its discretion in denying relief from judgment on grounds of mistake, where motion was filed nine months after six-month period had expired; default judgment was rendered in violation of automatic stay in bankruptcy, however, and was therefore void, and there was no time limit on relief from a void judgment. Overbey v. Murray, 569 So. 2d 303, 1990 Miss. LEXIS 634 (Miss. 1990).

Motion for relief from judgment filed seven months and eight days after entry of judgment was "made within a reasonable time" under subdivision (b)(6) of this rule. Burkett v. Burkett, 537 So. 2d 443, 1989 Miss. LEXIS 4 (Miss. 1989).

This rule accommodates concerns over finality by setting an outer time limit, while simultaneously inviting a flexible application depending on circumstances of each individual case by use of the "reasonable time" standard; time period for filing notice of appeal serves only as a relevant interval in the timeliness inquiry, and motions for relief from judgment filed after expiration of that time are not per se untimely. Accredited Surety & Casualty Co. v. Bolles, 535 So. 2d 56, 1988 Miss. LEXIS 574 (Miss. 1988).

**Newly discovered evidence.**

Without a showing that a parent's new evidence was substantive and a good reason why the parent was ignorant of it prior to a child custody hearing, the trial court properly denied the parent's post-trial motions. Warner v. Thomas, 281 So. 3d 216, 2019 Miss. App. LEXIS 108 (Miss. Ct. App. 2019).

In a child custody modification case, there was no abuse of discretion in denying a motion for a new trial under Miss. R. Civ. P. 60(b)(3) based on newly discovered evidence. A father failed to present evidence that he was unable to obtain his child's school records sooner; therefore, he did not exercise due diligence. Sudduth v. Mowdy, 991 So. 2d 1241, 2008 Miss. App. LEXIS 594 (Miss. Ct. App. 2008).

Witness's post-trial admission that he provided false testimony at trial did not constitute newly discovered evidence of sufficient gravity to warrant the granting of a new trial; the evidence was impeaching, which was fatal because in order to obtain a new trial based on newly discovered evidence, the evidence could not be merely cumulative or impeaching. Cuffee v. Wal-Mart Stores, Inc., 977 So. 2d 1187, 2007 Miss. App. LEXIS 555 (Miss. Ct. App. 2007).

Georgia relatives' claim that the chancellor erred in her determination that the decedent was a Mississippi resident at the time of her death failed where each of the reasons cited by the Georgia relatives in their motion was easily discoverable by the exercise of minimum due diligence, and could not qualify as newly discoverable evidence under Miss. R. Civ. P. 60(b). Ray v. Ray, 963 So. 2d 20, 2007 Miss. App. LEXIS 512 (Miss. Ct. App. 2007).

Termination of the mother's parental rights was improper because the county's Miss. R. Civ. P. 60(b)(3) motion was not supported by newly discovered evidence; none of the evidence was either newly discovered or of the sort that it could not have been discovered in time to have moved for a new trial. In re V.M.S., 938 So. 2d 829, 2006 Miss. LEXIS 530 (Miss. 2006).

Finding against the heir in her wrongful death action was proper pursuant to Miss. R. Civ. P. 60 where her argument that data concerning the decedent's medial records qualified as new evidence was inappropriate because the heir was aware of that data prior to trial. Richardson ex rel. Wrongful Death Heirs of Richardson v. DeRouen, 920 So. 2d 1044, 2006 Miss. App. LEXIS 84 (Miss. Ct. App. 2006).

Summary judgment was properly granted to the home sellers on the buyers' claims of fraud, because the buyers' claim of newly discovered evidence failed where they did not meet the exceptional circumstance requirement of Miss. R. Civ. P. 60(b)(6), because they gave no explanation of why they were unable to locate an ex-husband of a former owner, and failed to state the steps they took to locate the prior owner, and, under Rule 60(b)(3), their presentation of new evidence was untimely. Mitchell v. Nelson, 830 So. 2d 635, 2002 Miss. LEXIS 332 (Miss. 2002).

Motion brought under subsection (b)(6) was denied where defendant failed to show (1) that his "new" evidence was discovered following the trial, (2) that due diligence was exercised on his behalf, (3) that the evidence was not merely cumulative or impeaching, and (4) that the evidence was such that a new trial would probably produce a new result. Moore v. Jacobs, 752 So. 2d 1013, 1999 Miss. LEXIS 395 (Miss. 1999).

Post-judgment relief based on a claim of newly-discovered evidence was properly denied in a divorce proceeding, notwithstanding the husband's claim that, when the case was tried in February 1997, he was unaware that his 1996 income had dropped appreciably, since his financial affairs for 1996 had been concluded for over one month prior to trial and thus, the information was certainly available to him. Russell v. Russell, 733 So. 2d 858, 1999 Miss. App. LEXIS 24 (Miss. Ct. App. 1999).

Affidavit of medical expert filed in conjunction with plaintiff's motion for relief from judgment constituted newly discovered evidence which should have prompted court to set aside summary judgment under subdivision (b)(3) of this rule. January v. Barnes, 621 So. 2d 915, 1992 Miss. LEXIS 832 (Miss. 1992).

Divorce defendant was not entitled to relief from judgment on grounds of newly discovered evidence, where his allegations only dealt with evidence not in existence at time of judgment, and therefore subdivision (b)(3) of this rule was not applicable. Gray v. Gray, 562 So. 2d 79, 1990 Miss. LEXIS 237 (Miss. 1990).

**Other reasons.**

Husband was not properly denied relief from a property settlement agreement under Miss. R. Civ. P. 60(b)(6) where the chancellor found that the wife would have been actually prejudiced from the delay, and the husband had not shown cause for failing to act sooner. Smith v. Doe, 268 So. 3d 457, 2018 Miss. LEXIS 39 (Miss. 2018).

In an eminent domain proceeding in which it was clear that the Mississippi Transportation Commission is entitled to a judgment in the amount of its excess deposit, the trial court abused its discretion in denying a trustee's and a bank's Miss. R. Civ. P. 59(e) motion to amend the judgment or, alternatively, for relief from the judgment under Miss. Civ. P. 60(b)(6); to hold them responsible for the judgment almost 10 years after the money was disbursed to the landowner and applied to the landowner's mortgage constituted manifest injustice. Harrison v. Miss. Transp. Comm'n, 57 So. 3d 648, 2010 Miss. App. LEXIS 91 (Miss. Ct. App. 2010), aff'd on other grounds, 57 So. 3d 622, 2011 Miss. LEXIS 127 (Miss. 2011).

Trial judge did not abuse his discretion in denying the patron's Miss. R. Civ. P.

60(b) motion where the store supervisor provided false testimony; however, the supervisor was the only witness who did so, and there was no evidence to suggest that the supervisor deliberately schemed to defraud the court. Cuffee v. Wal-Mart Stores, Inc., 977 So. 2d 1187, 2007 Miss. App. LEXIS 555 (Miss. Ct. App. 2007).

In a child support dispute, despite participating in the second chancery court trial, the father filed a motion to set aside the court's contempt order pursuant to Miss. R. Civ. P. 60 because the court lacked jurisdiction; because the court lacked subject matter jurisdiction there was a reason justifying relief from the judgment. Harry v. Harry, 856 So. 2d 748, 2003 Miss. App. LEXIS 947 (Miss. Ct. App. 2003).

Rule 60(b)(6) is a catch-all provision that is the appropriate tool to request relief in a divorce case involving a property settlement agreement if no other grounds are available under Rule 60. Montgomery v. Montgomery, 759 So. 2d 1238, 2000 Miss. LEXIS 126 (Miss. 2000).

A wife was not entitled to relief from a divorce settlement where she alleged that she was coerced to settle by her own attorney; if there was any fault in the case, it was that of the wife's attorney, who was selected by the wife and represented her during almost 18 months of litigation, about whom she never expressed any dissatisfaction in open court. The alleged coercion did not rise to the level required by the relevant rule of civil procedure. Montgomery v. Montgomery, 759 So. 2d 1238, 2000 Miss. LEXIS 126 (Miss. 2000).

Neglect of a party's attorney does not constitute "any other reasons justifying relief." Buie v. Buie, 772 So. 2d 1079, 2000 Miss. App. LEXIS 552 (Miss. Ct. App. 2000).

Where default judgment was entered before the defendant was technically in default, as he had until 5:00 PM on that day to answer, the default judgment was prematurely entered and was void ab initio. McDaniel v. Burroughs, 739 So. 2d 461, 1999 Miss. App. LEXIS 236 (Miss. Ct. App. 1999).

Where the circuit clerk admitted that he directed the computer programmer to exclude from the jury lists all jurors who had been summoned to jury duty in either circuit or county courts within the preceding two years, whether they actually had served or not, the court reversed under subsection (b)(6) and ordered a new trial clerk's actions because the violated jury selection rules. Page v. Siemens Energy & Automation, Inc., 728 So. 2d 1075, 1998 Miss. LEXIS 507 (Miss. 1998).

The "any other reason" language of subsection (b)(6) refers to any other reason than those contained in the five enumerated grounds on which a court may grant a Rule 60(b) motion. Briney v. United States Fid. & Guar. Co., 714 So. 2d 962, 1998 Miss. LEXIS 274 (Miss. 1998).

Chancellor was correct in giving priority to caselaw concerning child support, over the procedural restrictions of subdivision (b)(6) of this rule. Williams v. Rembert, 654 So. 2d 26, 1995 Miss. LEXIS 197 (Miss. 1995).

Invalidity of parties' marriage justified chancellor's order relieving husband from judgment of separate maintenance. Weeks v. Weeks, 654 So. 2d 33, 1995 Miss. LEXIS 200 (Miss. 1995).

**Procedure.**

As victims of chemical exposure filed their notice of appeal almost 90 days after the entry of a trial court order, requiring enforcement of a settlement of the victims' personal injury claims against a pecan company, the appellate court lacked jurisdiction to consider the validity of that order pursuant to Miss. R. App. P. 2(a) and 4(a); the filing of a motion for relief from judgment under Miss. R. Civ. P. 60(b) did not alter the 30-day jurisdictional filing requirement. Melton v. Smith's Pecans, 65 So. 3d 853, 2011 Miss. App. LEXIS 58 (Miss. Ct. App.), cert. denied, 65 So. 3d 310, 2011 Miss. LEXIS 342 (Miss. 2011).

Miss. R. Civ. P. 60(b) does not require an evidentiary hearing prior to ruling on a motion to set aside a default judgment. Capital One Servs. v. Rawls, 904 So. 2d 1010, 2004 Miss. LEXIS 1407 (Miss. 2004), overruled in part, BB Buggies, Inc. v. Leon, 150 So. 3d 90, 2014 Miss. LEXIS 543 (Miss. 2014).

In initial suit by homeowners against a seller, for fraud, where the homebuilder appeared for a deposition pursuant to a subpoena, the homebuilder did not make an appearance when the homebuilder was not yet named as a party. Thus, when the homebuilder was later added as defendant in the homeowners' negligence action, and failed to timely answer, entry of default judgment was proper; further, the homebuilder's alleged inability to contact the homeowners' counsel did not annul the homebuilder's obligation to timely answer under Miss. R. Civ. P. 12. Williams v. Kelly, 872 So. 2d 783, 2004 Miss. App. LEXIS 420 (Miss. Ct. App. 2004).

Absent a motion or independent action having been brought, circuit court was without authority to set aside forfeiture order entered by default, and court erred in vacating order on its own initiative. State ex rel. Mississippi Bureau of Narcotics v. One Chevrolet Nova Auto., 573 So. 2d 787, 1990 Miss. LEXIS 816 (Miss. 1990).

**Review.**

Notice of appeal filed by one of the parties in a divorce proceeding only became effective once the chancellor entered an order granting the other party's motion to correct the judgment, or, in the alternative, motion to correct or amend the amended judgment. Dauenhauer v. Dauenhauer, 271 So. 3d 589, 2018 Miss. App. LEXIS 570 (Miss. Ct. App. 2018).

Circuit court properly denied defendant's motion to alter or amend as a successive writ because his motion and his brief on appeal were nothing more than attempts to relitigate the underlying merits of his motion for post-conviction relief for a fourth time. Beeks v. State, 130 So. 3d 163, 2014 Miss. App. LEXIS 21 (Miss. Ct. App. 2014).

Court of appeals refused to consider appellants' argument that a chancery court erred in denying their motion under Miss. R. Civ. P. 60 to set aside an order granting appellee summary judgment in appellants' action to set aside a foreclosure because appellants failed to cite to any authority in support of their argument that the chancery court erred by not setting aside a foreclosure due to newly discovered evidence. Davis v. Countrywide Home Loans, Inc., 72 So. 3d 1163, 2011 Miss. App. LEXIS 265 (Miss. Ct. App. 2011).

Although Mississippi appellate courts are generally without jurisdiction to hear direct appeals from temporary orders, Miss. Code Ann. § 11-51-3 (Supp. 1993), the denial of a Miss. R. Civ. P. 60(b) motion is a final judgment that is reviewable. Clark v. Clark, 43 So. 3d 496, 2010 Miss. App. LEXIS 28 (Miss. Ct. App.), cert. denied, 49 So. 3d 106, 2010 Miss. LEXIS 467 (Miss. 2010).

As the wife received no award for the actual property-distribution payments owed to her in accordance with the property-settlement agreement, but rather was awarded consequential damages which resulted from the husband's conversion of the property-settlement payments, the record indelibly revealed the husband to be the party at fault. Therefore, the appellate court departed from its previous decision finding that the husband was entitled to Miss. R. Civ. P. 60(b) relief. J.K. v. R K., 30 So. 3d 290, 2009 Miss. LEXIS 386 (Miss. 2009), amended in part, 2009 Miss. LEXIS 590 (Miss. Dec. 3, 2009).

Trial judge did not abuse his discretion in denying the motorist's request to set aside the default judgment. Particularly since the evidence suggested that she did not have good cause for failing to answer as she was well educated and could have understood the complaint and the summons, she did not even go to her own insurer regarding a defense until she was already in default, and she did not present sufficient evidence that belied a colorable defense, or that the other insurer who sued her would not have suffered prejudice, with regard to its subrogation action, had the default judgment been set aside. Leach v. Shelter Ins. Co., 909 So. 2d 1283, 2005 Miss. App. LEXIS 128 (Miss. Ct. App. 2005).

Where a Rule 60 motion is filed and disposed of within the time allowed for appeal from the underlying judgment and the notice of appeal speaks to the judgment and the order disposing of the motion, one notice of appeal is sufficient to bring to the appellate court court both the judgment and the Rule 60 order. Brame v. Brame, 796 So. 2d 970, 2001 Miss. LEXIS 154 (Miss. 2001).

To determine if trial court has correctly denied a motion for relief from judgment entered by default under subdivision (b) of this rule, court must consider whether there was a bona fide excuse for failure to answer timely, whether party in default had a colorable defense on the merits, and whether prejudice would result to the non-offending party if the judgment were set aside. State Highway Com. v. Hyman, 592 So. 2d 952, 1991 Miss. LEXIS 974 (Miss. 1991).

**Satisfaction, release, or discharge of judgment.**

In an insured's action against an insurer for uninsured-motorist benefits, the court erred in denying the insurer's motion for satisfaction of judgment under Miss. R. Civ. P. 60(b)(5) because the insurer was not obligated to satisfy a jury's award of damages for negligence attributed to another driver that had already been satisfied by the driver. State Farm Mut. Auto. Ins. Co. v. Moyer, 62 So. 3d 989, 2010 Miss. App. LEXIS 676 (Miss. Ct. App. 2010).

The fact that the movant had not paid the judgment as ordered rendered its motion under subsection (b) untimely because the judgment was not satisfied, released, or discharged. Trilogy Communs., Inc. v. Thomas Truck Lease, Inc., 733 So. 2d 313, 1998 Miss. App. LEXIS 1056 (Miss. Ct. App. 1998).

**Timeliness of motion.**

Chancellor did not abuse his discretion in refusing to set aside a property settlement agreement portion of a divorce judgment where the husband was well aware of the wife's alleged misconduct when he entered the agreement, but waited more that two and a half years after the agreement was final to bring the Miss. R. Civ. P. 60(b)(1) motion. Smith v. Doe, 268 So. 3d 457, 2018 Miss. LEXIS 39 (Miss. 2018).

Chancellor did not err by denying a motion to set aside an order denying an increase in alimony because the chancellor found that the movant failed to show a fraud on the court by the movant's former spouse as to the value of an asset, and the chancellor further found that the movant failed to bring the movant's allegations in a timely fashion in that the motion was filed more than seven years after the spouse's alleged misrepresentations and not within the six-month limit for fraud on a party, nor within a reasonable time. Weeks v. Weeks, 187 So. 3d 654, 2016 Miss. App. LEXIS 114 (Miss. Ct. App. 2016).

Chancery court lacked jurisdiction to grant a wife's motion to reconsider following a husband's notice of appeal because the wife filed her Miss. R. Civ. P. 60 motion nearly two months after the chancery court entered its order regarding the parties' motions to reconsider; therefore, Miss. R. App. P. 4(d) did not apply, and the chancery court did not retain jurisdiction to grant the Rule 60 motion. Marter v. Marter, 95 So. 3d 733, 2012 Miss. App. LEXIS 491 (Miss. Ct. App. 2012).

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Court was within its authority to modify a divorce judgment almost four years later when the wife presented evidence that the husband intentionally submitted a substantially false financial disclosure statement; such intentional filing constituted a fraud, for which there was no limitation of time restricting a remedy under Miss. R. Civ. P. 60(b). Trim v. Trim, 33 So. 3d 471, 2010 Miss. LEXIS 223 (Miss. 2010).

Trial court did not abuse its discretion in denying a motion for relief from judgment, under Miss. R. Civ. P. 60(b), because it was untimely; where a church member had knowledge of the alleged fraudulent concealment by her pastor before the trial court's ruling, which was more than six months prior. Mabus v. St. James Episcopal Church, 13 So. 3d 260, 2009 Miss. LEXIS 167 (Miss. 2009).

Where the debtor sued the bank for negligent and fraudulent misrepresentation, breach of fiduciary duty and breach of covenants of good faith and fair dealing, the trial court entered an order on March 3, 2006, denying the bank's motion for summary judgment; the bank's petition for an interlocutory appeal was denied on on March 29, 2006. On March 20, 2007, a specially appointed judge entered an order setting the case for trial on March 3, 2008, and the bank, on July 19, 2007, filed a Miss. R. Civ. P. 60 motion asking the trial court to reconsider the order denying summary judgment; the trial court acted within its authority in deeming the motion timely filed pursuant to Miss. R. Civ. P. 59. Holland v. Peoples Bank & Trust Co., 3 So. 3d 94, 2008 Miss. LEXIS 596 (Miss. 2008).

Appellate court did not have to consider whether a father's motion to reopen under Miss. R. Civ. P. 60 after the denial of his first petition for modification of child support and alimony was timely because the issue of modification was properly before the court after a father filed a second petition for modification; all the father was required to show was a material change in circumstances, and there was no time limit on modifications. Austin v. Austin, 981 So. 2d 1000, 2007 Miss. App. LEXIS 710 (Miss. Ct. App. 2007), cert. denied, 981 So. 2d 298, 2008 Miss. LEXIS 223 (Miss. 2008).

Circuit court did not abuse its discretion in finding that a creditor failed to file its motion for relief within a reasonable time period, as required by Miss. R. Civ. P. 60(b)(4), where it was filed two years and four months after entry of a default judgment in a case involving a failure to rectify an incorrect deed in a timely manner; the judgment was not void because the circuit court had subject matter jurisdiction, and due process was not violated. However, the awards of damages and attorney's fees were void because the evidence did not support such. Indymac Bank, F.S.B. v. Young, 966 So. 2d 1286, 2007 Miss. App. LEXIS 716 (Miss. Ct. App. 2007).

Chancery court properly dismissed a wife's motion for contempt and modification of a property settlement in a divorce proceeding; because there was no evidence of any fraudulent concealment on the part of the husband regarding his 401(k) plan, the statute of limitations ran from the entry of the judgment of divorce, and hence the wife's claim was time-barred under the limitations imposed in Miss. R. Civ. P. 60(b). Shaw v. Shaw, 985 So. 2d 346, 2007 Miss. App. LEXIS 688 (Miss. Ct. App. 2007), cert. denied, 977 So. 2d 1144, 2008 Miss. LEXIS 135 (Miss. 2008).

Chancellor did not manifestly err in granting a wife's motion to dismiss a husband's motion pursuant to Miss. R. Civ. P. 60(b) because the husband waited nearly 10 years to move to correct an amended qualified domestic relations order with respect to the husband's retirment benefits; the husband's motion was untimely. Salemi v. Salemi, 972 So. 2d 1, 2007 Miss. App. LEXIS 637 (Miss. Ct. App. 2007).

Motion for relief under Miss. R. Civ. P. 60(b)(4) was properly dismissed because an alleged descendant waited more than six years to challenge an adverse ruling in an ejectment action filed against a record title holder; there was no reason for his failure to file an appeal or his decision to wait so long to file the motion, and moreover there was no basis for arguing that the chancery court lacked subject matter jurisdiction over a property case. Netterville v. Weyerhaeuser Co., 963 So. 2d 38, 2007 Miss. App. LEXIS 534 (Miss. Ct. App. 2007).

Motion for post-judgment interest in a negligence action was not governed by the 10-day time period in Miss. R. Civ. P. 59(e) because the right to post-judgment interest was a statutory right governed by Miss. Code Ann. § 75-17-7; therefore, a motion filed 58 days after judgment was timely under Miss. R. Civ. P. 60(a). Miss. Dep't of Mental Health v. Hall, 936 So. 2d 917, 2006 Miss. LEXIS 462 (Miss. 2006).

Court did not err in refusing to set aside, pursuant to Miss. R. Civ. P. 60(b), a default judgment entered against a credit card company in plaintiffs' breach of contract action because the credit card company provided little explanation regarding its failure to appear for trial. Company also provided no explanation of why there was a 21-day delay between the filing of the entry of appearance and the filing of the motion to set aside the default judgment. Capital One Servs. v. Rawls, 904 So. 2d 1010, 2004 Miss. LEXIS 1407 (Miss. 2004), overruled in part, BB Buggies, Inc.

v. Leon, 150 So. 3d 90, 2014 Miss. LEXIS 543 (Miss. 2014).

When complaint seeking equitable relief was filed by the heirs of the original plaintiff over 60 years after a chancellor's decree determined that the original plaintiff and his partner each owned a one-half interest in the land, and the heirs alleged that the original decree was a mistake or accident under Miss. R. Civ. P. 60(b)(2), the heirs' complaint was time-barred. R. N. Turnbow Oil Invs. v. McIntosh, 873 So. 2d 960, 2004 Miss. LEXIS 259 (Miss. 2004).

Where a trial court voided an agreed judgment regarding a child support arrearage on a father's motion filed under Miss. R. Civ. P. 60(b)(4) the mother failed to show that the father's seven-month delay in filing his motion was unreasonable; hence, the granting of the motion was not error based on such delay in filing. Ladner v. Logan, 857 So. 2d 764, 2003 Miss. LEXIS 551 (Miss. 2003).

The trial court erred when it granted the plaintiff's second motion to reconsider her Rule 60(b) motion where such second motion was filed eight months after the expiration of the time to appeal from the denial of her first motion to reconsider; the plaintiff's proper avenue of relief was by way of appeal, rather than by way of a second motion for reconsideration. Pruett v. Malone, 767 So. 2d 983, 2000 Miss. LEXIS 154 (Miss. 2000).

It was an abuse of discretion for the chancellor to deny a motion to set aside a judgment of dismissal in a paternity proceeding as untimely, which dismissal was based on a failure to prosecute, notwithstanding that the motion was not made until 21 months after the judgment was rendered, in light of the paramount concern of protecting the best interests of the child. Mississippi Dep't of Human Servs. v. Helton, 741 So. 2d 240, 1999 Miss. LEXIS 263 (Miss. 1999).

**Void judgments.**

Limited liability company (LLC) was entitled to relief from a default judgment because the judgment was void as the party which sought to collect on a promissory note failed to properly serve the LLC, there was no effective waiver of service of process, and the doctrine of laches was inapplicable. Sun South LLC v. Bayou Vista LLC, 281 So. 3d 980, 2019 Miss. App. LEXIS 166 (Miss. Ct. App. 2019).

Chancery court did not err in denying a husband's Miss. R. Civ. P. 60(b)(4) motion for relief from a final judgment of divorce on the grounds that it lacked subject matter and personal jurisdiction where the wife had waived the defenses of lack of personal jurisdiction, insufficiency of process, and insufficiency of service of process by not raising them, and the husband's failure to comply with Miss. Code Ann. § 93-5-2(1) had created the alleged jurisdictional defect. Ridgeway v. Hooker, 240 So. 3d 1202, 2018 Miss. LEXIS 68 (Miss. 2018).

Chancellor did not abuse his discretion in refusing to set aside a default judgment entered against the majority shareholders as a result of their discovery misconduct where they had been given notice and an opportunity to be heard on the minority shareholder's motion to strike their answer, the decision was based on a finding that the majority shareholders had willfully refused to participate in the pending litigation, and thus, due process had been satisfied. Crossley v. Moore, 182 So. 3d 462, 2015 Miss. App. LEXIS 213 (Miss. Ct. App. 2015), cert. denied, 181 So. 3d 1010, 2016 Miss. LEXIS 22 (Miss. 2016).

When a lender failed to comply with Miss. R. Civ. P. 4(c) by attesting that it had performed a diligent inquiry before performing service by publication on a borrower, a default judgment entered against the borrower was void; thus, the chancery court erred in refusing to set the void judgment aside under Miss. R. Civ. P. 60(b)(4). Turner v. Deutsche Bank Nat'l Trust Co., 65 So. 3d 336, 2011 Miss. App. LEXIS 349 (Miss. Ct. App. 2011).

Chancellor lacked jurisdiction over the divorce action because the husband was improperly served with a Miss. R. Civ. P. 81 summons, rather than the required Miss. R. Civ. P. 4 summons. For that reason, the chancellor's judgment of divorce was void, as were all determinations therein, including the chancellor's awards of alimony, child custody, and child support; therefore, the chancellor erred in refusing to set aside the judgment pursuant to Miss. R. Civ. P. 60(b). Clark v. Clark, 43 So. 3d 496, 2010 Miss. App. LEXIS 28 (Miss. Ct. App.), cert. denied, 49 So. 3d 106, 2010 Miss. LEXIS 467 (Miss. 2010).

Student's motion to vacate the award of summary judgment to the school district under Miss. R. Civ. P. 60(b)(4) was properly denied as it was an attempt to circumvent an appeal for which she could not or would not pay; the student's assignments of error were far from extraordinary and were more appropriately dealt with on appeal. Harvey v. Stone County Sch. Dist., 982 So. 2d 463, 2008 Miss. App. LEXIS 20 (Miss. Ct. App. 2008).

While the trial court relied on the catch all provision in Miss. R. Civ. P. 60 (b)(6), it was clear that Rule 60(b)(4) would allow a void judgment to be set aside where the subsequent judgment in the trial court was void because the chancery court had priority jurisdiction and the owner's filing of his motion to set aside the judgment just over six months after it was entered was filed within a reasonable amount of time. Soriano v. Gillespie, 857 So. 2d 64, 2003 Miss. App. LEXIS 288 (Miss. Ct. App. 2003).

Divorce decree that incorporated an agreement that a parent would pay no child support was not void as against public policy because the decree remained subject to modification upon a showing of a material change in circumstances. Miss. Dep't of Human Servs. v. Shelby, 2001 Miss. LEXIS 209 (Miss. Aug. 23, 2001), op. withdrawn, sub. op., 802 So. 2d 89, 2001 Miss. LEXIS 326 (Miss. 2001).

Judgment rendered by chancellor was void, where it admitted will codicil to probate without joinder of all interested parties; joinder of all interested parties is jurisdictional, and therefore judgment was required to be set aside. Garrett v. Bohannon, 621 So. 2d 935, 1993 Miss. LEXIS 213 (Miss. 1993).

**Waiver.**

Custody award of the mother's and father's child to the father was appropriate, in part because the mother waived her jurisdictional arguments when she failed to timely seek resolution of the issue and when she participated in the hearing without first seeking an adjudication of her jurisdictional issue. Price v. McBeath, 989 So. 2d 444, 2008 Miss. App. LEXIS 497 (Miss. Ct. App. 2008).

**Illustrative cases.**

Dismissal of an appeal for lack of jurisdiction was appropriate, when the parties did not receive notice of the circuit court's order for more than fifteen months after it was entered and, upon receiving notice of the order, the circuit court granted the appellant's motion to reopen the time for filing the notice of appeal, because the notice of appeal was untimely filed and the circuit court lacked authority to reopen the time for filing the notice of appeal. Bailey v. Chamblee, 192 So. 3d 1078, 2016 Miss. App. LEXIS 302 (Miss. Ct. App. 2016).

Trial court erred by granting the administratrix of a decedent's estate additional time to file an appeal in a medical malpractice action against doctors and a hospital because the court granted the administratrix relief from an order certifying as final for appeal an order dismissing the doctors that was corrected by two separate orders by the court. Moreover, the running of the time to appeal began when the hospital, the last defendant, was dismissed from the case. Pope v. Brock, 179 So. 3d 1120, 2015 Miss. LEXIS 609 (Miss. 2015).

Circuit court properly denied the judgment debtors' motion to set aside a default judgment in favor of the judgment creditors because the circuit court weighed each statutory factor in making its ruling, the judgment creditors properly served the judgment debtors with process, the judgment debtors provided no good cause for failing to answer the complaint, and setting aside the default judgment would result in substantial prejudice to the creditors. Smith v. First Bank, 195 So. 3d 790, 2015 Miss. App. LEXIS 238 (Miss. Ct. App. 2015), cert. denied, 209 So. 3d 428, 2016 Miss. LEXIS 303 (Miss. 2016).

Wife was denied relief under Miss. R. Civ. P. 60(b)(6) where there was no evidence that the husband withheld asset information, the husband's alleged failure to file Miss. Unif. Ch. Ct. R. 8.05 statements alone was not sufficient cause for a remand, and an attorney's alleged dual representation was insufficient to modify a divorce decree. Collins v. Collins, 188 So. 3d 581, 2015 Miss. App. LEXIS 247 (Miss. Ct. App. 2015), cert. denied, 188 So. 3d 575, 2016 Miss. LEXIS 156 (Miss. 2016).

It was no abuse of discretion to dismiss a wife's Miss. R. Civ. P. 60(b) motion for relief from judgment or to deny Miss. R. Civ. P. 59(e) reconsideration of the dismissal, because (1) the motion for relief was dismissed only for failure to serve a summons and complaint, and (2) the wife was allowed to correct the error and refile the wife's requests. Harris v. Harris, 167 So. 3d 1254, 2014 Miss. App. LEXIS 538 (Miss. Ct. App. 2014), cert. denied, 168 So. 3d 962, 2015 Miss. LEXIS 354 (Miss. 2015).

Denial of a relative's motion under Miss. R. Civ. P. 60(b) to reopen a testator's estate was not an abuse of discretion because the relative did not present any extraordinary circumstances justifying setting aside the order closing the estate where the relative failed to produce any evidence that the relative was entitled to a share of the estate or to show how the relative was related to the testator. Perry v. Perry (In re Estate of Perry), 61 So. 3d 193, 2010 Miss. App. LEXIS 586 (Miss. Ct. App. 2010), cert. denied, 62 So. 3d 974, 2011 Miss. LEXIS 265 (Miss. 2011).

In action to void a tax sale, a property owner failed to comply with a settlement agreement the owner entered into with a purchaser; thus, a circuit court did not err in finding that the purchaser owned the property and in refusing to broaden or amend its ruling in considering the owner's Miss. R. Civ. P. 60(b) motion after the owner filed his notice of appeal. Howard v. Gunnell, 63 So. 3d 589, 2011 Miss. App. LEXIS 266 (Miss. Ct. App. 2011).

Chancellor did not abuse discretion in granting guardians' motion under Miss. R. Civ. P. 60(b)(6) as to the settlement of a minor's medical negligence claims against a registered nurse, as the petition for settlement was incomplete and there was no witness testimony on the minor's injury or damages. Carpenter v. Berry, 58 So. 3d 1158, 2011 Miss. LEXIS 89 (Miss. 2011).

Under Miss. R. Civ. P. 60(a), a trial court judge properly clarified a prior divorce judgment between the parties to reflect that a husband could satisfy the wife's equitable distribution award with a portion of his retirement using a qualified domestic relations order rather than paying cash; the intent of the equitable distribution award was for the parties to receive an equal share of the marital assets, such that the failure to include a qualified domestic relations order in the divorce judgment was merely an oversight. Jones v. Mayo, 53 So. 3d 832, 2011 Miss. App. LEXIS 57 (Miss. Ct. App. 2011).

Victims of chemical exposure failed to rebut the presumption that their attorney had the apparent authority to settle their personal injury claims, such that a trial court's denial of their motion under Miss. R. Civ. P. 60(b) for relief from an enforcement order of the settlement was not an abuse of discretion. Melton v. Smith's Pecans, 65 So. 3d 853, 2011 Miss. App. LEXIS 58 (Miss. Ct. App.), cert. denied, 65 So. 3d 310, 2011 Miss. LEXIS 342 (Miss. 2011).

Trial court did not abuse its discretion by refusing to consider a wife's affidavit, which was attached to her motion to set aside an order granting a logging company summary judgment, because the wife failed to submit an affidavit in support of her claims in her response to the company's motion for summary judgment, and the wife admitted that the sworn affidavit attached to her motion to set aside summary judgment contained alleged admissions made to her by her husband on the day of the accident; thus, that information was available and known to the wife when the company's motion for summary judgment was filed, that affidavit was later withdrawn by the wife, and since the wife's substitute affidavit was not sworn testimony, it was not admissible as evidence. Moore v. M & M Logging, Inc., 51 So. 3d 216, 2010 Miss. App. LEXIS 213 (Miss. Ct. App. 2010), cert. denied, 50 So. 3d 1003, 2011 Miss. LEXIS 22 (Miss. 2011).

In an employment termination case alleging tort claims and claims under 42 U.S.C.S. § 1983 in which a former teacher's aide argued on appeal that Miss. Code Ann. § 15-1-49 should be tolled because in the first case, his appeal from the school board's decision to terminate his employment, the circuit court failed to rule on certain Miss. R. Civ. P. 60 motions, that could not toll the statutes of limitations for his claims. Davis v. Biloxi Pub. Sch. Dist., 43 So. 3d 1135, 2009 Miss. App. LEXIS 765 (Miss. Ct. App. 2009), cert. dismissed, 49 So. 3d 106, 2010 Miss. LEXIS 487 (Miss. 2010).

Circuit court did not err in denying contractors' motion to set aside a default judgment against them under Rule 60(b)(6), where they failed to present any evidence of good cause or excusable neglect for the failure to take action to protect their rights, and they failed to present a colorable defense; the facts did not support the contractors' argument that they were unaware of homeowners' suit against them, where one of the contractors received and signed for the summonses. Woodkrest Custom Homes Inc. v. Cooper, 24 So. 3d 340, 2009 Miss. App. LEXIS 843 (Miss. Ct. App. 2009).

Where the chancellor offered adequate justification for his finding that the children's best interests would be served by granting the father sole physical custody with the mother having liberal rights of visitation, the court denied the mother's motion for relief from judgment under Miss. R. Civ. P. 60. Although other judges may have ruled differently, the court could not conclude that the chancellor abused his discretion in so ruling. Porter v. Porter, 23 So. 3d 438, 2009 Miss. LEXIS 593 (Miss. 2009).

Trial court did not err by denying a debtor's request for relief under Miss. R. Civ. P. 60(b)(6) in a case attempting to set aside a foreclosure; even though a hurricane in the area made it hard to comply with court orders, the debtor had 9 months prior to the storm to take action, and final judgment was entered 10 months after the storm. Despite the fact that the chancery court cited to time as a reason for the denial of the motion, the main reason for the denial of relief was the failure to state a ground for Rule 60 relief. Welch v. Bank One Nat'l Ass'n, 6 So. 3d 435, 2009 Miss. App. LEXIS 107 (Miss. Ct. App. 2009).

Where the debtor sued the bank for negligent and fraudulent misrepresentation, breach of fiduciary duty and breach of covenants of good faith and fair dealing, the trial court did not err in granting the bank's Miss. R. Civ. P. 60 motion for reconsideration of the order denying summary judgment. The order denying the bank's motion for summary judgment was not a final judgment, and the trial court acted within its authority in considering the bank's motion for reconsideration. Holland v. Peoples Bank & Trust Co., 3 So. 3d 94, 2008 Miss. LEXIS 596 (Miss. 2008).

In a case where custody was modified to award a father sole physical custody based on a mother's anticipated move to another state, the mother's request for relief under Miss. R. Civ. P. 60(b) when the move did not occur was properly denied; a failure to conduct an analysis under Albright v. Albright, 437 So. 2d 1003, 1005 (Miss. 1983), to re-evaluate the factors after the filing of the Miss. R. Civ. P. 60(b) was a harmless error. However, a remand was necessary to determine the mother's visitation rights, which had been changed to reflect the move. Porter v. Porter, 23 So. 3d 470, 2008 Miss. App. LEXIS 643 (Miss. Ct. App. 2008), cert. denied, 12 So. 3d 531, 2009 Miss. LEXIS 302 (Miss. 2009), aff'd in part and rev'd in part, 23 So. 3d 438, 2009 Miss. LEXIS 593 (Miss. 2009).

County court was not in error for not granting a debtor relief from judgment – that is, not modifying a payment schedule after the court altered the language of a settlement agreement – because although it was within the county court's discretion to stay the execution of the judgment, the debtor did not ask for this relief, and the payment schedule in the original order was agreed upon and valid. Franklin v. BSL, Inc., 987 So. 2d 1050, 2008 Miss. App. LEXIS 315 (Miss. Ct. App. 2008).

Chancellor did not abuse his discretion when he set aside and declared void a doctor's settlement agreement with a mother due to a recent Mississippi Supreme Court opinion that arguably made the agreement unworkable as a matter of law because the case fell under an exceptional and compelling circumstance, under Miss. R. Civ. P. 60(b)(6), because (1) the evidence was sufficient to establish that the parties entered into the settlement agreement under the mistaken assumption that the doctor could have been released, and the vicarious liability claims against a clinic would have remained viable; (2) when the settlement agreement took on ramifications the parties did not originally envision because of the improper circle of indemnity it created, the chancellor set it aside; (3) a court would not reverse the chancellor for failure to cite to Miss. R. Civ. P. 60(b) when that rule supported his actions; and (4) while the doctor executed the settlement agreement expecting to be finally released from the litigation, equity and fairness necessarily weighed toward the disabled child. Bush v. Lane (In re Lane), 994 So. 2d 775, 2008 Miss. App. LEXIS 118 (Miss. Ct. App. 2008).

Where a mother appealed from orders signed in a custody case that might have resulted from a settlement, a dismissal was appropriate because the notice of appeal should have been construed as a motion for relief under Miss. R. Civ. P. 60; the mother was given some leeway as she was proceeding pro se. It could not be determined whether a first order signed by a chancellor was the result of a settlement where no transcript of events was available, the father's statement of the case contended there was such an agreement, and the mother's attorney signed "approved as to form only." Klein v. McIntyre, 966 So. 2d 1252, 2007 Miss. App. LEXIS 708 (Miss. Ct. App. 2007).

Miss. R. Civ. P. 60 did not preclude a chancellor from ordering the retroactive modification of alimony since a chancellor had authority to modify based on a father's second petition for such; moreover, the chancellor had the authority to order the modification retroactive to a date within the filing of the petition and the entry of the order. Austin v. Austin, 981 So. 2d 1000, 2007 Miss. App. LEXIS 710 (Miss. Ct. App. 2007), cert. denied, 981 So. 2d 298, 2008 Miss. LEXIS 223 (Miss. 2008).

Where the trial court denied appellant's first motion for post-conviction relief from judgments convicting him on pleas of guilty to manslaughter and armed robbery, appellant was not entitled to relief under Miss. R. Civ. P. 60(b) based on a claim that he did not authorize counsel to file the motion; appellant showed no exceptional circumstances. Runnels v. State, 957 So. 2d 424, 2007 Miss. App. LEXIS 332 (Miss. Ct. App. 2007).

Motion for relief under Miss. R. Civ. P. 60(b)(1) in a case involving the modification of child custody was denied because misrepresentations regarding the certifications of the father's wife were not intended to influence the decision, and a chancery court did not rely on them; moreover, there was no misrepresentation regarding a move to Alaska. Williamson v. Williamson, 964 So. 2d 524, 2007 Miss. App. LEXIS 138 (Miss. Ct. App.), cert. denied, 964 So. 2d 508, 2007 Miss. LEXIS 513 (Miss. 2007).

Three-part balancing test of King v. King, 556 So.2d 716, as outlined in Rich by Brown v. Nevels, 578 So.2d 609, weighed in favor of the denial of a car purchaser's Miss. R. Civ. P. 60(b)(6) motion for relief from judgment; inter alia, his inability to attend the hearing because he was incarcerated was not an "extraordinary circumstance" and the trial judge decided to rule solely on the pleadings and exclude matters introduced at the hearing, his complaint was frivolous, dismissal pursuant to Miss. R. Civ. P. 12(b)(6) and sanctions under Miss. R. Civ. P. 11 were proper, and the car dealership would have been unduly prejudiced had the Rule 60(b)(6) been granted. Guinn v. Wilkerson, 963 So. 2d 555, 2006 Miss. App. LEXIS 824 (Miss. Ct. App. 2006), cert. denied, 962 So. 2d 38, 2007 Miss. LEXIS 490 (Miss. 2007), cert. denied, 553 U.S. 1022, 128 S. Ct. 2088, 170 L. Ed. 2d 823, 2008 U.S. LEXIS 3738 (U.S. 2008).

Trial court did not abuse its discretion in determining that plaintiffs' letter in response to the clerk's motion to dismiss, which requested that their personal injury action against the business not be dismissed, constituted an action of record such as would preclude a dismissal under Miss. R. Civ. P. 41(d); additionally, considering the clerk's failure to record or file plaintiffs' letter, correctly identify the order to dismiss, or provide notice to plaintiffs that the order to dismiss was entered, the circumstances warranted relief under Miss. R. Civ. P. 60(b)(6). Cucos, Inc. v. McDaniel, 938 So. 2d 238, 2006 Miss. LEXIS 488 (Miss. 2006).

Where defendant, whose motion for postconviction relief had been denied, failed to show that any circumstances existed which necessitated the granting of his Miss. R. Civ. P. 60(b) motion, the circuit court did not abuse its discretion when it denied the Rule 60(b) motion. Cook v. State, 921 So. 2d 1282, 2006 Miss. App. LEXIS 124 (Miss. Ct. App. 2006).

Chancellor did not err by granting the father's motion to modify a child custody agreement, based on a change of circumstances since the mother interfered with the father's visitation rights and caused the child emotional distress. The mother was not entitled to relief from the judgment granting custody to the father. Thornhill v. Van Dan, 918 So. 2d 725, 2005 Miss. App. LEXIS 171 (Miss. Ct. App. 2005).

Where decedent was killed by a tractor trailer while attempting to cross a two-lane highway, the jury found the driver of the tractor trailer and his company 30% at fault and awarded plaintiff $ 81,000. Plaintiff's motion for judgment notwithstanding the verdict on damages only or, in the alternative, for a new trial on damages, was properly denied; the jury was not confused in determining damages and liability. Wells v. Tru-Mark Grain, Inc., 895 So. 2d 181, 2004 Miss. App. LEXIS 1085 (Miss. Ct. App. 2004).

Trial court did not err in denying a motion to amend or alter a judgment filed by a developer and a contractor as the developer and contractor had drafted their settlement agreement to preclude a plumber, who had already prevailed on a partial summary judgment motion entitling him to interpled funds, from recovering any of the interpled funds. Noble House, Inc. v. W & W Plumbing & Heating, Inc., 881 So. 2d 377, 2004 Miss. App. LEXIS 880 (Miss. Ct. App. 2004).

Neither the wife nor the record explained how, and under what circumstances, the trial date in the divorce action was set. The docket index did not reflect an order setting the trial on the merits, and the wife did not contest that the husband did not receive notice of the date set for a trial on the merits. Therefore, the refusal of the chancellor to grant the husband's motion to set aside the judgment pursuant to Miss. R. Civ. P. 60(b)(6) was an abuse of discretion. Brown v. Brown, 872 So. 2d 787, 2004 Miss. App. LEXIS 439 (Miss. Ct. App. 2004).

Husband alleged that the entered judgment differed from the opinion rendered from the bench, however, since the bench opinion was not a final judgment, the husband had no basis for appealing from it. Moreover, the record was supplemented with a later judgment involving the same action, and did not supercede the earlier judgment at issue, thus, any concerns on the subject were alleviated. Cook v. Whiddon, 866 So. 2d 494, 2004 Miss. App. LEXIS 130 (Miss. Ct. App. 2004).

In an inmate's appeal from the denial of postconviction relief, the trial court did not err in denying the inmate's motion under Miss. R. Civ. P. 60(b), where the inmate claimed he was wrongfully indicted for burglary of a dwelling, because the inmate had not been wrongfully indicted for burglary and no miscarriage of justice had occurred. Sheffield v. State, 881 So. 2d 249, 2003 Miss. App. LEXIS 998 (Miss. Ct. App. 2003), cert. dismissed, 2005 Miss. LEXIS 87 (Miss. Feb. 3, 2005).

Where defendants alleged that newly discovered evidence that unnamed third parties were joint tortfeasors entitled them to relief under Miss. R. Civ. P. 60(b)(6), the trial court properly weighed the equities and determined that the plaintiff would be more prejudiced by further litigation than defendants by denial of a new trial; defendants failed to show "extraordinary circumstances" justifying relief. Harrison v. McMillan, 828 So. 2d 756, 2002 Miss. LEXIS 301 (Miss. 2002).

The defendant failed to demonstrate an exceptional circumstance entitling him to relief under subsection (b) from the trial court's denial of post-conviction relief, based on the failure of the trial court to grant an evidentiary hearing on his petition, where he merely relied on the same arguments in his initial petition to support his motion. Taylor v. State, 2000 Miss. App. LEXIS 192 (Miss. Ct. App. Apr. 25, 2000), op. withdrawn, sub. op., 782 So. 2d 166, 2000 Miss. App. LEXIS 592 (Miss. Ct. App. 2000).

Chancellor erred in utilizing subdivision (b)(6) of this rule to modify alimony payments, upon determining that payments constituted non-modifiable lump sum alimony, since a judge may not utilize rules of procedure to do that which substantive law of State forbids him to do. McDonald v. McDonald, 683 So. 2d 929, 1996 Miss. LEXIS 633 (Miss. 1996).

Defendant was entitled to have default judgment set aside for failure of notice and hearing; it was clear that defendant had made an appearance, and thus defendant was entitled to notice and a hearing on plaintiff's application for default. King v. Sigrest, 641 So. 2d 1158, 1994 Miss. LEXIS 377 (Miss. 1994).

Where plaintiff failed to timely assert alleged error in trial court pertaining to her stipulation, and abstained from appealing the alleged error, trial court was without power to delete stipulation and thereby change final judgment after supreme court's mandate of affirmance. Collins v. Acree, 614 So. 2d 391, 1993 Miss. LEXIS 61 (Miss. 1993).

Trial court was correct in denying plaintiff relief from default judgment, where her claim of mental illness was rejected by court based on credible expert testimony, and she had no colorable defense to merits of counterclaim against her. Sartain v. White, 588 So. 2d 204, 1991 Miss. LEXIS 709 (Miss. 1991).

Plaintiff whose knee injury unforeseeably worsened after settlement of his case, ultimately requiring amputation above knee, was not entitled to relief from judgment on theories of "mutual mistake" or "inadequate consideration". Lose v. Illinois C. G. R. Co., 584 So. 2d 1284, 1991 Miss. LEXIS 532 (Miss. 1991).

Trial judge correctly refused to set aside default judgment in negligence action against boarding house owner alleged to have been incompetent and therefore unable to understand process served upon her because the evidence didn't demonstrate she suffered from an incapacity. Rich by Brown v. Nevels, 578 So. 2d 609, 1991 Miss. LEXIS 111 (Miss. 1991).

That the appellee could have pled entrapment as a defense to a forfeiture action but did not, does not amount to extraordinary circumstances which justified the lower court granting relief from a default judgment. State ex rel. Mississippi Bureau of Narcotics v. One Chevrolet Nova Auto., 573 So. 2d 787, 1990 Miss. LEXIS 816 (Miss. 1990).

Trial court erred in refusing to set aside judgment for plaintiff and fix a new trial date, where defendant resided out-of-state and required notice to travel to Mississippi, he requested a continuance and informed plaintiff he could not be in Mississippi on day of trial, his answer asserted a colorable defense to merits of claim, and plaintiff would have suffered no appreciable prejudice had court recognized its error in setting the trial. King v. King, 556 So. 2d 716, 1990 Miss. LEXIS 32 (Miss. 1990).

Because county supervisors waited over two years before bringing motion to vacate consent decree, they were estopped from asserting that decree should be vacated for lack of specificity; moreover, because there was no showing of fraud, collusion, accident or mistake, the consent decree was presumptively valid and the trial judge erred in vacating it. Hinds County Bd. of Supervisors v. Common Cause of Mississippi, 551 So. 2d 107, 1989 Miss. LEXIS 719 (Miss. 1989).

Chancery court did not abuse its discretion in setting aside its prior default judgment in divorce action, and reforming judgment to take into account husband's contributions during previous nine years, because the couple continued to cohabit after the divorce and the husband supported the children thereafter. Burkett v. Burkett, 537 So. 2d 443, 1989 Miss. LEXIS 4 (Miss. 1989).

Divorce defendant was not entitled to have default judgment set aside or amended, where he failed to offer any defense to merits of claim for divorce, and his only excuse for failure to answer timely was that he was without funds to employ a lawyer and did not know that he could appear and answer without one. Mayoza v. Mayoza, 526 So. 2d 547, 1988 Miss. LEXIS 306 (Miss. 1988).

Medical malpractice action was properly dismissed due to plaintiff's procrastination, disobedience to lower court's orders, willful failure to comply with most areas of discovery, and obvious contempt for court's processes. Williams v. Puryear, 515 So. 2d 1231, 1987 Miss. LEXIS 2925 (Miss. 1987).

Circuit court did not exceed its authority in refusing to set aside default judgment; although defendant made a substantial showing of a colorable defense on merits, he had filed no answer and made no appearance at or before trial, despite being fully advised of his peril, and it would be inequitable to plaintiff to deny her judgment any future force or effect. Guaranty Nat'l Ins. Co. v. Pittman, 501 So. 2d 377, 1987 Miss. LEXIS 2268 (Miss. 1987).

## RESEARCH REFERENCES

**ALR.**

Vacating or opening judgment by confession on ground of fraud, illegality, or mistake. 91 A.L.R.5th 485.

Construction and Application of State Rules of Civil Procedure Authorizing Relief from Final Judgment or Order for "Any Other Reason" – General Principles. 86 A.L.R.6th 321.

Construction and Application of State Rules of Civil Procedure Authorizing Relief from Final Judgment or Order for "Any Other Reason" – Negligence and Intentional Tort Cases. 87 A.L.R.6th 197.

Construction and Application of State Rules of Civil Procedure Authorizing Relief from Final Judgment or Order for "Any Other Reason"— Real Estate and Construction-Related Cases. 88 A.L.R.6th 385.

Construction and Application of State Rules of Civil Procedure Authorizing Relief from Final Judgment or Order for "Any Other Reason" – Business-Related, Corporate, and Contract Cases. 89 A.L.R.6th 409.

Construction and Application of State Rules of Civil Procedure Authorizing Relief From Final Judgment or Order for "Any Other Reason" – Probate and Family Law Cases. 90 A.L.R.6th 451.

## Rule 61. Harmless error.

No error in either the admission or the exclusion of evidence and no error in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

**HISTORY: Comments repealed effective July 1, 2014.**

## JUDICIAL DECISIONS

### ANALYSIS

Admission of death certificate.
Hearing.
Harmless error.
Illustrative Cases.

**Admission of death certificate.**

Defendant's capital murder conviction was appropriate because his right to confrontation was not violated by the admission of the victim's death certificate into evidence. The death certificate was admissible as a public record under Miss. R. Evid. 902(4) and, while the trial court erred in allowing the death certificate into evidence showing the purported time of injury under Miss. R. Evid. 803(9), the error was harmless because witnesses testified that they could not be positive of the time of injury or the time of death. Birkhead v. State, 2009 Miss. LEXIS 73 (Miss. Feb. 19, 2009), op. withdrawn, sub. op., 57 So. 3d 1223, 2011 Miss. LEXIS 99 (Miss. 2011).

**Hearing.**

Because a decision to refuse a worker a

hearing was a "final action," a school board should have recorded that decision in the minutes; however, the decision was harmless since no prejudice was shown as a result. The worker failed to show how her appellate rights were hampered in a case where her employment contract was not renewed. Hodgins v. Phila. Pub. Sch. Dist., 966 So. 2d 1279, 2007 Miss. App. LEXIS 713 (Miss. Ct. App. 2007).

Trial court erred when it granted the movie theater's motion for summary judgment without oral hearing, but under the circumstances, the error was harmless as the customer, who alleged the theater was vicariously liable for the acts of its employee, failed to present any evidence to rebut the theater's motion. Adams v. Cinemark USA, Inc., 831 So. 2d 1156, 2002 Miss. LEXIS 395 (Miss. 2002).

**Harmless error.**

Mother was not afforded a fair trial, U.S. Const. Amend. XIV, Miss. Const. Art. 3, §§ 14, 24, where the chancellor was so combative, antagonistic, discourteous, and adversarial that no reasonable person, knowing all the facts, could conclude that the mother was afforded a fair trial; the chancellor's intemperance with the mother would leave any reasonable person with doubts about his impartiality. Schmidt v. Bermudez, 5 So. 3d 1064, 2009 Miss. LEXIS 104 (Miss. 2009).

Change of primary physical custody of the child from the father to the mother was proper because, even though the chancellor's remarks were clearly inappropriate, the error arising therefrom was harmless. The record revealed ample evidence that supported the chancellor's finding on every issue except that of visitation, which the appellate court remanded for further proceedings; thus, the appellate court was unable to find that the chancellor's improper conduct affected a substantial right of the parties. Schmidt v. Bermudez, 5 So. 3d 1100, 2008 Miss. App. LEXIS 36 (Miss. Ct. App. 2008), rev'd, 5 So. 3d 1064, 2009 Miss. LEXIS 104 (Miss. 2009).

**Illustrative Cases.**

Although defendant alleged that the circuit court should have declared a mistrial when the State of Mississippi used the word "rape" before the jury in defendant's trial for statutory rape, sexual battery of a minor child, and gratification of lust, because the term was prejudicial and inflammatory, there was no violation of defendant's due-process rights based on the cumulative-error doctrine and any error was harmless given the overwhelming weight of the evidence. Whittaker v. State, 269 So. 3d 1226, 2018 Miss. App. LEXIS 409 (Miss. Ct. App. 2018).

Characterizing defendant's motion as one for summary judgment instead of a motion to dismiss was harmless error that did not affect either party's substantial rights; to find otherwise would have favored form over substance. Patel v. Hill-Rom Co., 194 So. 3d 898, 2016 Miss. App. LEXIS 432 (Miss. Ct. App. 2016).

While the chancellor erred in failing to make an on-the-record determination on whether a father was entitled to court-appointed counsel before allowing him to proceed pro se, the error was harmless because the father was given a fair and adequate hearing, and the presence of an attorney would not have made a difference. Blakeney v. McRee, 188 So. 3d 1154, 2016 Miss. LEXIS 87 (Miss. 2016).

Although a trial court should have made a finding at the conclusion of an evidentiary hearing to submit the issue of punitive damages to the jury in a contractor's multi-count action against a law firm, as the firm failed to move for a directed verdict or object to the issue being submitted to the jury and there was sufficient evidence to support those damages, the error was harmless. Baker & McKenzie, LLP v. Evans, 123 So. 3d 387, 2013 Miss. LEXIS 548 (Miss. 2013).

### Rule 62. Stay of proceedings to enforce a judgment.

(a) *Automatic stay; exceptions.* — Except as stated herein or as otherwise provided by statute or by order of the court for good cause shown, no execution shall be issued upon a judgment nor shall proceedings be taken for its enforcement until the expiration of ten days after the later of its entry or the disposition of a motion for a new trial. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

(b) *Stay on motion.* — In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60(b), or of a motion to set aside a verdict made pursuant to Rule 50(b), or of a motion for amendment to the findings or for additional finding made pursuant to Rule 52(b).

(c) *Injunction pending appeal.* — When an interlocutory or final judgment has been rendered granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of an appeal from such judgment upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. The power of the court to make such an order is not terminated by the taking of the appeal.

(d) *Stay upon appeal.* — When an appeal is taken, the appellant, when and as authorized by statute or otherwise, may obtain a stay subject to the exceptions contained in subdivision (a) of this rule.

(e) *[omitted].* — When an appeal is taken, the appellant, when and as authorized by statute or otherwise, may obtain a stay subject to the exceptions contained in subdivision (a) of this rule.

(f) *Stay in favor of the state of Mississippi or agency thereof.* — When an appeal is taken by the State of Mississippi or an officer or agency thereof or by direction of any department of the government of same and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required of the appellant.

(g) *Power of appellate court not limited.* — The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

(h) *Stay of judgment upon multiple claims or as to multiple parties.* — When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

**HISTORY: Amended effective July 1, 1997; Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 1997, Rule 62(a) was amended to clarify that the stay of enforcement of a judgment expires ten days after the later of the entry of the judgment or the disposition of a motion for a new trial, and Rule 62(b) was amended to state that a court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion to set aside a verdict made pursuant to Rule 50(b). 689-692 So. 2d XLIX (West Miss. Cas. 1997).

## ADVISORY COMMITTEE NOTE

Subdivision (e) of the Federal Rules applies to stays in favor of the United States; it is omitted from the Mississippi Rules of Civil Procedure.

## JUDICIAL DECISIONS

### ANALYSIS

In general.
Illustrative cases.

**In general.**

Chancellor properly exercised his discretion in refusing to stay an injunction pending a property owner's appeal of an order requiring him to remove vehicles from his property; the chancellor granted the property owner an adequate remedy in case he prevailed on appeal. There was no reason why the chancellor should have stayed the injunction in light of findings that inoperable vehicles on the property caused a nuisance. Whitley v. City of Brandon, 15 So. 3d 483, 2009 Miss. App. LEXIS 241 (Miss. Ct. App.), cert. dismissed in part, 20 So. 3d 680, 2009 Miss. LEXIS 577 (Miss. 2009).

As a court of equity exercising its discretionary authority, it is essential that all four factors justifying injunctive relief be considered together and relative showings be measured; duty of court is to weigh strength of showings against each other and balance them against the potential harm to interests of plaintiffs and the public. Board of Trustees v. Knox, 638 So. 2d 1278, 1994 Miss. LEXIS 330 (Miss. 1994).

**Illustrative cases.**

Wife did not commit bigamy when she remarried while the husband's post-trial motion was pending as a stay of execution on a judgment was not the same thing as a stay of the judgment itself. McNeese v. Graves, 129 So. 3d 125, 2013 Miss. App. LEXIS 670 (Miss. Ct. App. 2013).

Trial court erred in enforcing a supersedeas bond against a city as a surety because the bond did not include two valid sureties or a surety company, and thus, the circuit clerk did not have the authority to receive it or issue supersedeas upon it; the city was not required to post a bond to stay the judgment and pursue its appeal because it was exempted by statute and procedural rule from the requirement to file a supersedeas bond. City of Belzoni v. Johnson, 121 So. 3d 216, 2013 Miss. LEXIS 472 (Miss. 2013).

Miss. R. Civ. P. 62(b) does not provide for an automatic stay upon the filing of a Miss. R. Civ. P. 59 or Miss. R. Civ. P. 60 motion. Therefore, no stay was in place that would have rendered the chancellor's final judgment of divorce invalid. McNeese v. McNeese, 119 So. 3d 264, 2013 Miss. LEXIS 172 (Miss. 2013).

County court was not in error for not granting a debtor relief from judgment – that is, not modifying a payment schedule after the court altered the language of a settlement agreement – because although it was within the county court's discretion to stay the execution of the judgment, the debtor did not ask for this relief, and the payment schedule in the original agreed order was agreed upon and valid. Franklin v. BSL, Inc., 987 So. 2d 1050, 2008 Miss. App. LEXIS 315 (Miss. Ct. App. 2008).

Contention of bail bondsmen that they were eligible for a stay of bond forfeiture during twelve months following final judgment, while they left such judgment unsatisfied, was totally without merit, and it directly contradicted terms of both statute and subdivision (a) of this rule. Sides v. State, 519 So. 2d 1222, 1988 Miss. LEXIS 127 (Miss. 1988).

Chancellor did not violate Miss. R. Civ. P. 62(a) by holding a hearing to enforce her final judgment less than 10 days after its entry, as Rule 62(a) excepted injunctions from the automatic stay. Pilgrim Rest Missionary Baptist Church v. Wallace, 835 So. 2d 67, 2003 Miss. LEXIS 28 (Miss. 2003).

Automatic right of supersedeas or stay was inconsistent with purpose of statute governing commitment for treatment of alcoholism, and therefore statute, rather than rule of civil procedure, controlled question whether person committed for chemical dependency treatment was entitled to supersedeas or stay pending appeal as a matter of right. McIntire v. Moore, 512 So. 2d 687, 1987 Miss. LEXIS 2760 (Miss. 1987).

## Rule 63. Judge's inability to proceed.

(a) *During trial.* — If for any reason the judge before whom an action has been commenced is unable to proceed with the trial, another judge regularly sitting in or assigned under law to the court in which the action is pending may proceed with and finish the trial upon certifying in the record that he has familiarized himself with the record of the trial; but if such other judge is satisfied that he cannot adequately familiarize himself with the record, he may in his discretion grant a new trial.

(b) *After verdict or findings.* — If for any reason the judge before whom an action has been tried is unable to perform the duties to be performed by the court after a verdict is returned, or after the hearing of a nonjury action, then any other judge regularly sitting in or assigned under law to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties, he may in his discretion grant a new trial.

**HISTORY: Comments repealed effective July 1, 2014; amended rule and advisory committee historical note, effective July 1, 2020.**

### ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 2020, the caption for Rule 62 was amended to refer to a judge's inability to proceed rather than a judge's disability. [Amended effective July 1, 2020.]

**Editor's Note** — The reference to "Rule 62" in the Advisory Committee Historical Note above is an apparent error. The reference should probably be to "Rule 63."

### JUDICIAL DECISIONS

#### ANALYSIS

Authority of judge.
Illustrative cases.

**Authority of judge.**

As a trial court judge, prior to recusal, had the authority under Miss. R. Civ. P. 60(a) to clarify his judgment in parties' divorce proceeding, a successor judge who was appointed after trial had the authority under Miss. R. Civ. P. 63(b) to perform the same duties. Jones v. Mayo, 53 So. 3d 832, 2011 Miss. App. LEXIS 57 (Miss. Ct. App. 2011).

Where the presiding trial judge grants a new trial, not specifically and solely based on a particular legal error such that we can say that the original judge's view of the credibility of the witnesses played no part in the decision, a successor judge is in no position to review and change that order; to do so would be an abuse of the discretion granted the successor judge under the rule. Amiker v. Drugs for Less, Inc., 796 So. 2d 942, 2000 Miss. LEXIS 192 (Miss. 2000).

A successor judge did not have authority to modify an order granting sanctions for discovery abuse since he was in no better position to decide the issues in the case than the original judge. Amiker v. Drugs for Less, Inc., 796 So. 2d 942, 2000 Miss. LEXIS 192 (Miss. 2000).

**Illustrative cases.**

Father failed to show that he was prejudiced due to the chancellor's unfamiliarity with the case in which he was seeking to assert, inter alia, interest in his former wife's estate where a single statement did not indicate that the chancellor was unfamiliar with the essential facts of the case, only that the chancellor was not initially aware that the father had been present via telephone for proceedings in which the court set the trial dates. Young v. O'Beirne, 147 So. 3d 877, 2014 Miss. App. LEXIS 311 (Miss. Ct. App. 2014).

Interim chancellor erred in modifying bench ruling in child visitation proceeding, without further hearing or without transcript of previous hearing, and without agreement by parties. Barnett Love v. Barnett, 611 So. 2d 205, 1992 Miss. LEXIS 792 (Miss. 1992).

### RESEARCH REFERENCES

**ALR.**

Power of Successor or Substituted Judge, in Civil Case, to Render Decision or Enter Judgment on Testimony Heard by Predecessor. 84 A.L.R.5th 399.

# CHAPTER VIII. PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS

## Rule 64. Seizure of person or property.

At the commencement of and during the course of an action or the seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by law. These remedies include attachment, replevin, claim and delivery, sequestration and other corresponding or equivalent remedies, however designated and regardless of whether the remedy is ancillary to an action or must be obtained by an independent action.

**HISTORY: Amended effective September 1, 1987; Comments repealed effective July 1, 2014.**

### ADVISORY COMMITTEE HISTORICAL NOTE

Effective September 1, 1987, Rule 64 was amended by deleting "garnishment" as a prejudgment remedy included in the provisions of the Rule. 508-511 So. 2d XXIX (West Miss. Cas. 1987).

### JUDICIAL DECISIONS

#### ANALYSIS

Construction.
Applicability.

**Construction.**

This rule did not apply in garnishment action, since such an action was a separate, successor action in which bank sought to enforce its judgment against judgment debtor, and garnishment was not a "provisional" remedy available "at the commencement of and during the course of an action." First Miss. First Mississippi Nat'l Bank v. KLH Industries, Inc., 457 So. 2d 1333, 1984 Miss. LEXIS 1978 (Miss. 1984).

**Applicability.**

Procedural rules by which a party seeks an attachment in chancery are those provided by attachment in chancery statutes, supplemented only by so much of the Mississippi Rules of Civil Procedure as may be found not inconsistent with procedures prescribed in statutes. Universal Computer Services, Inc. v. Lyall, 464 So. 2d 69, 1985 Miss. LEXIS 1901 (Miss. 1985).

## Rule 65. Injunctions.

(a) *Preliminary injunction.* —

(1) Notice. No preliminary injunction shall be issued without notice to the adverse party.

(2) Consolidation of Hearing With Trial on Merits. Before or after the commencement of the hearing on application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon a trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) *Temporary restraining order; notice; hearing; duration.* — A temporary restraining order may be granted, without notice to the adverse party or his attorney if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed ten days, as the court fixes (except in domestic relations cases, when the ten-day limitation shall not apply), unless within the time so fixed the order for good cause shown is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be stated in the order.

In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and take precedence over all matters except older matters of the same character. When the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order.

On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) *Security.* — No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs, damages, and reasonable attorney's fees as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained; provided, however, no such security shall be required of the State of Mississippi or of an officer or agency thereof, and provided further, in the discretion of the court, security may not be required in domestic relations actions. The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

(d) *Form and scope of injunction or restraining order.* —

(1) Every order granting a restraining order shall describe in reasonable detail and not by reference to the complaint or other document the act or acts sought to be restrained; it is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(2) Every order granting an injunction shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) *Jurisdiction unaffected.* — Injunctive powers heretofore vested in the circuit and chancery courts remain unchanged by this rule.

**HISTORY: Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

## ADVISORY COMMITTEE NOTE

Rule 65 authorizes parties to seek temporary restraining orders (TROs) and preliminary injunctions in civil cases in which permanent injunctive relief or other relief is being sought. A party may move for, and in appropriate circumstances, obtain a TRO and/or a preliminary injunction before the merits of the case are resolved.

Generally, the purpose of a TRO is to provide temporary short term relief until further action can be taken in the case. To obtain a TRO without notice to the adverse party, the party seeking relief must show, by affidavit or verified complaint, that it will suffer immediate and irreparable injury before the adverse party can be heard in opposition. In addition, the attorney for the party seeking the TRO must certify to the court in writing the efforts made to give the adverse party notice and the reasons why the notice to the adverse party should not be required. If a TRO is granted without notice, it must contain the information required by Rule 65(b) and it must expire by its terms, not more than 10 days after its entry, except in domestic relations cases. Before its expiration, a TRO may be extended by the court for a like period if the restrained party consents or the court extends the TRO for good cause shown.

The purpose of a preliminary injunction is to provide injunctive relief until the merits of the case are resolved. Preliminary injunctions cannot be granted without notice. A party moving for preliminary injunctive relief pursuant to Rule 65(a) must demonstrate that "(i) there exists a substantial likelihood that the [movant] will prevail on the merits; (ii) the injunction is necessary to prevent irreparable harm; (iii) the threatened injury to the [movant] outweighs the harm an injunction might do to the [opposing party]; and (iv) granting a preliminary injunction is consistent with the public interest." *See Littleton v. McAdams,* 60 So. 3d 169, 171 (Miss. 2011). Motions for preliminary injunctions are within the trial court's discretion. *See City of Durant v. Humphreys County Mem'l Hosp.,* 587 So. 2d 244, 250 (Miss. 1991).

Rule 65 (c) requires that proper security be given by the movant obtaining a TRO or preliminary injunction so that proper payment for costs, damages and reasonable attorneys' fees may be made to the restrained party in the event it is determined that such party was wrongfully enjoined or restrained. Such security is not required from the State of Mississippi and may be waived in domestic relations cases. Mississippi Code Annotated §11-13-37 provides an independent statutory basis for awarding damages and attorneys' fees upon dissolution of an injunction.

County courts have some authority to issue injunctive relief. Mississippi Code Annotated §9-9-21 provides that county courts "shall have jurisdiction concurrent with the circuit and chancery courts in all matters of law and equity wherein the amount of value of the things in controversy shall not exceeds...the sum of ...$200,000.00." Mississippi Code Annotated §99-9-23 provides that county courts "shall have the power to order the issuances of writs of certiorari, supersedeas, attachments, and other remedial writs in all cases pending in, or within the jurisdiction of, [the county court]." Section 9-9-23, however, further provides that county courts "shall not have original power to issue writs of injunction, or other remedial writs of equity or in law except in those cases hereinabove specified as being within [the court's] jurisdiction." The statutes have been interpreted as authorizing county courts to issue injunctions in cases falling within the concurrent jurisdiction of the chancery and county court. *See, e.g., Lee v. Coahoma Opportunities, Inc.,* 485 So. 2d 293, 294 (Miss. 1986) (citing Miss. Code Ann. §9-9-21(1)) ("A claim for specific performance of a contract of employment plus attendant injunctive relief is well within the jurisdiction of the county court on its equity side"); *Swan v. Hill,* 855 So. 2d 459, 462-63 (Miss. Ct. App. 2003) (holding that the county court had jurisdiction to issue injunctive relief in a case involving property rights).

## JUDICIAL DECISIONS

### ANALYSIS

In general.
Attorneys' fees.
Consolidation with trial.
Jurisdiction.
Order, when effective.
Remedies at law.
Security.
Specificity.
Illustrative cases.

**In general.**

There is no precedent for converting a domestic violence protection order into an injunction under the rule; neither the Domestic Abuse Protection Act nor the rule contemplates this action. Pratt v. Nelson, 170 So. 3d 620, 2015 Miss. App. LEXIS 381 (Miss. Ct. App. 2015).

Rule is not the proper vehicle for imposing a permanent restraining order; it is designed to afford temporary relief when irreparable harm occurs. Pratt v. Nelson, 170 So. 3d 620, 2015 Miss. App. LEXIS 381 (Miss. Ct. App. 2015).

Motion for preliminary injunction is a matter committed to trial court's sound discretion; court must weigh and balance equities, and make at least four findings: (1) there exists a substantial likelihood that plaintiff will prevail on the merits; (2) the injunction is necessary to prevent irreparable injury; (3) threatened injury to plaintiff outweighs harm an injunction might do to defendant; and (4) entry of a preliminary injunction is consistent with the public interest. Durant v. Humphreys County Memorial Hospital/Extended Care Facility, 587 So. 2d 244, 1991 Miss. LEXIS 672 (Miss. 1991).

General rule governing form of injunction is that a decree should be complete within itself, containing no extraneous references, and leaving open no matter or description or designation out of which contention may arise as to the meaning. Georgia Pacific Corp. v. Armstrong, 451 So. 2d 201, 1984 Miss. LEXIS 1696 (Miss. 1984).

**Attorneys' fees.**

Chancery court properly denied a homeowner's request for attorney's fees where the neighbors asserted claims for substantial compensatory damages based on alleged damage to their lawn and resulting costs, they also introduced evidence at the final hearing to support their claims, the homeowner also asserted a counterclaim for alleged damages to her driveway and presented evidence on her claim at the final hearing, and thus, the neighbors did not seek an injunction alone and an injunction was not the primary remedy sought. Mayton v. Oliver, 247 So. 3d 312, 2017 Miss. App. LEXIS 660 (Miss. Ct. App. 2017).

When a county failed to collect a gaming fee, part of which the county was to remit to a town and school district, the town and school district were not entitled to attorney's fees in ensuing litigation, under Miss. R. Civ. P. 65(c), on the theory that the county effectively granted itself an injunction and the ensuing litigation dissolved this wrongful injunction because Miss. R. Civ. P. 65(c) specifically referenced a court's authority to grant preliminary injunctive relief upon the payment of sufficient security, and the County's failure to make the required distributions was not analogous to an injunction. Tunica County v. Town of Tunica, 227 So. 3d 1007, 2017 Miss. LEXIS 179 (Miss. 2017).

Chancellor abused her discretion in awarding a motocross racing track owner attorney's fees under Miss. Code Ann. § 11-13-37 (Rev. 2004) and Miss. R. Civ. P. 65(c) where the record reflected that no permanent injunction ever issued on the county's amended application for such relief, substantial credible evidence supported the TRO and the preliminary injunction enjoining the owner from holding racing events in violation of a conditional use permit, and thus, the record reflected that the owner was never wrongfully enjoined or restrained. Lauderdale v. Desoto Cnty., 196 So. 3d 1091, 2016 Miss. App. LEXIS 456 (Miss. Ct. App. 2016).

Vendor and a former employee of a company in the pipeline services business were entitled to an award of attorneys' fees and expenses because the company filed its application for a preliminary injunction against them frivolously and in bad faith, regardless of the amount of the injunction bond posted by the company. Expro Ams., LLC v. Walters, 179 So. 3d 1010, 2015 Miss. LEXIS 574 (Miss. 2015).

There is no limit in subsection (c) such that attorney's fees will be allowed only when actual damage to the defending party has been caused; the fees are those "incurred or suffered by any party who is found to have been wrongfully enjoined." Cox v. Trustmark Nat'l Bank, 733 So. 2d 353, 1999 Miss. App. LEXIS 49 (Miss. Ct. App. 1999).

City was responsible for the expenses the owners incurred in fighting the city's actions to have the owners remove the fence from their own property as the injunction remained in force for six and a half years, during which time they were forced to allow their land to be used or taken by the city to benefit the neighbor; the chancellor was within his authority to award attorney's fees as damages to the owners in light of the city's actions in essentially restraining or taking the owners' property without due compensation. City of Waynesboro v. McMichael, 856 So. 2d 474, 2003 Miss. App. LEXIS 285 (Miss. Ct. App.), cert. denied, 860 So. 2d 1223, 2003 Miss. LEXIS 848 (Miss. 2003).

**Consolidation with trial.**

Chancellor committed no reversible errr in failing to consider witness's preliminary injunction testimony when he made his decision granting permanent injunction; any error was harmless since nothing prevented witness from testifying at hearing for permanent injunction. Goode v. Village of Woodgreen Homeowners Ass'n, 662 So. 2d 1064, 1995 Miss. LEXIS 533 (Miss. 1995).

**Jurisdiction.**

Although Miss. R. Civ. P. 65 provides that the previously bestowed injunctive powers of the circuit and chancery courts remain unchanged by Rule 65, the basis for equity jurisdiction of a suit for an injunction is the inadequacy of a remedy in circuit court; the insureds did not show that a circuit court could not grant the injunctive relief sought. Union Nat'l Life Ins. Co. v. Crosby, 870 So. 2d 1175, 2004 Miss. LEXIS 182 (Miss. 2004).

Motion for preliminary injunction lay within the subject matter jurisdiction of circuit court. Gibson v. Manuel, 534 So. 2d 199, 1988 Miss. LEXIS 543 (Miss. 1988).

**Order, when effective.**

In considering when an order becomes effective and grants the enlargement of time, in cases involving ex parte motions, the order becomes effective upon leaving the judge's control, but in cases where more than one party is involved and notice becomes essential, an order becomes effective once it is officially entered into the record by the court clerk; temporary restraining orders and other emergency orders are effective before filing with a clerk, and certain rulings requiring immediate action, such as those under a judge's contempt powers, would not be subject to the general rule. Graceland Care Ctr. of New Albany, LLC v. Hamlet, 2017 Miss. LEXIS 327 (Miss. Aug. 17, 2017), op. withdrawn, sub. op., 236 So. 3d 1, 2017 Miss. LEXIS 430 (Miss. 2017).

**Remedies at law.**

Statutory method of appeal to circuit court afforded county supervisor a plain, adequate, speedy, and complete remedy for a judicial determination of his right to office, and therefore chancery court properly denied his request for injunctive relief. Moore v. Sanders, 558 So. 2d 1383, 1990 Miss. LEXIS 154 (Miss. 1990).

**Security.**

Although a judgment creditor asked the circuit court to condition any relief given to the debtor on the posting of a bond under this rule, the debtor neither wrote a response brief nor objected at the hearing to the posting of a $ 100,000 bond. Therefore, the issue was not preserved for appellate review. Davenport v. HansaWorld, USA, Inc., 212 So. 3d 767, 2017 Miss. LEXIS 17 (Miss. 2017).

This rule did not allow defendant to re-characterize an award of attorney's fees as an award of security costs for plaintiff's seeking an allegedly improper injunction which was never issued. Denson v. George, 642 So. 2d 909, 1994 Miss. LEXIS 439 (Miss. 1994).

Chancellor did not err in returning cash bond to plaintiff upon dissolution of temporary restraining order, since defendants failed to file a suggestion of damages when they moved for dissolution, as required by statute. Ray v. Snow, 525 So. 2d 394, 1988 Miss. LEXIS 213 (Miss. 1988).

**Specificity.**

Consent decree relating to open meeting practices to be observed by county supervisors was sufficiently specific under subdivision (d)(2) of this rule, and if there were areas of disagreement as to future conduct, supervisors' remedy was to petition chancery court for clarification or modification. Hinds County Bd. of Supervisors v. Common Cause of Mississippi, 551 So. 2d 107, 1989 Miss. LEXIS 719 (Miss. 1989).

When ordering achievement of ends necessarily reached only through employment of scientific or engineering techniques, courts of equity should be cautious, since an overly precise specification of means will generally be beyond judicial competence in fact or in law. Hall v. Wood, 443 So. 2d 834, 1983 Miss. LEXIS 3024 (Miss. 1983).

**Illustrative cases.**

Chancery court erred by granting a permanent restraining order under the rule without finding a girlfriend was entitled to relief under the Protection from Domestic Abuse Law (PDAL) because in the absence of a finding of abuse under the PDAL, there was no basis to grant permanent injunctive relief; the girlfriend alleged an independent legal right and action under the PDAL, and the chancery court had to decide whether she proved domestic abuse by a preponderance of the evidence. Waite v. Adkisson, 282 So. 3d 744, 2019 Miss. App. LEXIS 387 (Miss. Ct. App. 2019).

Protection from Domestic Abuse Law (PDAL) not only provides a right and cause of action but also a complete scheme for the issuance of injunctive relief in the form of emergency, temporary, and final domestic abuse protection orders; therefore, resorting to Miss. R. Civ. P. 65 is entirely unnecessary in the case of a petition filed under the PDAL. Waite v. Adkisson, 282 So. 3d 744, 2019 Miss. App. LEXIS 387 (Miss. Ct. App. 2019).

Although the chancery court erred by granting a permanent restraining order under the rule without finding that a girlfriend was entitled to relief under the Protection from Domestic Abuse Law (PDAL), judgment could not be rendered for the girlfriend because the chancery court, as the finder of fact, had to determine whether she was entitled to relief under the PDAL; therefore, the case was remanded for the chancery court to grant or deny the petition for a protection order under the PDAL. Waite v. Adkisson, 282 So. 3d 744, 2019 Miss. App. LEXIS 387 (Miss. Ct. App. 2019).

Dismissal of a parent's claim for mandatory injunctive relief in the form of an order compelling the parent's child to deed the subject property to the parent was appropriate because the complaint did not meet the requirements for obtaining injunctive relief and failed to allege any facts that would have supported the request. Instead, the parent simply requested that the court order the child to specifically perform the child's obligation to transfer title to the parent when there was no enforceable agreement between the parties. White v. White, — So. 3d —, 2019 Miss. App. LEXIS 226 (Miss. Ct. App. May 21, 2019), sub. op., op. withdrawn, 325 So. 3d 666, 2019 Miss. App. LEXIS 618 (Miss. Ct. App. 2019).

Chancellor's decision to enter a restraining order and injunction under subsection (b) was clearly erroneous because the chancellor applied the wrong legal standard; a sister did not request relief under the rule but only requested a domestic violence order of protection under the Domestic Abuse Protection Act, and since relief was not originally requested under the rule, the requirements of subsection(d)(2) had not been met regarding the petition for a domestic violence protection order. Pratt v. Nelson, 170 So. 3d 620, 2015 Miss. App. LEXIS 381 (Miss. Ct. App. 2015).

Trial court did not err in granting a finance company's motion to dismiss because an investor failed to allege any legally cognizable claim for injunctive relief; the investor did not any sort of contractual agreement with the company, and the only harm he alleged was a loss of money but such a loss was reparable, not irreparable. Hinton v. Rolison, 175 So. 3d 1252, 2015 Miss. LEXIS 506 (Miss. 2015).

Permanent injunctive relief was properly denied in a real estate dispute because there was no need to restrain a seller from negotiating a sale with other buyers where a contract had already expired; therefore, the seller had every right to try and dispose of the property. Gunn v. Heggins, 964 So. 2d 586, 2007 Miss. App. LEXIS 588 (Miss. Ct. App. 2007).

Father alleged that the children would suffer irreparable harm if left in the mother's custody because, inter alia: (1) the maternal grandmother testified that the adoptive father provided beer to the minor children; and (2) the maternal grandmother corroborated the allegation that the mother purposefully did not alert the father to the termination of parental rights proceedings because she wanted her new husband to adopt the children; because the father provided specific allegations of immediate harm, which were corroborated by other testimony, pursuant to Miss. R. Civ. P. 65(b) the chancery court did not violate the mother's due process rights by failing to give her notice of the ex parte hearings granting a temporary restraining order and awarding temporary custody of the children to the father. C.M. v. R.D.H., 947 So. 2d 1023, 2007 Miss. App. LEXIS 29 (Miss. Ct. App. 2007).

Chancery court, as guardian of all minor children in its district, was vested with authority to temporarily grant custody in an ex parte proceeding, pending an investigation by a guardian ad litem, the county welfare department, or the county youth court, because emergency circumstances (the child's molestation by her schizophrenic's mother's divorce attorney) existed. E. J. M. v. A. J. M., 846 So. 2d 289, 2003 Miss. App. LEXIS 397 (Miss. Ct. App. 2003).

Chancery court did not err in denying city's application for preliminary injunction to enjoin construction of nursing home; there was little likelihood that plaintiffs would prevail on merits, injunction was not necessary to prevent irreparable injury, and entry of injunction would not have been consistent with the public interest. Durant v. Humphreys County Memorial Hospital/Extended Care Facility, 587 So. 2d 244, 1991 Miss. LEXIS 672 (Miss. 1991).

## Rule 65.1. Security: proceedings against sureties.

Whenever these rules require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting the liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the suretiess if their addresses are known.

### JUDICIAL DECISIONS

**Municipality.**

Trial court erred in enforcing a supersedeas bond against a city as a surety because the bond did not include two valid sureties or a surety company, and thus, the circuit clerk did not have the authority to receive it or issue supersedeas upon it; the city was not required to post a bond to stay the judgment and pursue its appeal because it was exempted by statute and procedural rule from the requirement to file a supersedeas bond. City of Belzoni v. Johnson, 121 So. 3d 216, 2013 Miss. LEXIS 472 (Miss. 2013).

## Rule 66. Receivers.

An action wherein a receiver has been appointed shall not be dismissed except by order of the court. In all other respects the action in which the appointment of a receiver is sought or which is brought by or against a receiver is governed by these rules.

## Rule 67. Deposit in court.

In any action in which any part of the relief sought is judgment for a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing.

Where money is paid into court to abide the result of any legal proceeding, the judge may order it deposited at interest in a federally insured bank or savings and loan association authorized to receive public funds, to the credit of the court in the action or proceeding in which the money was paid. The money so deposited plus any interest shall be paid only upon the check of the clerk of the court, annexed with its certified order for the payment, and in favor of the person to whom the order directs the payment to be made.

## Rule 68. Offer of judgment.

At any time more than fifteen days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within ten days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the court shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the cost incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict, order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time, not less than ten days, prior to the commencement of hearing to determine the amount or extent of liability.

### JUDICIAL DECISIONS

**In general.**

Although Miss. R. Civ. P. 68 applied because the jury's award was less than the defendant's rejected offer of settlement, costs were limited to those allowable under Miss. R. Civ. P. 54(d) and, therefore, the plaintiff could not be taxed with costs for copying, trial materials, and court reporter fees, or for expert witnesses costs in excess of Miss. Code Ann. § 25-7-47. Hubbard v. Delta Sanitation of Miss., 64 So. 3d 547, 2011 Miss. App. LEXIS 240 (Miss. Ct. App. 2011).

While looking solely at the motion to assess costs and the language of Miss. R. Civ. P. 68, the appellate court determined that the trial court did not err in denying the motion since there was no judgment obtained by the corporation in its suit against the tax collector to trigger the Rule-68 cost-shifting procedure. Fiddle, Inc. v. Shannon, 834 So. 2d 39, 2003 Miss. LEXIS 4 (Miss. 2003).

### RESEARCH REFERENCES

**ALR.**

Construction of state offer of judgment rule – Issues of time. 112 A.L.R.5th 47.

Construction of state offer of judgment rule – Issues concerning revocation and succession. 116 A.L.R.5th 433.

Construction of state offer of judgment rule-Sufficiency of offer and contract formation issues,. 118 A.L.R.5th 91.

Allowance and determination of attorney's fees under state offer of judgment rule. 119 A.L.R.5th 121.

State offer of judgment rule-Construction, operation, and effect of acceptance and resulting judgment. 120 A.L.R.5th 559.

Disallowance of award under state offer of judgment rule due to lack of good faith. 121 A.L.R.5th 325.

## Rule 69. Execution.

(a) *Enforcement of judgment.* — Process to enforce a judgment for the payment of money shall be by such procedures as are provided by statute. The procedure on execution, in proceedings supplementary to and in aid of judgment, and in proceedings on and in aid of execution, shall be as provided by statute.

(b) *Examination by judgment creditor.* — To aid in the satisfaction of a judgment of more than one hundred dollars, the judgment creditor may examine the judgment debtor or any other person, including the books, papers, or documents of same, upon any matter not privileged relating to the debtor's property.

The judgment creditor may examine the judgment debtor or other person in open court as provided by statute or may utilize the discovery procedures stated in Rules 26 through 37 hereof.

## JUDICIAL DECISIONS

### ANALYSIS

Construction.
Examination by judgment creditor.
Place of examination.

**Construction.**

By virtue of M.R.C.P. Rule 69 (a), procedural rules whereby a party seeks to secure and enforce the remedy of garnishment are those provided by Mississippi garnishment statutes, supplemented by so much of the Mississippi Rules of Civil Procedure as may be found not inconsistent with the procedures prescribed in such statutes. First Mississippi Nat'l Bank v. KLH Industries, Inc., 457 So. 2d 1333, 1984 Miss. LEXIS 1978 (Miss. 1984).

**Examination by judgment creditor.**

Judgment creditor may conduct examination of third parties that is limited in scope to matters, not privileged, relevant to allegations that judgment debtor has assets which properly should be discovered and used to satisfy the judgment; no inquiry is to be made, however, into third party's personal assets or affairs. Higdon v. Whitehead, 571 So. 2d 281 (Miss. 1990).

**Place of examination.**

Non-resident defendant could properly be required to submit to examination in Mississippi, where, by virtue of its default, defendant also waived any right it might have to argue that it may not be found in Mississippi for purposes of examination by its judgment creditor. H & W Transfer & Cartage Service, Inc. v. Griffin, 511 So. 2d 895, 1987 Miss. LEXIS 2610 (Miss. 1987).

## Rule 70. Judgment for specific acts; vesting title.

(a) *Specific acts.* — If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party.

(b) *Divestment of title.* — If real or personal property is within the State of Mississippi, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others; such judgment has the effect of a conveyance executed in due form of law.

(c) *Delivery of possession.* — When any order or judgment is for the delivery of possession, a certified copy of the judgment or order shall be sufficient authority for the sheriff of the county in which the property is located to seize same and deliver it to the party entitled to its possession.

(d) *Contempt.* — The court may also in proper cases adjudge the party in contempt.

**HISTORY: Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

### ADVISORY COMMITTEE NOTE

Rule 70 applies only after judgment is entered; Rules 6 and 65 provide for remedies prior to judgment. Rule 70 applies only if a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents to perform only other specific acts and the party has failed to comply within the time specified.

### JUDICIAL DECISIONS

**Execution.**

As victims of chemical exposure failed to execute settlement documents, despite being ordered to do so by a trial court, the court properly appointed a court clerk to execute the documents for them pursuant to Miss. R. Civ. P. 70(a). Melton v. Smith's Pecans, 65 So. 3d 853, 2011 Miss. App. LEXIS 58 (Miss. Ct. App.), cert. denied, 65 So. 3d 310, 2011 Miss. LEXIS 342 (Miss. 2011).

## Rule 71. Process in behalf of and against persons not parties.

When an order is made in favor of a person who is not a party to the action, other than a creditor of a party to a divorce proceeding, he may enforce obedience to the order by the same process as if he were a party; and when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party.

**HISTORY: Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

### ADVISORY COMMITTEE NOTE

A court order may be enforced by a non-party if the non-party shares an identity of interest with the prevailing party. For example, an assignee of a prevailing party in a case concerning title to property is entitled to enforce a judgment in the same manner as the party assignor. Similarly, a judgment may be against a person who is the successor in interest to a party, but the court must first obtain personal jurisdiction on the successor in interest. *See, e.g., Mansour v. Charmax Ind., Inc.,* 680 So. 2d 852, 855 (Miss. 1996) (holding that service of process is requirement to personal jurisdiction before Rule 71 can be applied); *Libutti v. U.S.,* 178 F.3d 114, 124-25 (2d Cir. 1999) (holding that the court must have personal jurisdiction over the non-party against whom the judgment is enforced).

### JUDICIAL DECISIONS

ANALYSIS

Applicability.
Illustrative cases.

**Applicability.**

Chancellor erred when he, sua sponte, invoked this rule to make State a party for purpose of receiving half of the punitive damages awarded to plaintiffs in private securities litigation. FSC Sec. Corp. v. McCormack, 630 So. 2d 979, 1994 Miss. LEXIS 15 (Miss. 1994).

**Illustrative cases.**

This rule requires that third party be

liable to same process for enforcing obedience to an order as if he were a party, and since no service of process occurred against third party individual as opposed to corporation bearing his name, trial court had no jurisdiction over individual and thus had no authority to issue a contempt citation against him personally. Mansour v. Charmax Indus., 680 So. 2d 852, 1996 Miss. LEXIS 498 (Miss. 1996).

### Rule 71A. Eminent domain. [Omitted].

## CHAPTER IX. APPEALS

### Rule 72. through 76. [Omitted].

## CHAPTER X. COURTS AND CLERKS

### Rule 77. Courts and clerks.

(a) *Court always open.* — The courts shall be deemed always open for the purposes of filing any pleading or other proper paper, of issuing and returning process, and of making and directing all interlocutory motions, orders, and rules.

(b) *Trials and hearings; orders in chambers.* — All trials upon the merits shall be conducted in open court, except as otherwise provided by statute. All other acts or proceedings may be done or conducted by a judge in chambers, without the attendance of the clerk or other court officials and at any place within the state either within or without the district; but no hearing shall be conducted outside the district without the consent of all parties affected thereby.

(c) *Clerk's office and orders by clerk.* — The clerk's office with the clerk or a deputy clerk in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays. All motions and applications to the clerk for issuing process, for issuing process to enforce and execute judgments, for entering defaults, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but his action may be suspended or altered or rescinded by the court upon cause shown.

(d) *Notice of orders or judgments.* — Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the service. Any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal, nor relieve, nor authorize the court to relieve, a party for failure to appeal within the time allowed, except as permitted by the Mississippi Rules of Appellate Procedure.

**HISTORY: Amended effective July 1, 1997; Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

#### ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 1997, Rule 77(d) was amended to allow for service of notices of the entry of orders and judgments by parties. 689-692 So. 2d LXII (West Miss. Cas. 1997.).

Effective February 1, 1990, Rule 77 was

amended by adding subsection (d), requiring the clerk of the court to give notice of the entry of orders and judgments to the interested parties. 553-556 So. 2d XLII (West Miss. Cas. 1990).

[Amended effective July 1, 1997; Amended effective October 7, 2021.]

## ADVISORY COMMITTEE NOTE

Rule 77(a) provides that the courts shall be deemed always open for the purpose of filing papers and issuing and returning process and making motions and orders. This does not mean that the office of the clerk must be physically open at all hours or that the filing of papers can be effected by leaving them in a closed or vacant office. Under Rule 5(e)(1) papers may be filed out of business hours by delivering them to the clerk or to the judge if he or she permits. See Miss. Const. § 24 (all courts shall be open).

Rule 77(b) requires that the "all trials upon the merits" be conducted in "open court"; all other acts or proceedings may be done or conducted by a judge "in chambers," without the necessity of the attendance of the clerk or other court official and at any place within the state. However, no hearing, other than one heard ex parte, shall be conducted outside the district without the consent of all parties affected thereby. *See Corporate Mgmt., Inc. v. Greene Rural Health Ctr. Bd. of Trustees,* 47 So. 3d 142, 146 (Miss. 2010).

Rule 77(d) requires that the clerk provide copies of all orders and judgments, immediately upon their entry, to all parties who are not in default for failure to appear.

M.R.A.P. 4(h) provides that a party who did not receive notice of entry of a judgment or order from the clerk or any party within 21 days of its entry may move the trial court to reopen the time for appeal.

Rule 77(d) gives a prevailing party who wants to ensure that the time for appeal is not reopened pursuant to M.R.A.P. 4(h), the opportunity to serve notice of entry of the judgment or order upon opposing parties in the manner provided in Rule 5. Although prevailing parties may take the initiative to assure that their adversaries receive effective notice, the clerk retains the duty to give notice of entry of judgments and orders.

## JUDICIAL DECISIONS

### ANALYSIS

Failure to comply.
Notice of order or judgments.
Time limitations.

**Failure to comply.**

General docket revealed that the circuit clerk did not comply with the requirements found in Miss. R. Civ. P. 77(d) because the Public Employees' Retirement System (PERS), an employee, and her counsel were never sent notice of the memorandum opinion and order of the circuit court from the circuit clerk's office; even if the deputy clerk sent notice to PERS, the clerk's office failed to document such notice in the docket, as required by Rule 77. In re Dunn, 166 So. 3d 488, 2013 Miss. LEXIS 232 (Miss. 2013).

**Notice of order or judgments.**

Trial court did not abuse its discretion in determining that plaintiffs' letter in response to the clerk's motion to dismiss, which requested that their personal injury action against the business not be dismissed, constituted an action of record such as would preclude a dismissal under Miss. R. Civ. P. 41(d). Cucos, Inc. v. McDaniel, 938 So. 2d 238, 2006 Miss. LEXIS 488 (Miss. 2006).

Although subsection (d) requires the court clerk to provide notice to each party of the entry of the summary judgment, this requirement does not relieve either party of their responsibility to discover the date when the judgment was entered. Byrd v. Biloxi Reg'l Med. Ctr., 722 So. 2d 166, 1998 Miss. App. LEXIS 707 (Miss. Ct. App. 1998).

Appeal was reinstated where documents styled "Jury Verdict for Defendant" did not contain the word "judgment," were not delivered to plaintiff's counsel, were not in the court file, and were not entered on the docket; documents did not constitute a final judgment and were not intended to be a final judgment, and plaintiff's right to due process protected her from losing her right to appeal since she was not aware of the jury verdict forms and was not notified of their existence. Roberts v. Grafe Auto Co., 653 So. 2d 250, 1994 Miss. LEXIS 360 (Miss. 1994).

**Time limitations.**

Appellant's notice of appeal was untimely, and thus, his appeal had to be dismissed, because appellant filed the notice of appeal more than thirty days after the judgment was entered. Cane v. State, 206 So. 3d 1268, 2016 Miss. App. LEXIS 814 (Miss. Ct. App. 2016).

Dismissal of an appeal for lack of jurisdiction was appropriate, when the parties did not receive notice of the circuit court's order for more than fifteen months after it was entered and, upon receiving notice of the order, the circuit court granted the appellant's motion to reopen the time for filing the notice of appeal, because the notice of appeal was untimely filed and the circuit court lacked authority to reopen the time for filing the notice of appeal. Bailey v. Chamblee, 192 So. 3d 1078, 2016 Miss. App. LEXIS 302 (Miss. Ct. App. 2016).

Appellate court lacked jurisdiction to hear an appeal from an order denying a motion to reconsider summary judgment because the order was not appealed within 30 days of its entry, notwithstanding that a circuit court clerk had failed to notify the parties of the order as required by Miss. R. Civ. P. 77(d). Payne v. Magnolia Healthcare, Inc., 984 So. 2d 290, 2007 Miss. App. LEXIS 575 (Miss. Ct. App. 2007), cert. dismissed, 2008 Miss. LEXIS 291 (Miss. June 12, 2008).

Lack of notice of the entry by the clerk did not affect the time to appeal, nor relieve, nor authorize the court to relieve, a party for failure to appeal within the time allowed. Smith v. Parkerson Lumber, Inc., 890 So. 2d 832, 2003 Miss. LEXIS 511 (Miss. 2003).

## Rule 78. Motion practice.

Each court shall establish procedures for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the judge at any time or place and on such notice, if any, as he considers reasonable may make orders for the advancement, conduct, and hearing of actions.

To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

**HISTORY: Amended effective March 1, 1989; amended effective April 17, 2003 to allow the courts, by rule to provide for determination of motions seeking final judgment without oral argument; Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

### ADVISORY COMMITTEE HISTORICAL NOTE

Effective March 1, 1989, Rule 78 was amended by changing its title to "MOTION PRACTICE" and by abrogating provisions for local rules. 536-538 So. 2d XXXI (West Miss. Cas. 1989).

## ADVISORY COMMITTEE NOTE

Rule 78 does not alter any local rules governing motion practice; however, the rule must be considered in light of Rule 83.

## JUDICIAL DECISIONS

### ANALYSIS

Construction.
Hearings.
Illustrative cases.

**Construction.**

In a case alleging exposure to mold and other substances, an issue relating to the failure to have a court reporter present at a hearing for summary judgment was not preserved for review since no objection was made; even if the error had been preserved, such presence was not required under Miss. R. Civ. P. 78 and Miss. Code Ann. § 9-13-25, and the appellate court had no authority to promulgate such a rule. Hosey v. Mediamolle, 963 So. 2d 1267, 2007 Miss. App. LEXIS 585 (Miss. Ct. App. 2007).

Defendant was entitled to have default judgment set aside for failure of notice and hearing; it was clear that defendant had made an appearance, and thus defendant was entitled to notice and a hearing on plaintiff's application for default. King v. Sigrest, 641 So. 2d 1158, 1994 Miss. LEXIS 377 (Miss. 1994).

**Hearings.**

Trial judge did not abuse the judge's discretion in denying the plaintiffs' request for their own, separately retained court reporter to transcribe a summary judgment hearing because the plaintiffs' did not have a statutory right, under Miss. Code. Ann. § 9-13-32, to transcribe the summary judgment hearing. Furthermore, there was no applicable rule justifying the adoption of such a mandatory transcription rule for dispositive motion hearings. Palermo v. LifeLink Found., Inc., 152 So. 3d 1177, 2014 Miss. App. LEXIS 14 (Miss. Ct. App.), aff'd, 152 So. 3d 1099, 2014 Miss. LEXIS 578 (Miss. 2014).

Trial court erred when it granted the movie theater's motion for summary judgment without oral hearing, but under the circumstances, the error was harmless as the customer, who alleged the theater was vicariously liable for the acts of its employee, failed to present any evidence to rebut the theater's motion. Adams v. Cinemark USA, Inc., 831 So. 2d 1156, 2002 Miss. LEXIS 395 (Miss. 2002).

**Illustrative cases.**

Trial court did not err in denying a conservator's motion to set aside and vacate, when the conservator argued that the court did not provide any written statement of reasons, because the court's order on the conservator's motion to disqualify the Attorney General of Mississippi specified that the conservator failed to present evidence that an attorney-client relationship involving the Attorney General existed and that the record did not support that the conservator reasonably believed that the Attorney General was the conservator's attorney. Newsome v. Shoemake, 234 So. 3d 1215, 2017 Miss. LEXIS 367 (Miss. 2017).

Plaintiff's lawyer conceded that he had at least three days' actual notice of the hearing, and nothing indicated that plaintiff was prejudiced by the fact that his lawyer did not appear at the hearing; defendant did not obtain an unfair advantage based on the lawyer's absence, and in effect, the circuit court made its decision on the pleadings. Patel v. Hill-Rom Co., 194 So. 3d 898, 2016 Miss. App. LEXIS 432 (Miss. Ct. App. 2016).

## Rule 79. Books and records kept by the clerk and entries therein.

(a) *General docket.* — The clerk shall keep a book known as the "general docket" of such form and style as is required by law and shall enter therein each civil action to which these rules are made applicable. The file number of each action shall be noted on each page of the docket whereon an entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be noted in this general docket on the page assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made. In the event a formal order is entered, the clerk shall insert the order in the file of the case.

(b) *Minute book.* — The clerk shall keep a correct copy of every judgment or order. This record shall be known as the "Minute Book."

(c) *Indexes; calendars.* — Suitable indexes of the general docket shall be kept by the clerk under the direction of the court. There shall be prepared, under the direction of the court, calendars of all actions ready for trial.

(d) *Other books and records.* — The clerk shall also keep such other books and records as may be required by statute or these rules. The documents required to be kept under this rule may be recorded by means of an exact-copy photocopy process.

(e) *Removing the file in a case.* — The file of a case shall not be removed from the office of the clerk except by permission of the court or the clerk.

**HISTORY: Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective April 1, 2002, the Comment to Rule 79(a) was amended to underscore that docket entries must accurately reflect the actual date of entry. 813-815 So. 2d LXXXVIII (West Miss. Cases 2002).

## ADVISORY COMMITTEE NOTE

Rule 79(a) specifies that the docket entries reflect the date on which entries are made in the general docket. Since several important time periods and deadlines are calculated from the date of the entry of judgments and orders, these entries must accurately reflect the actual date of the entries rather than another date, such as the date on which a judgment or order is signed by the judge. See, for example, Rule 58 mandating that a judgment is effective only when entered as provided in Rule 79(a), and Rule 59 which requires that motions to alter or amend judgments be filed within ten days after the entry of judgment.

## JUDICIAL DECISIONS

### ANALYSIS

Amendment of comment.
Illustrative cases.

**Amendment of comment.**

State Supreme Court adopted an amendment to the Comment to Miss. R. Civ. P. 79(a) governing general dockets kept by a court clerk where it found the proposed amendment would promote the fair and efficient administration of justice. In re Rules of Civ. Procedure, 2002 Miss. LEXIS 128 (Miss. Apr. 1, 2002).

**Illustrative cases.**

Chancellor abused her discretion in dismissing all pleadings filed subsequent to the signing of the final divorce decree on May 15, 2012, including the ex-husband's withdrawal of consent to the joint claim for divorce filed on August 23, 2013, because the final divorce decree signed by the chancellor was not final until it was entered by the chancery clerk on June 3, 2014; and the consent restriction in the irreconcilable-differences statute did not apply, and the husband was not required to obtain leave of court to withdraw his consent to the joint complaint for divorce as the parties did not invoke the irreconcilable-differences statute, and there were no issues upon which the parties did not agree. Arrington v. Arrington, 269 So. 3d 1265, 2018 Miss. App. LEXIS 441 (Miss. Ct. App. 2018).

Because a couple only raised an appeal after the circuit court's judgment against a nurse's employer finally adjudicated all the remaining claims among the parties, the nurse failed to address the provision in Miss. R. Civ. P. 58 that a judgment finally resolving all claims as to all parties constituted a final judgment when entered pursuant to Miss. R. Civ. P. 79(a), even if not properly titled. Havard v. Sumrall, 250 So. 3d 1282, 2017 Miss. App. LEXIS 634 (Miss. Ct. App. 2017), cert. denied, 250 So. 3d 1268, 2018 Miss. LEXIS 354 (Miss. 2018), cert. denied, 2018 Miss. LEXIS 351 (Miss. Aug. 9, 2018).

Court of appeals had jurisdiction to review a couple's appeal of an order granting a nurse's motion to dismiss their action for failure to prosecute because the default judgment the couple obtained against the nurse finally adjudicated their claims; the couple timely raised the appeal within thirty days of entry of the judgment because they filed their appeal and raised as error the circuit court's dismissal of their complaint after the judgment was entered into the general docket. Havard v. Sumrall, 250 So. 3d 1282, 2017 Miss. App. LEXIS 634 (Miss. Ct. App. 2017), cert. denied, 250 So. 3d 1268, 2018 Miss. LEXIS 354 (Miss. 2018), cert. denied, 2018 Miss. LEXIS 351 (Miss. Aug. 9, 2018).

Trial court properly denied a health care provider's motion to dismiss because a sister was the only party to the action, and thus, the order granting her motion for extension of time to serve process became effective once the order had been signed and had left the trial court's control; the sister timely obtained an extension to serve process and timely served process within that extension, and therefore, the statute of limitations remained tolled. Graceland Care Ctr. of New Albany, LLC v. Hamlet ex rel. Kinard, 236 So. 3d 1, 2017 Miss. LEXIS 430 (Miss. 2017).

Rule that in cases involving ex parte motions the order becomes effective upon leaving the judge's control in no way limits the ability of the trial judge, where otherwise allowed by law, to enter an order nunc pro tunc, make an order retroactive or have it relate back for enforcement purposes; the purpose of this rule is to effectuate notice to the parties and establish some finality as relates to the running of deadlines. Graceland Care Ctr. of New Albany, LLC v. Hamlet ex rel. Kinard, 236 So. 3d 1, 2017 Miss. LEXIS 430 (Miss. 2017).

In cases involving ex parte motions the order becomes effective upon leaving the judge's control, but there are certain orders to which this general rule would not apply; for instance, temporary restraining orders and other emergency orders (such as domestic protection orders) are effective before filing with a clerk, and certain rulings of a trial judge that require immediate action, such as those under a judge's contempt powers, would not be subject to the general rule. Graceland Care Ctr. of New Albany, LLC v. Hamlet ex rel. Kinard, 236 So. 3d 1, 2017 Miss. LEXIS 430 (Miss. 2017).

In cases involving ex parte motions the order becomes effective upon leaving the judge's control; ex parte orders, though, are still required to be filed promptly into the record, however, in cases in which more than one party is involved and notice becomes essential, an order becomes effective once it is entered officially into the record by the court clerk. Graceland Care Ctr. of New Albany, LLC v. Hamlet ex rel. Kinard, 236 So. 3d 1, 2017 Miss. LEXIS 430 (Miss. 2017).

Orders are effective upon filing, and such a rule will secure the just, speedy, and inexpensive determination of every action; a party should be responsible for timely filing a motion, ensuring that the judge rules on the motion, and making certain that the resulting order is timely filed with the clerk. Graceland Care Ctr. of New Albany, LLC v. Hamlet ex rel. Kinard, 236 So. 3d 1, 2017 Miss. LEXIS 430 (Miss. 2017).

Appeal was timely filed because a chancellor's order entitled "Opinion and Order" was not a final, appealable judgment, and did not have the force and finality of a judgment. Therefore, the appeal was timely filed following a final judgment that was signed and entered and a motion for a new trial that was timely filed. Bray v. Wooten, 247 So. 3d 1283, 2017 Miss. App. LEXIS 475 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 69, 2018 Miss. LEXIS 240 (Miss. 2018).

Docket entry did not comply with subsection (a) because no prior entry on the docket referenced any judgment being entered by the trial court, and the entry failed to contain the substance of the judgment; thus, the trial court did not abuse its discretion in finding that no judgment had been properly entered and in allowing a city to file its motion for new trial after the entry of judgment was properly recorded on the docket, and as such, the city's notice of appeal was timely. Cleveland Nursing & Rehab., LLC v. Estate of Gully, 206 So. 3d 516, 2016 Miss. LEXIS 436 (Miss. 2016).

Circuit clerk adequately complied with Miss. Code Ann. § 9-7-171 and Miss. R. Civ. P. 79 because no evidence was adduced that a docket entry was backdated. In re Dunn, 166 So. 3d 488, 2013 Miss. LEXIS 232 (Miss. 2013).

Where intervenor argued that a dismissal was not proper pursuant to Miss. R. Civ. P. 58 and Miss. R. Civ. P. 79, the supreme court, however, disagreed; while Rule 58 was important for establishing a date for computing post-trial motions and appeals, the supreme court did not interpret the rule to be the only means by which to effect a dismissal, especially where the parties have stipulated to dismiss a separate case, even though the stipulation was located in an order entered in a separate suit. Hayes v. Leflore County Bd. of Supervisors, 935 So. 2d 1015, 2006 Miss. LEXIS 445 (Miss. 2006).

Appeal was reinstated where documents styled "Jury Verdict for Defendant" did not contain the word "judgment," were not delivered to plaintiff's counsel, were not in the court file, and were not entered on the docket; documents did not constitute a final judgment and were not intended to be a final judgment, and plaintiff's right to due process protected her from losing her right to appeal since she was not aware of the jury verdict forms and was not notified of their existence. Roberts v. Grafe Auto Co., 653 So. 2d 250, 1994 Miss. LEXIS 360 (Miss. 1994).

## Rule 80. Stenographic report or transcript as evidence. [Omitted].

### ADVISORY COMMITTEE NOTE

Mississippi has statutory provisions for the appointment, oath, nature and term of office, bond, removal from office, and duties and responsibilities of court reporters. See Miss. Code Ann. §§9-13-1 et seq. (1972) and M.R.A.P. Appendix III.

## Rule 81. Applicability of rules.

(a) *Applicability in general.* — These rules apply to all civil proceedings but are subject to limited applicability in the following actions which are generally governed by statutory procedures.

(1) proceedings pertaining to the writ of habeas corpus;

(2) proceedings pertaining to the disciplining of an attorney;

(3) proceedings pursuant to the Youth Court Law and the Family Court Law;

(4) proceedings pertaining to election contests;

(5) proceedings pertaining to bond validations;

(6) proceedings pertaining to the adjudication, commitment, and release of narcotics and alcohol addicts and persons in need of mental treatment;

(7) eminent domain proceedings;

(8) Title 91 of the Mississippi Code of 1972;

(9) Title 93 of the Mississippi Code of 1972;

(10) creation and maintenance of drainage and water management districts;

(11) creation of and change in boundaries of municipalities;

(12) proceedings brought under sections 9-5-103, 11-1-23, 11-1-29, 11-1-31, 11-1-33, 11-1-35, 11-1-43, 11-1-45, 11-1-47, 11-1-49, 11-5-151 through 11-5-167, and 11-17-33, Mississippi Code of 1972.

Statutory procedures specifically provided for each of the above proceedings shall remain in effect and shall control to the extent they may be in conflict with these rules; otherwise these rules apply.

(b) *Summary proceedings.* — In *ex parte* matters where no notice is required proceedings shall be as summary as the pertinent statutes contemplate.

(c) *Publication of summons or notice.* — Whenever a statute requires summons or notice by publication, service in accordance with the methods provided in Rule 4 shall be taken to satisfy the requirements of such statute.

(d) *Procedure in certain actions and matters.* — The special rules of procedure set forth in this paragraph shall apply to the actions and matters enumerated in subparagraphs (1) and (2) hereof and shall control to the extent they may be in conflict with any other provision of these rules.

(1) The following actions and matters shall be triable 30 days after completion of service of process in any manner other than by publication or 30 days after the first publication where process is by publication, to-wit: adoption; correction of birth certificate; alteration of name; termination of parental rights; paternity; legitimation; uniform reciprocal enforcement of support; determination of heirship; partition; probate of will in solemn form; caveat against probate of will; will contest; will construction; child custody actions; child support actions; and establishment of grandparents' visitation.

(2) The following actions and matters shall be triable 7 days after completion of service of process in any manner other than by publication or 30 days after the first publication where process is by publication, to wit: removal of disabilities of minority; temporary relief in divorce, separate maintenance, child custody, or child support matters; modification or enforcement of custody, support, and alimony judgments; contempt; and estate matters and wards' business in which notice is required but the time for notice is not prescribed by statute or by subparagraph (1) above.

(3) Complaints and petitions filed in the actions and matters enumerated in subparagraphs (1) and (2) above shall not be taken as confessed.

(4) No answer shall be required in any action or matter enumerated in subparagraphs (1) and (2) above but any defendant or respondent may file an answer or other pleading or the court may require an answer if it deems it necessary to properly develop the issues. A party who fails to file an answer after being required so to do shall not be permitted to present evidence on his behalf.

(5) Upon the filing of any action or matter listed in subparagraphs (1) and (2) above, summons shall issue commanding the defendant or respondent to

appear and defend at a time and place, either in term time or vacation, at which the same shall be heard. Said time and place shall be set by special order, general order or rule of the court. If such action or matter is not heard on the day set for hearing, it may by order signed on that day be continued to a later day for hearing without additional summons on the defendant or respondent. The court may by order or rule authorize its clerk to set such actions or matters for original hearing and to continue the same for hearing on a later date.

(6) Rule 5(b) notice shall be sufficient as to any temporary hearing in a pending divorce, separate maintenance, custody or support action provided the defendant has been summoned to answer the original complaint.

(e) *Proceedings modified.* — The forms of relief formerly obtainable under writs of fieri facias, scire facias, mandamus, error coram nobis, error coram vobis, sequestration, prohibition, quo warranto, writs in the nature of quo warranto, and all other writs, shall be obtained by motions or actions seeking such relief.

(f) *Terminology of statutes.* — In applying these rules to any proceedings to which they are applicable, the terminology of any statute which also applies shall, if inconsistent with these rules, be taken to mean the analogous device or procedure proper under these rules; thus (and these examples are intended in no way to limit the applicability of this general statement):

Bill of complaint, bill in equity, bill, or declaration shall mean a complaint as specified in these rules;

Plea in abatement shall mean motion;

Demurrer shall be understood to mean motion to strike as set out in Rule 12(f);

Plea shall mean motion or answer, whichever is appropriate under these rules;

Plea of set-off or set-off shall be understood to mean a permissible counter-claim;

Plea of recoupment or recoupment shall refer to a compulsory counter-claim;

Cross-bill shall be understood to refer to a counter-claim, or a cross-claim, whichever is appropriate under these rules;

Revivor, revive, or revived, used with reference to actions, shall refer to the substitution procedure stated in Rule 25;

Decree pro confesso shall be understood to mean entry of default as provided in Rule 55;

Decree shall mean a judgment, as defined in Rule 54;

(g) *Procedure not specifically prescribed.* — When no procedure is specifically prescribed, the court shall proceed in any lawful manner not inconsistent with the Constitution of the State of Mississippi, these rules, or any applicable statute.

**HISTORY: Amended effective June 24, 1992; April 13, 2000; Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective April 13, 2000, Rule 81(d)(5) was amended to make a continuance effectual on a signed rather than an entered order. 753-754 So. 2d XVII) (West Miss. Cas. 2000.)

Effective June 24, 1992, Rule 81(h) was

deleted. 598-602 So. 2d XXIII-XXIV (West Miss. Cas. 1992).

Effective January 1, 1986, Rule 81(a) was amended by adding subsections (10) - (12); Rule 81(b) was amended by deleting examples and by deleting a provision that no answers are required in ex parte matters; Rule 81(d) was rewritten to provide for proceedings in a number of specified actions and to abrogate its treatment of domestic relations matters. 470- 473 So. 2d XVI-XVIII (West Miss. Cas. 1986).

## ADVISORY COMMITTEE NOTE

Rule 81 compliments Rule 1 by specifying which civil actions are governed only partially, or not at all, by the provisions of the M.R.C.P.

Rule 81(a) lists 12 categories of civil actions which are not governed entirely by the M.R.C.P. In each of those actions there are statutory provisions detailing certain procedures to be utilized. See generally Miss. Code Ann. §§11-43-1, et seq., (habeas corpus); 73-3-301, et seq., (disciplining of attorneys); 43-21-1, et seq., (youth court proceedings); 23-15-911 et seq. (election contests); 31-13-1, et seq., (bond validation); 41-21-61, et seq., (persons with mental illness or an intellectual disability); 41-30-1, et seq., (adjudication, commitment and release of alcohol and drug addicts); 11-27-1, et seq., (eminent domain); 91-1-1, et seq., (trusts and estates); 93-1-1, et seq., (domestic relations); 51-29-1, et seq., and 51-31-1, et seq., (creation and maintenance of drainage and water management districts); 21-1-1, et seq., (creation of and change in boundaries of municipalities); and those proceedings identified in category (12) by their Code Title as follows: 9-5-103 (bonds of receivers, assignees, executors may be reduced or cancelled, if excessive or for sufficient cause); 11-1-23 (court or judge may require new security); 11-1-29 (proceedings on death of surety on bonds, etc.); 11-1-31 (death of parties on bonds having force of judgment-citation in anticipation of judgment); 11-1-35 (death of parties on bonds having force of judgment when citation issued and returnable); 11-1-43 through 11-1-49 (seizure of perishable commodities by legal process); 11-5-151 through 11-5-167 (receivers in chancery); and 11-17-33 (receivers appointed for nonresident or unknown owners of mineral interests).

However, in any instance in the twelve listed categories in which the controlling statutes are silent as to a procedure, the M.R.C.P. govern.

As to ex parte matters, Rule 81(b) is intended to preserve, inter alia, the summary manner in which many matters testamentary, of administration, in minors/wards' business, and in cases of idiocy, lunacy, and persons of unsound mind are handled. See Miss. Code Ann. §11-5-49 (1972).

Rule 81(c) pertains to actions or matters where a statute requires that summons or notice be made by publication. In those instances, publication as provided by Rule 4 shall satisfy the requirements of such statute(s).

Rule 81(d) recognizes that there are certain actions and matters whose nature requires special rules of procedure. Basically these are matters of which the State has an interest in the outcome or which because of their mature should not subject a defendant/respondent to a default judgment for failure to answer. Furthermore, they are matters that should not be taken as confessed even in the absence of the appearance of the defendant/respondent. Most of the matters enumerated are peculiar to chancery court. Rule 81(d) divides the actions therein detailed into two categories. This division is based upon the recognition that some matters, because of either their simplicity or need for speedy resolution, should be triable after a short notice to the defendant/respondent; while others, because of their complexity, should afford the defendant/respondent more time for trial preparation.

Rule 81(d)(3) provides that the pleading initiating the action should be commenced by complaint or petition only and shall not be taken as confessed. Initiating Rule 81(d) actions by "motion" is not intended.

Rule 81(d)(5) recognizes that since no answer is required of a defendant/respondent, then the summons issued shall inform him of the time and place where he is to appear and defend. If the matter is not heard on the date originally set for the hearing, the court may sign an order on that day continuing the matter to a later date. The rule also provides that the Court may adopt a rule or issue an order authorizing its Clerk to set actions or matters for original hearings and to continue the same for hearing on a later date. (Local rules should be filed with the Supreme Court as required by Rule 83).

Rule 81(d)(6) provides that as to any temporary hearing in a pending action for divorce, separate maintenance, child custody or support, notice in the manner prescribed by Rule 5(b) shall be sufficient, provided the defendant/respondent has already been summoned to answer.

## JUDICIAL DECISIONS

### ANALYSIS

In general.
Applicability.
Attachments in chancery.
Attorney discipline.
Child custody proceedings.
Divorce actions.
Due process.
Election contests.
Garnishment proceedings.
Hearings.
Incapacitated individuals.
Initiation of actions.
Notice.
Paternity proceedings.
Probated claims.
Summons.
Support proceedings.
Illustrative cases.

**In general.**

In a child custody case, because service was served on the mother's counsel of record when in personam service of process on the mother was attempted but not completed by a process server, the requirements of Miss. R. Civ. P. 81 were fully satisfied. Allen v. Williams, 914 So. 2d 254, 2005 Miss. App. LEXIS 518 (Miss. Ct. App. 2005).

Where mother's attorney appeared on her behalf to defendant father's motion, and attorney did not raise the issues of jurisdiction or improper service, the mother waived any challenge to the insufficiency of service of process. Isom v. Jernigan, 840 So. 2d 104, 2003 Miss. LEXIS 102 (Miss. 2003).

Rule 81 notice to revive a dormant action provides protections akin to those for beginning litigation. Sanghi v. Sanghi, 759 So. 2d 1250, 2000 Miss. App. LEXIS 239 (Miss. Ct. App. 2000).

The initiation of actions under subsection (d) should be by filing complaints or petitions and counterclaims or cross-claims, not motions. Magee v. Magee, 754 So. 2d 1275, 1999 Miss. App. LEXIS 713 (Miss. Ct. App. 1999).

Notice of the transfer of structured settlement payment rights under Miss. Code Ann. § 11-5-11(2) requires a return for a date certain similar to the procedure authorized in Miss. R. Civ. P. 81(d)(5); once the original notice is provided to an interested party, notice of subsequent proceedings must comply with Miss. R. Civ. P. 5. RSL Funding, LLC v. Saucier (In re Saucier), 130 So. 3d 1108, 2013 Miss. App. LEXIS 133 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 71 (Miss. 2014), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 74 (Miss. 2014).

**Applicability.**

Because the Mississippi Structured Settlement Protection Act, Miss. Code Ann. §§ 11-57-1 through 11-57-1-15, requires court approval of a transfer of structured settlement payment rights, a civil action is commenced by filing a complaint with the court; to obtain personal jurisdiction over an interested party, service of process is required consistent with either Miss. R. Civ. P. 4 or 81. RSL Funding, LLC v. Saucier (In re Saucier), 130 So. 3d 1108, 2013 Miss. App. LEXIS 133 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 71 (Miss. 2014), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 74 (Miss. 2014).

**Attachments in chancery.**

Procedural rules by which a party seeks

an attachment in chancery are those provided by attachment in chancery statutes, supplemented only by so much of the Mississippi Rules of Civil Procedure as may be found not inconsistent with procedures prescribed in statutes. Universal Computer Services, Inc. v. Lyall, 464 So. 2d 69, 1985 Miss. LEXIS 1901 (Miss. 1985).

**Attorney discipline.**

Mississippi State Bar rules of discipline contain no provisions concerning default judgments, and therefore Rules of Civil Procedure concerning default judgments apply to disciplinary proceedings. Harrison v. The Mississippi Bar, 637 So. 2d 204, 1994 Miss. LEXIS 266 (Miss. 1994).

Bar disciplinary matters are governed first and foremost by Rules of Discipline for Mississippi State Bar, subject only to Constitutions of State of Mississippi and of United States; to the extent they are not inconsistent with Rules of Discipline, Mississippi Rules of Civil Procedure are to govern bar disciplinary matters, and where there is conflict between a provision of Rules of Discipline and a provision of Civil Rules, Rules of Discipline shall control. Mississippi State Bar v. Attorney L., 511 So. 2d 119, 1987 Miss. LEXIS 2615 (Miss. 1987).

There are no specific procedures concerning entry of default judgment in attorney disciplinary actions by the State Bar Committee, and therefore M.R.C.P. Rule 55 applies. Vining v. Mississippi State Bar Asso., 508 So. 2d 1047, 1987 Miss. LEXIS 2500 (Miss. 1987).

**Child custody proceedings.**

Chancellor rightfully possessed jurisdiction over the matter and committed no error in hearing and ruling upon a father's counter-petition because he properly served the mother in accordance with the procedures mandated by M.R.C.P. 81; the father sought modification of his custody arrangement with the wife, and therefore, the procedures in M.R.C.P. 4(h) did not apply. Hilton v. Harvey, 284 So. 3d 850, 2019 Miss. App. LEXIS 540 (Miss. Ct. App. 2019).

Chancellor rightfully possessed jurisdiction over the matter and committed no error in hearing and ruling upon a father's counter-petition because he properly served the mother in accordance with the procedures mandated by the rule; the father filed the counter-petition and served the mother with a summons in compliance with M.R.C.P. 81(d)(5), and the chancellor properly ordered the hearing be continued upon agreement of the parties. Hilton v. Harvey, 284 So. 3d 850, 2019 Miss. App. LEXIS 540 (Miss. Ct. App. 2019).

Chancery court did not err in failing to continue a contempt proceeding to allow a mother to conduct discovery because the mother failed to make any specific request to conduct discovery; the mother was obliged to appear in court for the contempt hearing and explain her actions and her failure to comply with the chancery court's judgment. Brown v. Hewlett, 281 So. 3d 189, 2019 Miss. App. LEXIS 94 (Miss. Ct. App. 2019).

Chancery court properly awarded sole legal and physical custody of the parties' child to the mother because the chancellor correctly noted that the parties were not required to file responsive pleadings, the award of custody to the mother could not have constituted unfair surprise where the father knew that she was a party to the litigation from the beginning and did not object to the chancellor's dismissal of the maternal grandparents or their substitution of the mother as the petitioner, the natural-parent presumption did not apply where the issue was an initial custody determination between two natural parents-not between a natural parent and a third party-and the child's best interests would be served by awarding the mother custody. Bradshaw v. Moore, 228 So. 3d 319, 2017 Miss. App. LEXIS 353 (Miss. Ct. App. 2017).

Chancery court did not err in failing to dismiss the mother's complaint seeking modification of a child custody order based on fraud where the father was served with a Miss. R. Civ. P. 81 summons, and he appeared and participated in the hearing. Roberts v. Lopez, 148 So. 3d 393, 2014 Miss. App. LEXIS 520 (Miss. Ct. App. 2014).

Father waived any issue as to defective service of the grandparents' claim; he was already before the chancery court concerning a number of other matters when the child's maternal grandparents had filed their motion and the chancery court was considering the matters of custody, visitation, and the father's parental rights. Therefore, the chancery court had already exercised jurisdiction over father; additionally, while the notice served on behalf of the grandparents might not have strictly complied with Miss. R. Civ. P. 81, the father was put on notice and he appeared at the hearing and presented evidence on his behalf. M.H. v. D.A., 17 So. 3d 610, 2009 Miss. App. LEXIS 555 (Miss. Ct. App. 2009).

Custody award of the mother's and father's child to the father was appropriate, in part pursuant to Miss. R. Civ. P. 81(d)(2) because any defect regarding notice of the March 26, 2007, hearing was waived when the mother failed to raise it before the chancellor. Price v. McBeath, 989 So. 2d 444, 2008 Miss. App. LEXIS 497 (Miss. Ct. App. 2008).

Custody award of the mother's and father's child to the father was appropriate, in part because the mother waived her jurisdictional arguments when she failed to timely seek resolution of the issue and when she participated in the hearing without first seeking an adjudication of her jurisdictional issue. Price v. McBeath, 989 So. 2d 444, 2008 Miss. App. LEXIS 497 (Miss. Ct. App. 2008).

Miss. R. Civ. P. 81 was complied with where the father defended himself before the court and, according to the transcript, was given the opportunity to address the court as well as cross-examine the mother. Ellzey v. White, 922 So. 2d 40, 2006 Miss. App. LEXIS 125 (Miss. Ct. App. 2006), overruled in part, Daniels v. Bains, 967 So. 2d 77, 2007 Miss. App. LEXIS 714 (Miss. Ct. App. 2007).

Father in child custody proceeding received insufficient notice under subdivision (d) of this rule, where summons did not indicate time and place the complaint would be heard, and it required him to mail or hand deliver a written response to the complaint. Caples v. Caples, 686 So. 2d 1071, 1996 Miss. LEXIS 688 (Miss. 1996).

**Divorce actions.**

Chancellor lacked jurisdiction over the divorce action because the husband was improperly served with a Miss. R. Civ. P. 81 summons, rather than the required Miss. R. Civ. P. 4 summons. For that reason, the chancellor's judgment of divorce was void, as were all determinations therein, including the chancellor's awards of alimony, child custody, and child support; therefore, the chancellor erred in refusing to set aside the judgment pursuant to Miss. R. Civ. P. 60(b). Clark v. Clark, 43 So. 3d 496, 2010 Miss. App. LEXIS 28 (Miss. Ct. App.), cert. denied, 49 So. 3d 106, 2010 Miss. LEXIS 467 (Miss. 2010).

Finding of contempt was reversed because the wife was never given an opportunity to present evidence on her behalf before a finding of contempt was made. There was no Miss. R. Civ. P. 81 notice of a contempt hearing because there was no contempt hearing at all and the was given no opportunity to present evidence of her hospitalization as the basis for her failure to vacate the house. Hanshaw v. Hanshaw, 55 So. 3d 170, 2009 Miss. App. LEXIS 925 (Miss. Ct. App. 2009), rev'd, 55 So. 3d 143, 2011 Miss. LEXIS 42 (Miss. 2011).

Although contempt proceedings in divorce cases often are filed in the same cause number and proceed with the underlying divorce case, they are held to be separate actions, requiring new and special summons under Miss. R. Civ. P. 81. Shavers v. Shavers, 982 So. 2d 397, 2008 Miss. LEXIS 254 (Miss. 2008).

As the Mississippi Rules of Civil Procedure apply only to the extent that the divorce statutes do not, strict reliance on the Mississippi Rules of Appellate Procedure and Mississippi Rules of Civil Procedure is misplaced. Mississippi divorce statutes do not place a time limit on modification. Austin v. Austin, 981 So. 2d 1000, 2007 Miss. App. LEXIS 710 (Miss. Ct. App. 2007), cert. denied, 981 So. 2d 298, 2008 Miss. LEXIS 223 (Miss. 2008).

Miss. R. Civ. P. 81 summons was not necessary for the December 14, 2004, hearing on whether the ex-husband was in contempt for failing to comply with the agreed temporary order for alimony and child support, and even assuming arguendo that Miss. R. Civ. P. 81 was applicable to a hearing to enforce a temporary order in ongoing litigation, the husband's attorney's appearance at the December 1, 2004, hearing waived any error; similarly, a Miss. R. Civ. P. 81 summons was not necessary to apprise the husband of the February 1, 2005, trial. Carroll v. Carroll, 976 So. 2d 880, 2007 Miss. App. LEXIS 301 (Miss. Ct. App. 2007), cert. denied, 977 So. 2d 343, 2008 Miss. LEXIS 107 (Miss. 2008).

Appellate court in no way suggests, intimates or holds that the date of a divorce trial must be set on the trial docket at least 20 days prior to trial. In many instances, if not most, complaints for divorce may be set for trial outside of the normal docket setting of the civil trial docket because a divorce case may not be set down on the issue docket unless at the request of one of the parties. Miss. Code Ann. § 93-5-7. The appellate court simply holds that once a party appears in a temporary phase of the divorce proceeding, the party is entitled to notice of the subsequent hearing on the underlying divorce proceeding unless the party is so notified during the temporary proceeding. Brown v. Brown, 872 So. 2d 787, 2004 Miss. App. LEXIS 439 (Miss. Ct. App. 2004).

Husband argued that the wife's failure to comply with the requirements of Miss. R. Civ. P. 81 warranted reversal of the contempt order and the judgment of divorce; the appellate court determined that service by mail, without an accompanying summons issued in accordance with the dictates of Miss. R. Civ. P. 81(d)(5), did not provide the requisite service of process which would enable a trial court to act, such that the motion for contempt and the notice of the second hearing for the judgment of divorce were separate matters listed under Rule 81(d) and both required a proper Rule 81 summons. Floyd v. Floyd, 870 So. 2d 677, 2004 Miss. App. LEXIS 306 (Miss. Ct. App. 2004), overruled in part, Bailey v. Fischer, 946 So. 2d 404, 2006 Miss. App. LEXIS 425 (Miss. Ct. App. 2006).

There was no merit in a former husband's claim that the rescheduling of a hearing date on the former wife's petition for modification of alimony was improper, given that the husband received a copy of the order changing the date, and was provided with reasonable notice and an opportunity to be heard. In re Profilet, 2001 Miss. App. LEXIS 270 (Miss. Ct. App. July 17, 2001), aff'd in part, vacated, 826 So. 2d 91, 2002 Miss. LEXIS 281 (Miss. 2002).

The hearing date in a proceeding to modify the alimony provisions of a divorce decree was properly set where (1) the husband waived formal service of process and accepted the summons through his counsel, (2) the summons listed the date of the hearing as May 20, (3) the chancery court subsequently entered an order that changed the date to May 19, and (4) the husband admitted to having received a copy of the order. Profilet v. Profilet (In re Marriage of Profilet), 2001 Miss. App. LEXIS 48 (Miss. Ct. App. Feb. 6, 2001).

Procedural provisions of statute governing divorce actions limit applicability of Mississippi Rules of Civil Procedure, which govern only where the divorce statute stands silent. Rawson v. Buta, 609 So. 2d 426, 1992 Miss. LEXIS 666 (Miss. 1992).

**Due process.**

In criminal contempt proceeding, husband waived his claims of defective service and violation of due process where the chancery court had personal jurisdiction over him because chancery courts have ongoing personal jurisdiction over parties to a divorce proceeding and husband's attorney was served with a motion for contempt two weeks prior to the hearing, the receipt of which was not disputed, and husband was given a meaningful opportunity to explain his actions which were the subject of the motion for contempt and did, in fact, aggressively defend himself at the hearing. Dennis v. Dennis, 824 So. 2d 604, 2002 Miss. LEXIS 264 (Miss. 2002).

Husband was denied due process by adjudication of child custody and support matters in his absence, where summons with which he was served was a M.R.C.P. Rule 4 alias summons, which did not set a time, date and place for hearing on complaint; proper procedure would have been to serve husband with motion for modification and a Rule 81 summons, setting a time and date for hearing. Powell v. Powell, 644 So. 2d 269, 1994 Miss. LEXIS 627 (Miss. 1994).

**Election contests.**

Circuit court erred in allowing election officials to intervene as parties in a candidate's action contesting the results of a primary election when the statute mandated contrary duties because intervention was inconsistent with the election officials' statutory duties during judicial review of an election contest; the circuit clerk is a mandatory participant, as are the election commissioners, who serve as advisors and assistants to the trial judge. Dillon v. Myers, 227 So. 3d 923, 2017 Miss. LEXIS 134 (Miss. 2017).

Miss. Code Ann. § 23-15-927 is silent regarding the amendment of pleadings. Therefore, Miss. R. Civ. P. 15(a) controls and amendments are allowed at any time before a responsive pleading is served; in the case at bar, no responsive pleading from the County Democratic Executive Committee was on record, and even if there was a response by the Committee served upon the candidate (who opposed the holding of a new primary election), in the record, Miss. R. Civ. P. 15(a) allowed the amendment of pleadings after a responsive pleading was served "by leave of the court." Jefferson Davis County v. Davies, 912 So. 2d 837, 2005 Miss. LEXIS 212 (Miss. 2005).

Nothing in statutes governing election contests conflicted with rules of civil procedure respecting amendments, and trial court did not err when it allowed petition for judicial review to be amended. Pearson v. Parsons, 541 So. 2d 447, 1989 Miss. LEXIS 143 (Miss. 1989).

Proceedings in an election contest before a political party's executive committee are not civil proceedings in a court of record, and hence Rules of Civil Procedure have no application; with respect to proceedings before special tribunal, Rules of Civil Procedure control only to extent that governing statute is silent. Shannon v. Henson, 499 So. 2d 758, 1986 Miss. LEXIS 2883 (Miss. 1986).

**Garnishment proceedings.**

By virtue of M.R.C.P. Rule 69 (a), procedural rules whereby a party seeks to secure and enforce the remedy of garnishment are those provided by Mississippi garnishment statutes, supplemented by so much of the Mississippi Rules of Civil Procedure as may be found not inconsistent with the procedures prescribed in such statutes. First Mississippi Nat'l Bank v. KLH Industries, Inc., 457 So. 2d 1333, 1984 Miss. LEXIS 1978 (Miss. 1984).

**Hearings.**

The rule allows a general rule of the court to establish the time and place of hearings, including a rule that authorizes the court clerk to set matters for hearing; this permits a clerk to set the date and time for hearings without the need for a chancellor's signature on an order, but does not authorize the chancellors of a district to bypass the summons requirement by using court administrator notice, even if there were a local rule adopted providing for that. Sanghi v. Sanghi, 759 So. 2d 1250, 2000 Miss. App. LEXIS 239 (Miss. Ct. App. 2000).

**Incapacitated individuals.**

Proceedings holding a state hospital director (director) in contempt for refusing to admit two individuals committed by a trial court were procedurally defective because (1) the contempt was criminal and constructive, as the director was held in contempt for past acts, was unable to purge the contempt, and was fined in an amount to be paid to the court, (2) the court did not recuse itself after issuing a show-cause order, and (3) the director was not properly served with process. Miss. Dep't of Mental Health v. Lamar Cty. (In re C.W.), 250 So. 3d 1248, 2018 Miss. LEXIS 358 (Miss. 2018).

Automatic right of supersedeas or stay was inconsistent with purpose of statute governing commitment for treatment of alcoholism, and therefore statute, rather than rule of civil procedure, controlled question whether person committed for chemical dependency treatment was entitled to supersedeas or stay pending appeal as a matter of right. McIntire v. Moore, 512 So. 2d 687, 1987 Miss. LEXIS 2760 (Miss. 1987).

**Initiation of actions.**

The initiation of actions under subsection (d) should be by filing "complaints" or "petitions," and "counterclaims" or "cross-claims" (whichever might be appropriate), not "motions" and "cross-petitions." Cornelius v. Overstreet, 757 So. 2d 332, 2000 Miss. App. LEXIS 153 (Miss. Ct. App. 2000).

**Notice.**

Failure to issue a summons under this rule to an attorney, who was a former guardian, for a show-cause hearing regarding a past-due accounting did not violate the attorney's due process rights because notice was required for criminal contempt and the attorney was found in civil contempt; the attorney had been dealing with the defectiveness of the accounting for two years, had already been held in contempt, never objected to the service of process, and explained his actions at the hearing. Zebert v. Guardianship of Baker, 129 So. 3d 972, 2014 Miss. App. LEXIS 11 (Miss. Ct. App. 2014).

Chancery court lacked jurisdiction to enforce a protective order issued in Ohio, although a wife's testimony would have been sufficient to show a violation of the Ohio order, because there was no compliance with the notice requirements of Miss. R. Civ. P. 81. Wolfe v. Wolfe, 49 So. 3d 650, 2010 Miss. App. LEXIS 634 (Miss. Ct. App. 2010).

Father was subject to the chancery court's continuing jurisdiction and received notice of the trial date; the document which gave the father notice of the hearing was a Miss. R. Civ. P. 81 summons and it listed the time and date for the father to appear, which he did, and he was present when the case was transferred to the other chancellor, such that the father had every opportunity to check with the chancery clerk's office and the mother's attorney regarding the case's status. Vincent v. Griffin, 852 So. 2d 620, 2003 Miss. App. LEXIS 924 (Miss. Ct. App. 2003), rev'd, 872 So. 2d 676, 2004 Miss. LEXIS 501 (Miss. 2004).

Plaintiff waived any objection he might have had to not being given timely notice of the hearing when he did not raise any objections during the proceedings or request a continuance when the chancellor announced that he would consider the motion for contempt and rule upon it. Yancey v. Yancey, 752 So. 2d 1006, 1999 Miss. LEXIS 388 (Miss. 1999).

**Paternity proceedings.**

Six person juror requirement in M.R.C.P. Rule 48(b) applied to paternity proceeding transferred from chancery court to county court following defendant's demand for jury trial, since nothing in statute governing such proceedings suggested the number of jurors that may be required. Clark v. Whiten, 508 So. 2d 1105, 1987 Miss. LEXIS 2565 (Miss. 1987).

**Probated claims.**

Where executrix filed a complaint to admit the decedent's will to probate in solemn form, a Miss. R. Civ. P. 81 matter, but decedent's brother was served notice pursuant to Miss. R. Civ. P. 4, the trial court erred in admitting the will in solemn form, but had jurisdiction over the common form probate proceedings, and as decedent's brother did not contest the will within the two-year limitations period, the probate in common form was final and binding. In re Estate of Kelly v. Cuevas, 951 So. 2d 564, 2005 Miss. App. LEXIS 995 (Miss. Ct. App. 2005), aff'd in part and rev'd in part, 951 So. 2d 543, 2007 Miss. LEXIS 18 (Miss. 2007).

Summary judgment practice under M.R.C.P. Rule 56 is inapplicable in contests of probated claims, because it is inconsistent with statutory procedure requiring claimant to enter court to introduce evidence in support of claim and permitting personal representative to rebut claim. Saddler v. Saddler, 556 So. 2d 344, 1990 Miss. LEXIS 13 (Miss. 1990).

**Summons.**

Attorney's motion to quash, premised on alleged judge shopping, was wholly unfounded and without justification because a standing order by its express terms applied to all Miss. R. Civ. P. 81(d) summonses, and so Rule 81(d)(2) summonses for contempt were clearly covered by the standing order; Miss. Unif. Ch. Ct. R. 1.06 makes no distinction between Rule 81(d)(1) and (2) matters. Garner v. Smith, 277 So. 3d 536, 2019 Miss. LEXIS 241 (Miss. 2019).

Judgment was reversed because the summons was defective as it failed to specify the correct place for the hearing because the summons directed appellant to appear on May 15, 2017, at the Oktibbeha County Courthouse at Columbus, Mississippi, however, the Oktibbeha County Courthouse was in Starkville, Mississippi, not Columbus, and Columbus was located in Lowndes County; thus, appellant would not have known whether to appear at the Oktibbeha County Courthouse in Starkville or the Lowndes County Courthouse in Columbus. Edwards v. Edwards, 281 So. 3d 130, 2019 Miss. App. LEXIS 65 (Miss. Ct. App. 2019).

Miss. R. Civ. P. 4 summons served by certified mail and publication invoked a chancery court's personal jurisdiction to find a father's wrongful death beneficiaries because (1) the court did not find heirship, and (2) a wrongful death suit, which could only be brought by statutory parties, was not part of a decedent's estate. Alexander v. DeForest (In re Determination of Wrongful Death Heirs of Underhill), 262 So. 3d 1111, 2019 Miss. LEXIS 54 (Miss. 2019).

Mother was adequately notified of the custody matter because the summons was preserved with each signed order of continuance, and an additional summons was not required; a central tenet of the rule was adequate notice of a pending legal matter, and the mother was given notice at the inception of the custody matter. Tullos v. Tullos (In re Tullos), 230 So. 3d 330, 2017 Miss. App. LEXIS 636 (Miss. Ct. App. 2017).

Wife failed to properly serve notice to a daughter, who was the executor of the decedent's estate, of her contempt action because the wife's attorney mailed a copy of the contempt "motion" to the estate attorney, and the chancery court issued a summons to the daughgter in "care of" the estate attorney; those actions, failed to constitute proper service of process because the daughter, not the estate attorney, should have been served with the wife's contempt "motion" and the summons. Chester v. Labasse (In re Estate of Labasse), 242 So. 3d 167, 2017 Miss. App. LEXIS 540 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 70, 2018 Miss. LEXIS 192 (Miss. 2018).

Because appellant was not served with a summons under this rule on the will construction issue, and she did not waive service by appearing at the will construction hearing or otherwise defending the issue on the merits, the judgment on the will construction was void, and the appellate court vacated that judgment and the derivative decisions dividing the real property pursuant to the construed will. Russell v. Byrd (In re Estate of Wylie), 226 So. 3d 114, 2017 Miss. App. LEXIS 462 (Miss. Ct. App. 2017).

In a series of disputes between two sisters over real property left to them by their mother, the specific issue of service of a summons under this rule was jurisdictional, and could be raised for the first time on appeal. Russell v. Byrd (In re Estate of Wylie), 226 So. 3d 114, 2017 Miss. App. LEXIS 462 (Miss. Ct. App. 2017).

Chancellor in a partition action should have required additional service of Miss. R. Civ. P. 81 summonses on all of the remaining co-owners of the subject property before holding a subsequent hearing because the initial hearing was continued or recessed without addressing the merits of the case and without entry of an order or a continuance. Brown v. Tate, 95 So. 3d 745, 2012 Miss. App. LEXIS 474 (Miss. Ct. App. 2012).

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Although counsel for both parties appeared before the chancellor when sanctions were imposed against a spouse for delay in leaving the marital home that was being sold, Miss. R. Civ. P. 81 required that a summons be personally served on the spouse before the contempt proceeding. A new contempt hearing after proper notice was ordered. Hanshaw v. Hanshaw,

55 So. 3d 143, 2011 Miss. LEXIS 42 (Miss. 2011).

Because the order setting the last hearing date was not entered on the date of continuance of a prior hearing, the chancellor should have required service of an additional Miss. R. Civ. P. 81 summons on the father before holding the hearing and assessing him with attorney fees. Vincent v. Griffin, 872 So. 2d 676, 2004 Miss. LEXIS 501 (Miss. 2004).

When proceeding under matters enumerated in the Rule, a proper summons had to be served; a Miss. R. Civ. P. 4 summons did not satisfy the requirements of Rule 81. Reichert v. Reichert, 807 So. 2d 1282, 2002 Miss. App. LEXIS 83 (Miss. Ct. App.), overruled in part, Morrison v. Miss. Dep't of Human Servs., 852 So. 2d 578, 2002 Miss. App. LEXIS 616 (Miss. Ct. App. 2002).

Summons under the Rule was mandatory and absent a summons, the judgment was void, Miss. R. Civ. P. 60(b)(4) allowed relief from a void judgment. Reichert v. Reichert, 807 So. 2d 1282, 2002 Miss. App. LEXIS 83 (Miss. Ct. App.), overruled in part, Morrison v. Miss. Dep't of Human Servs., 852 So. 2d 578, 2002 Miss. App. LEXIS 616 (Miss. Ct. App. 2002).

Chancellor did not have jurisdiction, in contempt proceeding resulting from husband's failure to pay temporary support obligations during a divorce proceeding, to incarcerate the husband because there was no evidence that a summons was served on the husband regarding the contempt hearing. Serton v. Serton, 819 So. 2d 15, 2002 Miss. App. LEXIS 55 (Miss. Ct. App. 2002).

**Support proceedings.**

Chancery court did not err in allowing a father to pursue his emancipation argument because the father was not required under the rule to respond to the mother's petition without being ordered to do so, and the record did not establish that the chancery ordered him to respond; the father also was not required to raise any arguments or plead any defenses prior to the hearing. Oster v. Ratliff, 205 So. 3d 1149, 2016 Miss. App. LEXIS 229 (Miss. Ct. App.), cert. denied, 205 So. 3d 1086, 2016 Miss. LEXIS 528 (Miss. 2016).

Father failed to present any evidence of prejudice due to the denial of his request for a continuance, as he was properly served by a summons on the mother's petition for contempt and modification approximately 21 days before the hearing date, and he was only entitled to seven days' notice prior to the hearing; the father had time to obtain an attorney and was given time at the hearing to review the bills the mother submitted, and thus there was no abuse of discretion. Stallings v. Allen, 201 So. 3d 500, 2016 Miss. App. LEXIS 62 (Miss. Ct. App.), cert. denied, 203 So. 3d 599, 2016 Miss. LEXIS 414 (Miss. 2016).

Because a summons under this rule needed to be issued for the child support modification issue, and no summons under this rule was ever issued for the modification-of-child-support issue, the trial court had no jurisdiction to hear the case; because no hearing was held on the modification action, and a hearing was required under this rule to modify child support, that constituted reversible error. Curry v. Frazier, 119 So. 3d 362, 2013 Miss. App. LEXIS 426 (Miss. Ct. App. 2013).

Failure to achieve proper service in the divorce action did not render the action for temporary relief void. A separate Miss. R. Civ. P. 81 summons was properly issued in the wife's action for temporary support, thus giving the chancellor jurisdiction to award temporary relief; therefore, because the chancellor had jurisdiction over the matters adjudicated at the temporary support hearing, the temporary order stood. Clark v. Clark, 43 So. 3d 496, 2010 Miss. App. LEXIS 28 (Miss. Ct. App.), cert. denied, 49 So. 3d 106, 2010 Miss. LEXIS 467 (Miss. 2010).

Where a mother filed a complaint for custody and support, the Mississippi court lacked personal jurisdiction over the father sufficient to enter a child support award because the father had no contact with Mississippi and agreeing to an order setting the case for trial did not act as a general appearance or otherwise waive the defense of lack of personal jurisdiction. Richardson v. Stogner, 958 So. 2d 235, 2007 Miss. App. LEXIS 373 (Miss. Ct. App. 2007).

Lone action of agreeing to an order setting the case for trial does not act as a general appearance or otherwise waive the defense that the court lacks personal jurisdiction. Richardson v. Stogner, 958 So. 2d 235, 2007 Miss. App. LEXIS 373 (Miss. Ct. App. 2007).

Order finding a father in contempt for his nonpayment of child support was upheld where he had received a valid summons for the initial hearing; because the father appeared at the hearing at which he was found in contempt, any defects in the issuance of the notice by the court administrator were waived. Bailey v. Fischer, 946 So. 2d 404, 2006 Miss. App. LEXIS 425 (Miss. Ct. App. 2006), cert. denied, 947 So. 2d 960, 2007 Miss. LEXIS 54 (Miss. 2007).

Where defendant denied being served with process, there was no return of service in the record, and no entry in the docket book indicating that there ever was a return, a judgment finding him in contempt and ordering him to pay educational expenses was void. Morrison v. Miss. Dep't of Human Servs., 863 So. 2d 948, 2004 Miss. LEXIS 16 (Miss. 2004).

In a contempt proceeding on the husband's failure to pay child support, the affirmative defense of the statute of limitations was not waived because, although the husband filed an answer, no such pleading was required under Miss. R. Civ. P. 12(b) and 81(d)(2), (4); thus, the husband had the right to raise the defense at any stage and the statute of limitations would bar any claims filed seven years after the youngest child reached the age of 21 pursuant to Miss. Code Ann. § 15-1-59. Miss. Dep't of Human Servs. v. Guidry, 830 So. 2d 628, 2002 Miss. LEXIS 320 (Miss. 2002).

Rule 81(d)(3) requires that a petition or complaint be filed to modify or enforce child support and alimony judgments or to seek contempt; the mislabeling of the initiating pleading is a matter of form and would not by itself create a lack of authority for the court to act. Sanghi v. Sanghi, 759 So. 2d 1250, 2000 Miss. App. LEXIS 239 (Miss. Ct. App. 2000).

**Illustrative cases.**

Judge did not abuse her discretion in sanctioning an attorney and his client because a standing order merely implemented Miss. Unif. Ch. Ct. R. 1.06(C), which authorized the opponent's Miss. R. Civ. P 81(d) summons; thus, the attorney's motion to quash and request for sanctions against the opponent had no hope for success. Garner v. Smith, 277 So. 3d 536, 2019 Miss. LEXIS 241 (Miss. 2019).

Opponent's Miss. R. Civ. P. 81(d) summons noticing a hearing on his contempt petition before a judge was clearly permissible under the rules because a standing order was nothing more than on order implementing Miss. Unif. Ch. Ct. R. 1.06(C); because the order made no distinction between Rule 81(d)(1) and (2) matters, and it contained no "special provisions" that varied from Rule 1.06, it need not be approved by the supreme court. Garner v. Smith, 277 So. 3d 536, 2019 Miss. LEXIS 241 (Miss. 2019).

Rules of civil procedure clearly defer to Mississippi's statutory provisions for matters concerning termination of parental rights and adoption; when a chancellor is faced with matters concerning the termination of parental rights or adoption, the controlling body of law is the statute rather than the rules of civil procedure. Simmons v. Harrison Cty. Dep't of Human Servs., 228 So. 3d 347, 2017 Miss. App. LEXIS 582 (Miss. Ct. App. 2017).

Despite the improper service of a wife's contempt action, a daughter waived the issue for appeal because the daughter failed to raise the issue at her "first opportunity" or at any time thereafter in the proceedings before the chancery court; the daughter not only participated in responding to the merits of the contempt action without objecting to the defective service, but the estate attorney, on her behalf, also signed a subsequent agreed order without raising the issue. Chester v. Labasse (In re Estate of Labasse), 242 So. 3d 167, 2017 Miss. App. LEXIS 540 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 70, 2018 Miss. LEXIS 192 (Miss. 2018).

Because the father admittedly did not plead a contempt claim pursuant to Miss. R. Civ. P. 81(d)(3) based on the mother's refusal to pay the doctor's bill, the chancellor erred when he held the mother in contempt for her failure to pay the doctor's court-appearance fee and ordered her to pay a $3,700 judgment; moreover, the mother's alleged violation of the custody order was not willful and deliberate since the mother's uncontradicted testimony was that she did not pay the bill because she believed it to be a litigation expense incurred by the father, not a medical expense of their child. Therefore, the contempt judgment against the mother was vacated. The award in favor of the father was reversed, and the case was remanded to the trial court for entry of an order reducing the amount awarded to the father by $3,700. McKnight v. Jenkins, 155 So. 3d 730, 2013 Miss. LEXIS 54 (Miss. 2013).

Constructive criminal contempt judgments against a process server, a notary, and the owner of a process service company (accuseds) were vacated as a chancellor violated the accuseds' due process rights under Miss. Const. art. III, § 26 since he failed to recuse himself after initiating the proceedings, and failed to issue summonses notifying the accuseds of the criminal nature of the charges against them under Miss. R. Civ. P. 81(d). In re McDonald, 98 So. 3d 1040, 2012 Miss. LEXIS 492 (Miss. 2012).

Fair reading of the annexation statutes, Miss. R. Civ. P. 15(a), Miss. R. Civ. P. 81(a)(11), and applicable case law leaves no doubt that, in most instances, annexation pleadings are amendable pursuant to Miss. R. Civ. P. 15. So that the court's interpretation is clear, it clarifies today that in annexations proceedings, when errors appear in the legal description of the territory proposed to be annexed and/or in the legal description of the entire boundary as changed after enlargement/annexation, such errors may be amended pursuant to the Mississippi Rules of Civil Procedure and case law. Lamar County v. City of Hattiesburg (In re Extension of the Boundaries of Hattiesburg ), 840 So. 2d 69, 2003 Miss. LEXIS 41 (Miss. 2003).

Chancellor erred in granting default judgment, since defendant was not required to file an answer and subdivision (d)(5) of this rule required issuance of summons commanding defendant to appear and defend, which precluded a default judgment. Biloxi Regional Medical Center, Inc. v. Estate of Ross, 546 So. 2d 667, 1989 Miss. LEXIS 297 (Miss. 1989).

## CHAPTER XI. GENERAL PROVISIONS

### Rule 82. Jurisdiction and venue.

(a) *Jurisdiction unaffected.* — These rules shall not be construed to extend or limit the jurisdiction of the courts of Mississippi.

(b) *Venue of actions.* — Except as provided by this rule, venue of all actions shall be as provided by statute.

(c) *Venue where claim or parties joined.* — Where several claims or parties have been properly joined, the suit may be brought in any county in which any one of the claims could properly have been brought. Whenever an action has been commenced in a proper county, additional claims and parties may be joined, pursuant to Rules 13, 14, 22 and 24, as ancillary thereto, without regard to whether that county would be a proper venue for an independent action on such claims or against such parties.

(d) *Improper venue.* — When an action is filed laying venue in the wrong county, the action shall not be dismissed, but the court, on timely motion, shall transfer the action to the court in which it might properly have been filed and the case shall proceed as though originally filed therein. The expenses of the transfer shall be borne by the plaintiff. The plaintiff shall have the right to select the court to which the action shall be transferred in the event the action might properly have been filed in more than one court.

(e) *Forum non-conveniens.* — With respect to actions filed in an appropriate venue where venue is not otherwise designated or limited by statute, the court may, for the convenience of the parties and witnesses or in the interest of justice, transfer any action or any claim in any civil action to any court in which the action might have been properly filed and the case shall proceed as though originally filed therein.

**HISTORY: Amended effective February 20, 2004, to add Section 82(e) allowing transfer for forum non-conveniens for cases filed after the effective date; Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

## ADVISORY COMMITTEE NOTE

Rule 82(c) provides that if venue is proper for one plaintiff's claim and such plaintiff has been properly joined with other plaintiffs, venue is proper for all plaintiffs' claims. Mississippi Code Annotated §11-11-3(2), however, provides that "[i]n any civil action where more than one (1) plaintiff is joined, each plaintiff shall independently establish proper venue; it is not sufficient that venue is proper for any other plaintiff joined in the civil action." Rule 82(b) states that "[e]xcept as provided by this rule, venue in all actions shall be as provided by statute." Thus, there is a conflict between the rule and the statute in that the rule states that venue is proper in cases involving multiple plaintiffs who are properly joined if venue is proper for a single plaintiff's claim, whereas the statute provides that in cases involving multiple plaintiffs venue must be proper for each plaintiff's claim. There is no conflict in cases involving multiple defendants-"venue properly established against one defendant generally is proper against all defendants." *See Penn Nat'l Gaming, Inc. v. Ratliff,* 954 So. 2d 427, 432 (Miss. 2007). In cases involving a medical malpractice defendant and another defendant, however, venue established by Mississippi Code Annotated §11-11-3 is only appropriate in the county where the alleged malpractice occurred. *See Adams v. Baptist Memorial Hospital-DeSoto, Inc.,*965 So. 2d 652, 657-58 (Miss. 2007).

Rule 82(e) authorizes a motion to transfer venue to another court having proper venue within the state based upon forum non-conveniens. In addition, Mississippi Code Annotated §11-11-3 authorizes transfer to another forum within Mississippi that is more convenient and further authorizes dismissal of the case in Mississippi if a more convenient forum is available in another state. A trial court ruling on a motion to dismiss made pursuant to the statute must determine whether, given "the interest of justice" and "the convenience of the parties and witnesses," "a claim or action would be more properly heard in a forum outside this state or in a different county of proper venue within this state." Mississippi Code Annotated §11-11- 3(4)(a). The trial court may consider the factors set forth in Mississippi Code Annotated §11- 11-3(4)(a).

## JUDICIAL DECISIONS

### ANALYSIS

In general.
Construction.
Improper venue.
Purpose.

**In general.**

Does an amended complaint, which names a new party to the suit, relate back to the time of filing of the original complaint for the purposes of determining venue? The Supreme Court of Mississippi finds that it does not. Forrest Gen. Hosp. v. Upton, 240 So. 3d 410, 2018 Miss. LEXIS 174 (Miss. 2018).

As both discovery and accounting remained independent causes of action under Mississippi law, and because an attorney never argued the insufficiency of the former clients' allegations seeking only discovery or an accounting on any specific element of either, the trial court erred in granting the attorney's motion to dismiss the clients' complaint for failure to state a claim upon which relief could be granted. Graham v. Franks, 220 So. 3d 992, 2017 Miss. App. LEXIS 17 (Miss. Ct. App. 2017).

Transferring venue over plaintiffs' wrongful death action from the Lauderdale circuit court to the Covington county circuit court was an abuse of discretion because, at the time the suit was filed, neither the common law nor the Mississippi Rules of Civil Procedure allowed an intrastate change of venue based on the doctrine of forum non conveniens; rather, Miss. R. Civ. P. 82(e), which allowed intrastate transfer of cases for forum nonconveniens, was not retroactive and applied only to cases filed after February 20, 2004. Goodwin v. Culpepper Enters., 963 So. 2d 1166, 2007 Miss. LEXIS 511 (Miss. 2007).

Both Miss. R. Civ. P. 82(e) and Miss. Code Ann. § 11-11-3(4)(a) required the transfer of a case brought by a resident of Claiborne County, Mississippi, against a doctor, who resided in Warren County, Mississippi, and two nonresident defendants to county of proper venue –i.e., Warren County–where the reason for the transfer was the inability to seat an impartial jury. Warren County was the only county of appropriate venue because it was the only county in Mississippi in which a defendant (the doctor) resided. Namihira v. Bailey, 891 So. 2d 831, 2005 Miss. LEXIS 38 (Miss. 2005).

Pharmaceutical companies argued that the plaintiffs took the prescription drug at different times, under different labels and warnings and had different pre-existing conditions. Because of those differences, the companies sought to have plaintiffs' joinder in Jefferson County severed, alleging that the inquiries into alleged defective design, failure to warn, breach of warranty and misrepresentation would be wholly distinct in each plaintiff's case; the Mississippi Supreme Court concluded a jury could well be overwhelmed by the 30 separate fact patterns that were offered to prove medical malpractice, affirmed the trial court's decision to sever plaintiffs' claims, and affirmed the trial court's decision, allowing for transfer of the claims of those plaintiffs without jurisdiction in Jefferson County to the court or courts of plaintiffs' counsel's choosing. Culbert v. Johnson & Johnson, 883 So. 2d 550, 2004 Miss. LEXIS 1197 (Miss. 2004).

In a suit where an administratrix sued a railroad for her husband's death, alleging injuries and death due to exposure to asbestos, although the decedent resided and worked for the railroad in Tennessee, a suit with others against it in Mississippi was proper because the administratrix was properly joined under Miss. R. Civ. P. 20, and thus, under Miss. R. Civ. P. 82(c), venue was proper for all plaintiffs where it was proper for one. Ill. Cent. R.R. Co. v. Travis, 808 So. 2d 928, 2002 Miss. LEXIS 101 (Miss. 2002), overruled in part, Capital City Ins. Co. v. G.B. "Boots" Smith Corp., 889 So. 2d 505, 2004 Miss. LEXIS 1329 (Miss. 2004), overruled, Ill. Cent. R.R. Co. v. Gregory, 912 So. 2d 829, 2005 Miss. LEXIS 297 (Miss. 2005).

Where there are multiple defendants and they live in different counties, venue is proper in the county where one of the defendants resides, and if one of the defendants is a nonresident of the State, the plaintiff may bring suit against the nonresident in the county of plaintiff's residence; jurisdiction and venue of that nonresident defendant makes the county of plaintiff's residence the proper venue against all resident defendants, even though they may live in different counties. Senatobia Community Hosp. v. Orr, 607 So. 2d 1224, 1992 Miss. LEXIS 604 (Miss. 1992), overruled, Capital City Ins. Co. v. G.B. "Boots" Smith Corp., 889 So. 2d 505, 2004 Miss. LEXIS 1329 (Miss. 2004).

**Construction.**

Miss. Code Ann. § 93-5-11 governs the venue of a divorce action and limits the chancery court's exercise of personal jurisdiction over the defendant; the Mississippi Rules of Civil Procedure control the procedure to be utilized when venue is improper. Lewis v. Pagel, 233 So. 3d 740, 2017 Miss. LEXIS 221 (Miss. 2017).

Inmate's challenge to the inmate's earned-time calculation by the Mississippi Department of Corrections was a post-administrative review procedure subject to transfer pursuant to Miss. R. Civ. P. 82(d) rather than a motion for post-conviction relief. Putnam v. Epps, 63 So. 3d 547, 2011 Miss. LEXIS 205 (Miss. 2011).

In a wrongful death action, a trial court did not err in transferring a hospital and other medical defendants to the county where the hospital was located because under Miss. Code Ann. § 11-11-3(3), the only proper venue for a suit against medical providers was the county in which the alleged act or omission occurred; there was no conflict between Miss. Code Ann. § 11-11-3(3) and the more liberal venue provision of Miss. R. Civ. P. 82(c) because Miss. R. Civ. P. 82(b) state: “Except as provided by this rule, venue of all actions shall be as provided by statute.” Adams v. Baptist Mem'l Hospital-Desoto, Inc., 965 So. 2d 652, 2007 Miss. LEXIS 472 (Miss. 2007).

Miss. R. Civ. P. 82(c) does not support a plaintiff establishing venue in his own county of residence when a resident defendant is a party to the suit. Capital City Ins. Co. v. G.B. "Boots" Smith Corp., 889 So. 2d 505, 2004 Miss. LEXIS 1329 (Miss. 2004).

Bill of discovery was not abolished or rendered obsolete by enactment of the Mississippi Rules of Civil Procedure. State Oil & Gas Bd. v. McGowan, 542 So. 2d 244, 1989 Miss. LEXIS 184 (Miss. 1989).

**Improper venue.**

Circuit court abused its discretion in denying a motion to transfer venue where the suit was filed in one county, it named only defendants from another county, and because the amended complaint naming a new party did not relate back to the time of filing, venue was improper as to all defendants. Forrest Gen. Hosp. v. Upton, 240 So. 3d 410, 2018 Miss. LEXIS 174 (Miss. 2018).

Where two medical defendants fall within the same category, Miss. Code Ann. § 11-11-3(3) does not contain any language preventing permissive joinder under Miss. R. Civ. P. 20. Further, the plain language does not prevent the application of Miss. R. Civ. P. 82(c). Miss. Baptist Health Sys. v. Harkins, 245 So. 3d 370, 2018 Miss. LEXIS 69 (Miss. 2018).

Husband waived his objection to improper venue because he litigated in the county where the wife filed the divorce action; after the husband noticed the appeal, he entered three agreed orders that recognized that the county chancery court had jurisdiction over both the subject matter of the dispute and the parties involved in the dispute. Lewis v. Pagel, 233 So. 3d 740, 2017 Miss. LEXIS 221 (Miss. 2017).

Husband waived his objection to improper venue because he did not timely raise it; the husband he first raised the issue of venue six years after the entry of the judgment of divorce. Lewis v. Pagel, 233 So. 3d 740, 2017 Miss. LEXIS 221 (Miss. 2017).

Since the court of appeals could easily affirm the dismissal of the inmate's petition for writ of habeas corpus on the merits, there was no reason to address the issue of venue; improper venue is a reason to transfer a case, not to dismiss it. Fluker v. State, 200 So. 3d 1148, 2016 Miss. App. LEXIS 504 (Miss. Ct. App. 2016), cert. denied, 214 So. 3d 1058, 2017 Miss. LEXIS 126 (Miss. 2017).

Trial court did not err by dismissing a football player's case without prejudice instead of transferring it to the appropriate venue because Mississippi trial courts lacked the authority to transfer cases to the courts of the other states. Ramsey v. Auburn Univ., 191 So. 3d 102, 2016 Miss. LEXIS 82 (Miss. 2016).

Change of venue should have been granted because the mandatory language of the general venue statute of former Miss. Code Ann. § 11-11-3 controlled over the permissive language of former Miss. Code Ann. § 11-11-11 so that plaintiffs were not entitled to establish venue in their county of residence when a resident defendant was a party to the negligence suit; Miss. R. Civ. P. 82(c) did not establish venue in plaintiffs' county of residence, and venue was determined from the date of original filing so that the dismissal of the resident defendant did not cure or correct improper venue. Crenshaw v. Roman, 942 So. 2d 806, 2006 Miss. LEXIS 655 (Miss. 2006).

Where plaintiffs, numerous former and present employees, sued defendant, a railroad company, for occupational lung disease (all but one plaintiff residing outside of Tunica County, Mississippi, where the suit was filed, and some plaintiffs residing in Tennessee), primarily due to alleged exposure to asbestos, the railroad company successfully argued that joinder was improper because their employment consisted of work in different crafts at different work sites during different periods of time, and there was no transaction or occurrence or "distinct litigable event" common to all plaintiffs. Moreover, all claims against out-of-state defendants based on causes of action that accrued out of state were dismissed based on forum non conveniens, and all other plaintiffs' claims had to be severed from those of the Tunica County resident, including claims of plaintiffs who alleged exposure in Tunica County; all cases that could not be brought individually in Tunica County were to be transferred to a venue in which each plaintiff could have originally brought his or her claim, as required by Miss. R. Civ. P. 82(d). Ill. Cent. R.R. Co. v. Gregory, 912 So. 2d 829, 2005 Miss. LEXIS 297 (Miss. 2005).

Defendant hospital was a Mississippi corporation with its principal place of business in De Soto County and the patient was treated at the hospital in De Soto County when he received the alleged negligent care and treatment from the hospital and doctor; therefore, venue was proper in De Soto County and the circuit court abused its discretion in denying a change of venue from Quitman County to De Soto County. Baptist Mem. Hospital-Desoto, Inc. v. Bailey, 919 So. 2d 1, 2005 Miss. LEXIS 362 (Miss. 2005).

Four out-of-state owners had to be dismissed because if they were not dismissed, the insurer and agents would be forced to travel to California, Georgia and Alabama for discovery, and the cost of the travel would increase the already high cost of litigation; Mississippi had no local interest in trying the out-of-state owners' claims, and the doctrine of forum non conveniens demanded that the out-of-state claims be heard in another forum. State Farm Mut. Auto. Ins. Co. v. Murriel, 904 So. 2d 112, 2004 Miss. LEXIS 1341 (Miss. 2004).

Because the city, a defendant, was wholly situated in Lauderdale County, venue was only proper in Lauderdale County and not in Hinds County; therefore, there was no question that the suit should have been transferred pursuant to Miss. R. Civ. P. 82(d), and there was no discernible basis for the refusal by the trial court to transfer the case. United States Fid. & Guar. Co. v. Moss, 873 So. 2d 76, 2004 Miss. LEXIS 284 (Miss. 2004).

Chancery court erred in dismissing the nurse's appeal, filed in the wrong county, that should have been filed in the chancery court of the county of his residence; the chancery court should have transferred the action to the nurse's resident county and the case could proceed as though originally filed in the resident county. Taylor v. Miss. Bd. of Nursing, 863 So. 2d 1015, 2004 Miss. App. LEXIS 28 (Miss. Ct. App. 2004).

Where plaintiff sued the Mississippi Attorney General to obtain discovery from him for use in an administrative proceeding, as the suit was against him in his official capacity, and under Miss. Const. art. 4, § 101, the seat of state government was in Hinds County, venue was proper there, not in Rankin County, where he lived. Moore v. Bell Chevrolet-Pontiac-Buick-GMC, LLC, 864 So. 2d 939, 2004 Miss. LEXIS 12 (Miss. 2004).

Trial court abused its discretion in denying a motion by a hospital and three physicians to transfer venue in a medical malpractice action because a decedent's heirs had failed to assert a reasonable claim of liability against certain defendants that had been dismissed from the action and because the hospital was a community hospital under the Mississippi Tort Claims Act and was entitled to venue in the county in which its governing body's principal offices were located. Wayne Gen. Hosp. v. Hayes, 2003 Miss. LEXIS 598 (Miss. Nov. 6, 2003), op. withdrawn, 2004 Miss. LEXIS 298 (Miss. Mar. 25, 2004), op. withdrawn, sub. op., 868 So. 2d 997, 2004 Miss. LEXIS 289 (Miss. 2004).

Although an appeal from a workers' compensation award must be filed to the circuit court of the county in which the injury occurred, this requirement is a matter of venue rather than jurisdiction and the appropriate remedy when an appeal is filed with the wrong circuit court is a transfer of venue, rather than a dismissal. Underwood v. McRae's, 811 So. 2d 400, 2001 Miss. App. LEXIS 62 (Miss. Ct. App. 2001).

Chancery court should have transferred divorce action to county which husband still considered his residence, where he still owned a home, and where he voted and had a homestead exemption, rather then retaining jurisdiction and venue in county where husband temporarily resided and was found for service of process. Dunn v. Dunn, 577 So. 2d 378, 1991 Miss. LEXIS 117 (Miss. 1991).

When a defendant is sued in both a paternity and support proceeding, putative father has right to have case heard in county in which he resides, if he is a resident of Mississippi; defendant must timely assert this right via a M.R.C.P. Rule 12(b)(3) motion, and his failure to do so amounts to waiver. Belk v. State Dep't of Public Welfare, 473 So. 2d 447, 1985 Miss. LEXIS 2179 (Miss. 1985).

**Purpose.**

Subdivision (a) of this rule makes clear that nothing in rules of civil procedure alters jurisdiction of any court, nor is power of any court to grant substantive relief changed from what it was before enactment of the rules. State Oil & Gas Bd. v. McGowan, 542 So. 2d 244, 1989 Miss. LEXIS 184 (Miss. 1989).

## RESEARCH REFERENCES

**Law Reviews.**

Litigation in Mississippi Today: A Symposium: Life in Lawsuit Central: An Overview of the Unique Aspects of Mississippi's Civil Justice System, 71 Miss. L.J. 359, Winter, 2002.

Now Open for Business: The Transformation of Mississippi's Legal Climate, 24 Miss. C. L. Rev. 393, Spring, 2005.

State Court Class Actions in Mississippi: Why Adopt Them Now?, 24 Miss. C. L. Rev. 437, Spring, 2005.

## Rule 83. Local court rules.

(a) *When permissible.* — The conference of circuit, chancery and county court judges may hereafter make uniform rules and amendments thereto concerning practice in their respective courts not inconsistent with these rules. Likewise, any court by action of a majority of the judges thereof may hereafter make local rules and amendments thereto concerning practice in their respective courts not inconsistent with these rules. In the event there is no majority, the senior judge shall have an additional vote.

(b) *Procedure for approval.* — All such local rules and uniform rules adopted before being effective must be filed in the Supreme Court of Mississippi for approval. Such motions shall also include a copy of the motion and of the proposed rules in an electronically formatted medium (such as USB Flash Drive or CD-ROM). Upon receipt of such proposed rules and prior to any approval of the same, the Supreme Court may submit them to the Supreme Court Advisory Committee on Rules for advice as to whether any such rules are consistent or in conflict with these rules or any other rules adopted by the Supreme Court.

(c) *Publication.* — All local and uniform rules hereinafter approved by the Supreme Court shall be submitted for publication in the Southern Reporter (Mississippi cases).

**HISTORY: Amended effective March 1, 1989; November 29, 1989; February 1, 1990; March 13, 1991; December 16, 1991; amended March 10, 1994, effective retroactively from and after January 1, 1993; amended October 13, 1995, effective from and after April 14, 1994; amended effective July 1, 2010;**

**Comments repealed and Advisory Committee Notes amended effective July 1, 2014.**

### ADVISORY COMMITTEE HISTORICAL NOTE

Rule 83 was amended March 10, 1994, effective retroactively from and after January 1, 1993, by deleting the word "hereinafter" in Rule 83(b) following the words, "uniform rules"; by deleting Rule 83(c) in its entirety; and by renumbering 83(d) as 83(c). 632-635 So.2d XXIII-XXIV (West Miss.Cases 1994).

### ADVISORY COMMITTEE NOTE

Practitioners may access local rules that have been approved by the Mississippi Supreme Court on the Court's website.

### JUDICIAL DECISIONS

#### ANALYSIS

Child custody.
Procedure for approval.

**Child custody.**

There was no reversible error in awarding a mother temporary physical custody of the daughter because the record contained only an agreed order, the father never raised the issue that the chancery court erred by following an unapproved local rule, and he failed to establish any prejudice since there was substantial evidence to support the chancery court's permanent custody decision. Sanders v. Sanders, 281 So. 3d 1043, 2019 Miss. App. LEXIS 208 (Miss. Ct. App. 2019).

**Procedure for approval.**

Summary judgment for defendant in medical malpractice case was reversed, where parties' affidavits raised triable questions of fact which, but for imposition of improperly promulgated local rule governing summary judgment, would have resulted in jury trial. Koerner v. Crittenden, 635 So. 2d 833, 1994 Miss. LEXIS 184 (Miss. 1994).

### Rule 84. Forms.

The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.

### Rule 85. Title.

These rules shall be known as the Mississippi Rules of Civil Procedure and may be cited as M.R.C.P.; e. g., M.R.C.P. 85.

## APPENDIX A. Forms

[*See* Rule 84]

INTRODUCTORY STATEMENT

1. The following forms are intended for illustration only. They are limited in number. No attempt is made to furnish a manual of forms.

2. Except where otherwise indicated, each pleading, motion, and other paper should have a caption similar to that of the summons, with the designation of

the particular paper substituted for the word "Summons." In the caption of the summons and in the caption of the complaint all parties must be named but in other pleadings and papers it is sufficient to state the name of the first party on each side, with an appropriate indication of other parties. *See* M.R.C.P. 4(b), 7(b)(2), and 10(a).

3. Each pleading, motion, and other paper is to be signed by at least one attorney of record in his individual name (M.R.C.P. 11). The attorney's name is to be followed by his address as indicated in Form 2. In forms following Form 2 the signature and address are not indicated.

4. If a party is not represented by an attorney, the signature and address of the party are required in place of those of the attorney (M.R.C.P. 11).

### Form 1A. Summons.

**(Process Server)**

IN THE _______ COURT OF _______ COUNTY, MISSISSIPPI

A.B., Plaintiff(s)

v. Civil Action, File No. _______

CD., Defendant(s)

**SUMMONS**

THE STATE OF MISSISSIPPI

TO: (Insert the name and address of the person to be served)

**NOTICE TO DEFENDANT(S)**

THE COMPLAINT WHICH IS ATTACHED TO THIS SUMMONS IS IMPORTANT AND YOU MUST TAKE IMMEDIATE ACTION TO PROTECT YOUR RIGHTS.

You are required to mail or hand deliver a copy of a written response to the Complaint to _________________, the attorney for the Plaintiff(s), whose post office address is _________________________ and whose street address is _________________________. Your response must be mailed or delivered within (30) days from the date of delivery of this summons and complaint or a judgment by default will be entered against you for the money or other things demanded in the complaint.

You must also file the original of your response with the Clerk of this Court within a reasonable time afterward.

Issued under my hand and the seal of said Court, this ______________ day of, __________

_________________________

Clerk of_________________________ County, Mississippi

________________________

________________________

(Seal)

## MISSISSIPPI COURT RULES

[This form shall appear on the reverse side of Form 1A. Summons (Process Server)]

## PROOF OF SERVICE–SUMMONS
## (Process Server)

[*Use separate proof of service for each person served*]

______________________________________________

Name of Person or Entity Served

I, the undersigned process server, served the summons and complaint upon the person or entity named above in the manner set forth below (process server must check proper space and provide all additional information that is requested and pertinent to the mode of service used):

___________ FIRST CLASS MAIL AND ACKNOWLEDGEMENT SERVICE. By mailing (by first class mail, postage prepaid), on the date stated in the attached Notice, copies to the person served, together with copies of the form of notice and acknowledgement and return envelope, postage prepaid, addressed to the sender (Attach completed acknowledgement of receipt pursuant to M.R.C.P. Form 1B).

_____________ PERSONAL SERVICE. I personally delivered copies to ___________ on the ___________ day of, ___________, where I found said person(s) in ___________ County of the State of ___________.

_____________ RESIDENCE SERVICE. After exercising reasonable diligence I was unable to deliver copies to said person within ___________ county, (state). I served the summons and complaint on the ___________ day of ___________, ___________, at the usual place of abode of said person by leaving a true copy of the summons and complaint with ___________ who is the ___________ (here insert wife, husband, son, daughter or other person as the case may be), a member of the family of the person served above the age of sixteen years and willing to receive the summons and complaint, and thereafter on the ___________ day of ___________, ___________, I mailed (by first class mail, postage prepaid) copies to the person served at his or her usual place of abode where the copies were left.

_____________ CERTIFIED MAIL SERVICE. By mailing to an address outside Mississippi (by first class mail, postage prepaid, requiring a return receipt) copies to the person served. (Attach signed return receipt or the return envelope marked "Refused.")

At the time of service I was at least 18 years of age and not a party to this action.

Fee for service: $_____________

Process server must list below: [Please print or type]

Name_____________

Social Security No.______________

Address______________

Telephone No.______________

State of______________

County of ______________

Personally appeared before me the undersigned authority in and

for the state and county aforesaid, the within named ______________ who being first by me duly sworn states on oath that the matters and facts set forth in the foregoing "Proof of Service-Summons" are true and correct as therein stated.

________________________________________

Process Server (Signature)

Sworn to and subscribed before me this the ______________ day of ______________.

________________________________________

Notary Public

(Seal) My Commission Expires:________________________________________

**HISTORY: Adopted effective March 1, 1985; amended effective May 2, 1985; amended March 17, 1995.**

### Form 1AA. Summons.

**(Sheriff)**

IN THE ____________ COURT OF ____________ COUNTY, MISSISSIPPI

A.B., Plaintiff(s)

v. Civil Action, File No.______________

C.D., Defendant(s)

**SUMMONS**

THE STATE OF MISSISSIPPI
TO: (Insert the name and address of the person to be served)

**NOTICE TO DEFENDANT(S)**

THE COMPLAINT WHICH IS ATTACHED TO THIS SUMMONS IS IMPORTANT AND YOU MUST TAKE IMMEDIATE ACTION TO PROTECT YOUR RIGHTS.

You are required to mail or hand-deliver a copy of a written response to the Complaint to ______________, the attorney for the Plaintiff(s), whose post office address is ____________, and whose street address is ____________. Your response must be mailed or delivered within (30) days from the date of delivery of this summons and complaint or a judgment by default will be entered against you for the money or other things demanded in the complaint.

You must also file the original of your response with the Clerk of this Court within a reasonable time afterward.

Issued under my hand and the seal of said Court, this ____________ day of____________, ____________.

______________________________

Clerk of ____________ County,
Mississippi

______________________________

______________________________

(Seal)

____________

[This form shall appear on the reverse side of Form 1AA: Summons (Sheriff)]

RECEIVED THIS ____________ DAY OF ____________, ____________.

BY__________________________

SHERIFF

**SHERIFF'S RETURN**

State of Mississippi

County of ____________

( ) I personally delivered copies of the summons and complaint on the _______ day of _______, _______, to: _______.

( ) After exercising reasonable diligence I was unable to deliver copies of the summons and complaint to _______ within _______ County, Mississippi. I served the summons and complaint on the _______ day of _______, _______, at the usual place of abode of said _______, by leaving a true copy of the summons and complaint with _______, who is the (here insert wife, husband, son, daughter or other person so as the case may be), a member of the family of the person served above the age of sixteen years and willing to receive the summons and complaint, and thereafter on the _______ day of _______, _______, I mailed (by first class mail, postage prepaid) copies to the person served at his or her usual place of abode where the copies were left.

( ) I was unable to serve the summons and complaint.

This the ____________ day of ____________, ____________.

______________________________

Sheriff of _____________ County,
Mississippi

By: _____________, Deputy Sheriff

[Note: All summons issued to the sheriff must be returned within thirty days from the day the summons was received by the sheriff pursuant to the requirements of Mississippi Rule of Civil Procedure 4(c)(2)].

**HISTORY: Adopted effective March 1, 1985; amended effective February 1, 1990.**

### Form 1B. Notice and acknowledgement for service by mail.

IN THE COURT OF ___________ COUNTY, MISSISSIPPI

A.B., Plaintiff(s)

(include appropriate designation of other plaintiffs)

v. Civil Action, File No.___________

C.D., Defendant(s)

(include appropriate designation of other defendants)

**NOTICE**

TO: (Insert the name and address of the person to be served)

The enclosed summons and complaint are served pursuant to Rule 4(c)(3) of the Mississippi Rules of Civil Procedure.

You must sign and date the acknowledgement at the bottom of this page. If you are served on behalf of a corporation, unincorporated association (including a partnership), or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority.

If you do not complete and return the form to the sender within 20 days of the date of mailing shown below, you (or the party on whose behalf you are being served) may be required to pay any expenses incurred in serving a summons and complaint.

If you do complete and return this form, you (or the party on whose behalf you are being served) must respond to the complaint within 30 days of the date of your signature. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

I declare that this Notice and Acknowledgement of Receipt of Summons and Complaint was mailed on _____________ (Insert date)

______________________________
Signature

## THIS ACKNOWLEDGEMENT OF RECEIPT OF SUMMONS AND COMPLAINT MUST BE COMPLETED

I acknowledge that I have received a copy of the summons and of the complaint in the above-captioned matter in the State of ____________.

______________________________
Signature

(Relationship to Entity/Authority
to Receive Service of Process)

______________________________
Date of Signature

State of______________
County of______________

Personally appeared before me, the undersigned authority in and for the State and County aforesaid, the above named ______________, who solemnly and truly declared and affirmed before me that the matters and facts set forth in the foregoing Acknowledgement of Receipt of Summons and Complaint are true and correct as therein stated.

Affirmed and subscribed before me this ______________ day of ______________, ______________.

______________________________
Notary Public
My Commission Expires ____________

(Seal)

**HISTORY: Adopted effective March 1, 1985; amended effective May 2, 1985; amended March 17, 1995.**

**Form 1C. Summons by publication.**

IN THE COURT OF __________ COUNTY, MISSISSIPPI

A.B., Plaintiff(s)

(It is sufficient here to state the name of the first plaintiff with an appropriate designation of other plaintiffs.)

v. Civil Action, File No.____________

CD., Defendant(s)

(It is sufficient here to state the name of the first defendant with an appropriate designation of other defendants.)

## SUMMONS

THE STATE OF MISSISSIPPI

TO: (Insert name of the person(s) to be served)

You have been made a Defendant in the suit filed in this Court by (Insert name of all Plaintiffs), Plaintiff(s), seeking (Insert a brief description of the relief being sought). Defendants other than you in this action are (Insert names of all defendants other than the person or persons who are the subject of this summons)

You are required to mail or hand deliver a written response to the Complaint filed against you in this action to ____________, Attorney for Plaintiff(s), whose post office address is ____________ and whose street address is ____________

YOUR RESPONSE MUST BE MAILED OR DELIVERED NOT LATER THAN THIRTY DAYS AFTER THE ____________ DAY OF ____________, ____________, WHICH IS THE DATE OF THE FIRST PUBLICATION OF THIS SUMMONS. IF YOUR RESPONSE IS NOT SO MAILED OR DELIVERED, A JUDGMENT BY DEFAULT WILL BE ENTERED AGAINST YOU FOR THE MONEY OR OTHER RELIEF DEMANDED IN THE COMPLAINT.

You must also file the original of your Response with the Clerk of this Court within a reasonable time afterward.

Issued under my hand and the seal of said Court, this ____________ day of ____________, ____________.

______________________________

Clerk of ____________ County,
Mississippi

______________________________

______________________________

(Seal)

**HISTORY: Adopted effective March 1, 1985; amended effective May 2, 1985.**

**Form 1D. Rule 81 Summons.**

**(Sheriff or Process Server)**

IN THE COURT OF __________ COUNTY, MISSISSIPPI

A. B., Plaintiff(s)

v. Civil Action, File No.____________

C. D., Defendant(s)

## SUMMONS

THE STATE OF MISSISSIPPI
TO: (Insert the name)

## NOTICE TO DEFENDANT(S)

**THE COMPLAINT OR PETITION WHICH IS ATTACHED TO THIS SUMMONS IS IMPORTANT AND YOU MUST TAKE IMMEDIATE ACTION TO PROTECT YOUR RIGHTS.**

You are summoned to appear and defend against said complaint orpetition at ______ O'clock ________.M. on the ______________ day of ______________, in the courtroom of the ______________ County Courthouse at ______________, Mississippi, and in case of your failure to appear and defend a judgment will be entered against you for the money or other things demanded in the complaint or petition.

You are not required to file an answer or other pleading but you may do so if you desire.

Issued under my hand and the seal of said Court, this ______________ day of ______________, ______________

______________________________
(Seal) Clerk of ______________ County,
Mississippi

(Note: All summons issued to the sheriff must be returned prior to the time the defendant is summoned to appear.)

**HISTORY: Adopted effective January 10, 1986.**

### Form 1DD. Rule 81 Summons.

**(Summons by Publication)**

IN THE COURT OF ____________ COUNTY, MISSISSIPPI

A.B., Plaintiff(s)

(It is sufficient here to state the name of the first plaintiff with an appropriate designation of other plaintiffs.)

v. Civil Action, File No. ______________

C.D., Defendant(s)

(It is sufficient here to state the name of the first defendant with an appropriate designation of other defendants.)

## SUMMONS

THE STATE OF MISSISSIPPI
TO: (Insert name of the person(s) to be served.)

You have been made a Defendant in the suit filed in this Court by ______________, (Insert name of all Plaintiffs) Plaintiff(s) seeking ______________ (Insert a brief description of the relief being sought). Defendants other than you in this action are ______________ (Insert names of all defendants other than the person or persons who are the subject of this summons).

You are summoned to appear and defend against the complaint or petition filed against you in this action at ______________ o'clock ______________. M. on the ______________ day of ______________, ______________, in the courtroom of the ______________ County Courthouse at ______________, Mississippi, and in case of your failure to appear and defend, a judgment will be entered against you for the money or other things demanded in the complaint or petition.

You are not required to file an answer or other pleading but you may do so if you desire.

Issued under my hand and the seal of said Court, this ______________ day of ______________, ______________,

________________________________

Clerk of County,
Mississippi

(Seal)

**Form 1E. Waiver of process.**

IN THE COURT OF ____________ COUNTY, MISSISSIPPI

A.B. Plaintiff

v. Civil Action, File No. ______________

C.D. Defendant

## WAIVER OF PROCESS

The undersigned ______________ (name), whose post office address is ______________ and whose street address is ______________, does hereby waive the service of summons and (designate any pleading on which service is being waived) ______________ upon myself in this cause.

In executing this document I certify that I am not an unmarried minor and am not mentally incompetent.

(In addition the person executing the waiver may add any or all of the following to the document:)

[Furthermore, by the filing of this document, I enter my appearance in this cause]

[just as if I had been served more than 30 days prior to this date]

[and agree that this action may be heard and disposed of without further notice to me]

[and join in this action and in the prayer for relief]

This the ____________ day of ____________, 20_______.

____________________________

Name

STATE OF ____________)
COUNTY OF ____________)

Personally appeared before me, the undersigned authority for the jurisdiction aforesaid, the within named ____________ who acknowledged that he signed and delivered the above and foregoing instrument on the day and year therein mentioned.

Given under my hand this the ____________ day of ____________,
20 _____

____________________________

Notary Public

My Commission Expires: ____________

[In lieu of the above acknowledgment the following oath may be used:]

STATE OF ____________
COUNTY OF ____________

Personally appeared before me the undersigned authority in and for the jurisdiction aforesaid the within named ____________ who, being first by me duly sworn, states on oath that the matters and facts set forth in the foregoing instrument are true and correct as therein stated.

____________________________

Name

Sworn to and subscribed before me this the _______ day of _______
20 _______

__________

Notary Public

My Commission Expires: ____________

**HISTORY: Adopted effective February 1, 1990; amended effective July 1, 2009, to delete convicted felony exception.**

**Form 2. Complaint on a promissory note.**

1. Defendant on or about ____________, ____________, executed and

delivered to Plaintiff a promissory note [in the following words and figures: (here set out the note verbatim)]; [a copy of which is hereto annexed as Exhibit A]; [whereby defendant promised to pay to plaintiff or order on ____________, ____________, the sum of ____________ dollars with interest thereon at the rate of ____________ percent per annum] [and agreed to pay a reasonable attorney's fee for collection].
2. Defendant owes to plaintiff [the amount of said note] [$____________ that is due on said note] and interest.

Wherefore plaintiff demands judgment against defendant for the sum of ____________ dollars, interest, attorney's fee, and costs.

____________________________________
Attorney for Plaintiff

____________________________________
____________________________________
Address

### Form 3. Complaint on covenant or agreement.

1. On or about the ____________ day of ____________, ____________, plaintiff and defendant entered into agreement by which defendant promised [here set out agreement in general terms].
2. Defendant breached the agreement by [here set out breaches in general terms].
Wherefore plaintiff demands judgment against defendant in the sum of ____________ dollars, interest and costs.

### Form 4. Complaint for specific performance.

1. This is an action for specific performance of a contract to convey real property in ____________ County, Mississippi.
2. On ____________, ____________, plaintiff and defendant entered into a written contract, a copy being attached and marked Exhibit A
3. Plaintiff timely tendered the purchase price to defendant and requested a conveyance of the real property described in the contract but defendant refused to accept the tender or to make the conveyance
4. Plaintiff offers to pay the purchase price.
Wherefore plaintiff demands judgment that defendant be required to perform specifically the contract and for damages.

### Form 5. Complaint on an open account.

1. Defendant owes plaintiff ______________ dollars due by open account.

Wherefore plaintiff demands judgment against defendant in the sum of ______________ dollars, interest and costs.

### Form 6. Complaint on account stated.

1. Defendant owes plaintiff ____________ dollars on an account stated between

the plaintiff and defendant on the ____________ day of ____________, ____________.

Wherefore plaintiff demands judgment against defendant in the sum of ____________ dollars, interest and costs.

### Form 7. Complaint for goods sold and delivered.

1. Defendant owes plaintiff ______________ dollars for goods sold and delivered by plaintiff to defendant between the ______________ day of ______________ and the ______________ day of ______________, ______________.

Wherefore plaintiff demands judgment against defendant in the sum of ______________ dollars, interest and costs.

### Form 8. Complaint for work and labor done.

1. Defendant owes plaintiff ______________ dollars for work and labor done for the defendant by the plaintiff on the ______________ day of ______________, at defendant's request.

Wherefore plaintiff demands judgment against defendant in the sum of ______________ dollars, interest and costs.

### Form 9. Complaint for money lent.

1. Defendant owes plaintiff ______________ dollars for money lent by plaintiff to defendant on or about the ______________ day of ______________, ______________.

Wherefore plaintiff demands judgment against defendant in the sum of ______________ dollars, interest and costs.

### Form 10. Complaint for money paid by mistake.

1. Defendant owes plaintiff ______________ dollars for money paid by plaintiff to defendant by mistake on or about the ______________ day of ______________. ______________, under the following circumstances:

[here briefly state the circumstances].
Wherefore plaintiff demands judgment against defendant in the sum of ______________ dollars, interest and costs.

### Form 11. Complaint for money had and received.

1. Defendant owes plaintiff ______________ dollars for money had and received from one on or about the ______________ day of ______________, ______________, to be paid by defendant to plaintiff.

Wherefore plaintiff demands judgment against defendant in the sum of ______________ dollars, interest and costs.

### Form 12. Complaint for money paid by plaintiff for defendant.

1. Defendant owes plaintiff ______________ dollars because of money paid by

the plaintiff for the defendant on or about the __________ day of __________, __________, at defendant's request.

Wherefore plaintiff demands judgment against defendant in the sum of __________ dollars, interest and costs.

### Form 13. Complaint on a policy of life insurance.

1. On or about the __________ day of __________, __________, defendant issued a policy whereby the defendant insured the life of __________ who died on the __________ day of __________, __________, of which the defendant has had notice.

2. As a result, the amount of the policy is now due and the plaintiff is the beneficiary of the proceeds of the policy.

Wherefore plaintiff demands judgment against defendant in the sum of __________ dollars, interest and costs.

### Form 14. Complaint on a policy of fire insurance.

1. On or about the __________ day of __________. __________, defendant insured plaintiffs dwelling house (or other property, as the case may be) against loss or injury by fire and other perils in a policy of insurance, for the term of __________ years.

2. The house (or other property) was wholly destroyed (or was damaged) by fire on the __________ day of __________, __________, of which the defendant has had notice.

Wherefore plaintiff demands judgment against defendant in the sum of __________ dollars, interest and costs.

### Form 15. Complaint for negligence or wantonness.

1. On or about the __________ day of __________, __________, upon a public highway [state the name of the street] in [City]; __________ County, Mississippi, the defendant negligently [or wantonly] caused or allowed a motor vehicle to collide with a motor vehicle occupied by the plaintiff.

2. As a proximate consequence of the defendant's said negligence [or wantonness], the plaintiff was caused to suffer the following injuries and damages: [enumerate injuries and damages].

Wherefore plaintiff demands judgment against defendant in the sum of __________ dollars and costs.

### Form 16. Complaint for assault and battery.

1. On or about the __________ day of __________, __________, the defendant committed an assault and battery on the plaintiff.

Wherefore plaintiff demands judgment against defendant in the sum of __________ dollars and costs.

### Form 17. Complaint for false imprisonment.

1. On or about the ______________ day of ______________, ______________, the defendant unlawfully arrested and imprisoned the plaintiff (or caused the plaintiff to be arrested and imprisoned as the case may be) on a charge of larceny (or as the case may be) for ______________ days.

Wherefore plaintiff demands judgment against defendant in the sum of ______________ dollars and costs.

### Form 18. Complaint for malicious prosecution.

1. On or about the ______________ day of ______________, ______________, defendant, maliciously, and without probable cause therefor, caused the plaintiff to be arrested under a warrant issued by ______________, a justice court judge, on a charge of (as the case may be).

2. Before the commencement of this action, this charge was judicially investigated, the prosecution ended, and the plaintiff discharged.

Wherefore plaintiff demands judgment against defendant in the sum of ______________ dollars and costs.

### Form 19. Complaint for fraud.

1. On or about the ______________ day of ______________, ______________, defendant and plaintiff were negotiating concerning the purchase by plaintiff from defendant of the following described property:

[describe property].

2. At that time defendant represented to plaintiff that [here set out representations with particularity].

3. The representations made by defendant were false [and defendant knew that they were false] [and defendant, without knowledge of the true facts, recklessly misrepresented them] [and were made with the intention that plaintiff should rely upon them].

4. Plaintiff believed the representations and in reliance upon them purchased the property.

Wherefore plaintiff demands judgment against defendant in the sum of ______________ dollars and costs.

### Form 20. Complaint on a warranty.

1. On or about the ______________ day of ______________, ______________, defendant sold a (as the case may be) to the plaintiff on which the defendant gave warranty as shown by Exhibit A which is attached hereto [or insert the substance of the warranty].

2. In fact [here state the breach in general terms].

### Form 21. Complaint for conversion.

1. On or about the ____________ day of ____________, ____________, defendant converted to his own use [here describe in general terms the property allegedly converted] of the ____________ Company of the value of ____________ dollars, the property of plaintiff.

Wherefore plaintiff demands judgment against defendant in the sum of ____________ dollars, interest and costs.

**Editor's Note** — Form 21 contains a paragraph designated 1. but no other designated paragraphs. The form appears as adopted effective January 1, 1982.

### Form 22. Motion to dismiss pursuant to Rule 12(b).

The defendant moves that the Court proceed as follows:

1. To dismiss the complaint for lack of subject matter jurisdiction in that it is [an action seeking the reformation of a written instrument (or as the case may be)] and plaintiff has a full and adequate remedy [at law] [in equity].

2. To dismiss the complaint for lack of jurisdiction over the person in that [the defendant is a corporation organized under the laws of the State of ____________ and was not and is not subject to service of process within the State of Mississippi (or as the case may be)].

3. To dismiss the action on the ground of improper venue in that defendant is a domestic corporation domiciled in ____________ County, which is not the county in which [this action is brought] [the cause of action occurred or accrued].

4. To dismiss the complaint because of insufficiency of process in that the summons served on the defendant [was not signed by the clerk] [does not contain the names and addresses of the parties] [is directed to a person other than the defendant named in the complaint [did not have attached a copy of the complaint] (or as the case may be).

5. To dismiss the action because of insufficiency of service of process in that the summons served on defendant [was sent by ordinary mail rather than by certified mail] [was served by a process server who is not sheriff of the county in which it was served nor a person eighteen years or older] [was served on a member of defendant's family who is less than sixteen years of age] [was served on ____________, who is neither an officer nor the registered agent of the defendant corporation] (or as the case may be).

6. To dismiss the complaint for failure to state a claim upon which relief can be granted.

7. To dismiss the complaint for failure to join ____________, a [person] [corporation] necessary for just adjudication because [he] [it] is this defendant's [co-tenant, lessee, royalty holder, assignee (or as the case may be)] whose rights are involved in this action.

## NOTICE OF MOTION

TO:

______________________________
Attorney for Plaintiff

______________________________

______________________________
Address

Please take notice that the undersigned will bring the above motion on for hearing before this court at the _____________ County Courthouse in the City of _____________, Mississippi, on the _____________ day of _____________, _____________, at _____________ o'clock a. m./p. m. that day or as soon thereafter as counsel can be heard.

______________________________

Attorney for Defendant

## CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of this Motion to Dismiss and Notice of same on J.K, Counsel of Record for the Plaintiff, A.B., by placing a copy of same in the United States mail, postage prepaid, addressed to his regular business mailing address.
This the _____________ day of _____________, _____________.

______________________________
Attorney for Defendant

______________________________

______________________________
Address

### Form 23. Answer presenting defenses under Rule 12(b).

### First Defense

### [Improper Venue]

The action is brought in the wrong county because the defendant is a domestic corporation domiciled in _____________ County, which is not the county in which this action is brought or in which the cause of action occurred or accrued.

### Second Defense

### [Admission and Denial]

Defendant admits the allegations contained in paragraphs 1 and 4 of the complaint; alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the complaint; and denies each and every other allegation contained in the complaint.

### Third Defense

### [Statute of Limitations]

The right of action set forth in the complaint did not accrue within ____________ years next before the commencement of this action.

### Counter-claim

Here set forth any claim as a counter-claim in the manner in which a claim is pleaded in a complaint.

### Cross-Claim against Defendant M. N.

Here set forth the claim constituting a cross-claim against defendant M. N. in the manner in which a claim is pleaded in a complaint.

## Form 24. Motion to bring in third-party defendant.

Defendant moves for leave, as third-party plaintiff, to cause to be served upon E. F. a summons and third-party complaint, copies of which are attached as Exhibit A.

## Form 25. Third-party complaint.

1. Plaintiff, A. B., has filed against defendant, C. D., a complaint, a copy of which is attached as Exhibit A.

2. If the defendant, C. D., is liable to the plaintiff on the occasion complained of in the complaint, it is liable because [here state the grounds upon which C. D., is entitled to recover from E. F., all or part of what A. B. may recover from C. D. The statement should be framed as in an original complaint.]

Wherefore, C. D. demands judgment against third-party defendant E. F. for all sums that may be adjudged against defendant C. D. in favor of plaintiff, A. B.

## Form 26. Motion to intervene as a defendant under Rule 24.

[Based upon the Complaint, Form 15]

IN THE CIRCUIT COURT OF __________ COUNTY, MISSISSIPPI

A.B., Plaintiff
v. Civil Action, File No.____________
C.D., Defendant
E.F., Applicant for Intervention

### MOTION TO INTERVENE AS A DEFENDANT

E. F. moves to intervene as a defendant in this action to assert the defenses set forth in his proposed answer, a copy of which is attached hereto, on the ground that he is the owner of the automobile alleged in the Complaint to have collided with the vehicle occupied by the plaintiff and as such as a defense to plaintiffs claim presenting both questions of law and of fact which are common to the main action.

______________________________
Attorney for E. F.
Applicant for Intervention
______________________________
______________________________
Address

NOTICE OF MOTION

[Contents the same as in Form 22]

IN THE CIRCUIT COURT OF __________ COUNTY, MISSISSIPPI

A.B., Plaintiff
v. Civil Action, File No.____________
C.D., Defendant
E.F., Intervener

## INTERVENER'S ANSWER

### First Defense

Intervener denies the allegations stated in paragraphs 1 and 2 of the Complaint in so far as they assert negligence on the part of the defendant.

### Second Defense

Intervener asserts that at the time of the collision stated in the Complaint the plaintiff was operating his vehicle under the influence of alcohol and in a wantonly negligent manner.

### Third Defense

Intervener asserts that at the time of the collision stated in the Complaint defendant was operating intervener's vehicle without intervener's authority, permission, or license.

### Form 27. Motion to drop defendant or for severance of claims.

Defendant, ____________, moves the court for an order dropping him as a party defendant herein or in the alternative for an order severing the claim asserted against him by plaintiff herein from the claim asserted against defendant, ____________, on the grounds that:

1. The alleged claim asserted against defendant, ____________, does not arise from the same transaction, occurrence, or series of transactions or occurrences, as the claim asserted against defendant, ____________; nor do the two alleged claims involve questions of law or fact common to both defendants.

2. The moving defendant will be put to undue expense and embarrassment if he is required to proceed with his defense without a severance of the issues.

3. The trial of action will be embarrassing and the jury confused by a joint trial of the claims asserted against the two defendants herein, all to the prejudice of the moving defendant.

### Form 28. Motion by defendant for severance of claims of several plaintiffs.

Defendant moves the court for an order severing the claims asserted by the respective plaintiffs herein against the defendant, on the grounds that:

1. The alleged claim or claims of each plaintiff differ in material and essential elements and respects from the alleged claim or claims of each of the other plaintiffs.

2. The alleged claims of the plaintiffs do not arise out of the same transaction, occurrence, or series of transactions or occurrences, and do not involve questions of law or fact common to all the plaintiffs.

3. The joining in one action and one complaint of the alleged claims of the plaintiffs is prejudicial to the defendant and injures his substantial rights and will embarrass and delay the trial.

### Form 29. Motion by plaintiff to add defendant.

Plaintiff moves the court for an order making ______________ a party defendant herein and directing the issuance and service of process on him, and for grounds therefor shows:

1. This is an action for [state briefly the nature of the claim for relief].

2. [State facts showing that the proposed additional defendant is an indispensable, necessary or proper party defendant].

3. The said ______________ is a citizen and resident of ______________, is subject to the jurisdiction of this court as to both service of process and venue and can be made a party defendant herein without depriving the court of jurisdiction.

### Form 30. Motion by defendant to bring in additional defendant.

Defendant moves the court for an order making ______________ a party defendant herein; directing that process be issued and served upon defendant ______________; and requiring plaintiff to serve and file an amended complaint, and for grounds therefor shows:

1. This is an action for [state briefly the nature of the claim for relief].

2. [State facts showing that a person needed for just adjudication has not been joined as a defendant].

3. The said ______________ is a citizen and a resident of ______________, is subject to the jurisdiction of this court as to both service of process and venue, and can be made a party defendant herein without depriving the court of jurisdiction.

### Form 31. Motion by defendant to add additional plaintiff.

Defendant moves the court for an order directing that ______________ be made a party plaintiff herein, or in the alternative, if ____________ refuses to join as a plaintiff, he be made a defendant as provided by Rule 19(a), and for grounds therefor shows:

1. This is an action for [state briefly the nature of the claim for relief].

2. [State facts showing that a person needed for just adjudication has not been joined as a plaintiff].

3. The said ____________ is a citizen and resident of ____________; he is subject to the jurisdiction of this court as to service of process and venue; and he can be made a party plaintiff (or, as the case may be, a party defendant) herein without depriving the court of jurisdiction.

### Form 32. Answer to complaint set forth in Form 11 with counter-claim for interpleader.

#### Defense

Defendant admits the allegations stated in paragraph 1 of the complaint and denies the allegations stated in paragraph 2 to the extent set forth in the counter-claim herein.

#### Counter-claim for Interpleader

1. Defendant received the sum of ____________ dollars as a deposit from E. F.

2. Plaintiff has demanded the payment of such deposit to him by virtue of an assignment of same which he claims to have received from E. F.

3. E. F. has notified the defendant that he claims such deposit, that the purported assignment is not valid, and that he holds the defendant responsible for the deposit.

Wherefore defendant demands:

(1) That the court order E. F. to be made a party defendant to respond to the complaint and to this counter-claim.

(2) That the court order the plaintiff or E. F. to interplead their respective claims.

(3) That the court adjudge whether the plaintiff or E. F. is entitled to the sum of money.

(4) That the court discharge defendant from all liability in the action except to the person it shall adjudge entitled to the sum of money.

(5) That the court award to the defendant its costs and attorney's fees.

### Form 33. Plaintiff's motion for substitution — Deceased party defendant.

Plaintiff shows to the court that ____________, the above-named defendant, died intestate (or testate) on or about the ______________ day of ______________, ______________; that letters of administration upon the estate of the said were issued on the ______________ day of ______________, ______________, to ______________ as administrator by the ______________ Court of the State of Mississippi (or, that ______________ was duly appointed executor of the last will of ______________ by the ______________ Court of the State of Mississippi and qualified as such executor on the ______________ day of ______________, ______________): and this is an action for [state briefly nature of action] and the claim of plaintiff was not extinguished by the death of defendant.

Wherefore plaintiff moves the court for an order substituting ______________, administrator (or, as the case may be, executor) of the estate of ______________, deceased, as party defendant herein.

### Form 34. Pre-trial order.

1. Counsel.

Appearing for the plaintiff: ____________________________

Appearing for the defendant: ____________________________

2. Nature of the case. [Count 1 of] the complaint alleges a cause of action based upon [negligence, breach of warranty, breach of oral contract, etc.].

3. Positions of the parties.

a. Plaintiff contends: [concise statement of factual and legal contentions].

b. Defendant contends: [concise statement of factual and legal contentions].

4. Stipulations and admissions.

5. Discovery. Discovery proceedings have been completed except as follows: [specify additional discovery proceedings required].

6. Additional Orders: [as required by the particular case].

Ordered that the above allowances and agreements are binding on all parties in the above-styled cause unless this order be hereafter modified by the Court for good cause and to prevent manifest injustice.

Done this ______________ day of ______________, ______________.

________________________________

Judge

### Form 35. Motion for judgment notwithstanding the verdict, or in the alternative, for new trial.

Defendant [Plaintiff] moves the Court to set aside the verdict and judgment entered in the above-styled action on ______________, ______________, and to enter judgment in favor of the Defendant [Plaintiff] in accordance with the motion for directed verdict, or, in the alternative, Defendant [Plaintiff] moves the court to set aside the verdict and grant Defendant [Plaintiff] a new trial on the following grounds, to-wit:

1.

2. [Herein state grounds]

3.

**Form 36. Application to clerk for entry of default and supporting affidavit.**

The clerk is requested to enter default against the defendant in the above entitled action for failure to plead, answer or otherwise defend as set out in the affidavit hereto annexed.

______________________________

Attorney for Plaintiff

State of Mississippi______________

County of______________

______________, being duly sworn, deposed and says:

1. That he is attorney of record of the plaintiff, and has personal knowledge of the facts set forth in this affidavit.
2. That the defendant was duly served with a copy of the summons, together with a copy of plaintiffs complaint, on the ______________ day of ______________, ______________.

3. That more than 30 days have elapsed since the date on which the said defendant was served with summons and a copy of the complaint.

4. That the defendant has failed to answer or otherwise defend as to plaintiffs complaint, or serve a copy of any answer or other defense which he might have upon the undersigned attorney of record for the plaintiff.

5. That this affidavit is executed by affiant herein in accordance with Rule 55(a) of the Mississippi Rules of Civil Procedure, for the purpose of enabling the plaintiff to obtain an entry of default against the defendant, for his failure to answer or otherwise defend as to the plaintiffs complaint.

______________________________

Attorney for Plaintiff

Sworn to and subscribed before me this the ______________ day of ______________, ______________.

______________________________

Notary Public

**Form 37. Docket of entry of default.**

Default entered against defendant _____________ this _____________ day of _____________, _____________.

**Form 38. Default judgment entered by court.**

This action came on for hearing on the motion of the plaintiff for a default judgment pursuant to Rule 55(b)(2) of the Mississippi Rules of Civil Procedure, and the defendant having been duly served with the summons and complaint and not being an infant or an unrepresented incompetent person and having failed to plead or otherwise defend, and his default having been duly entered and the defendant having taken no proceedings since such default was entered,

It is Ordered and Adjudged that [here set forth relief granted to plaintiff].

This _____________ day of _____________, _____________.

_______________________________
Judge

## APPENDIX B. Statutes Affected

*[DELETED IN ITS ENTIRETY.]*
[Effective June 24, 1992.]

## APPENDIX C. Time Table for Proceedings Under the Mississippi Rules of Civil Procedure

*[DELETED IN ITS ENTIRETY.]*
[Effective June 24, 1992.]

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# MISSISSIPPI RULES OF CRIMINAL PROCEDURE

### ADOPTED EFFECTIVE JULY 1, 2017

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# RULE 1. GENERAL PROVISIONS

## Rule 1.1. Scope.

These are the Mississippi Rules of Criminal Procedure and shall govern the procedure in all criminal proceedings, from arrest through post-trial motions, in all trial courts within the State of Mississippi, except as otherwise provided in these Rules. They may be cited as MRCrP; e.g., MRCrP 1.

**HISTORY: Effective July 1, 2017.**

### COMMENT

The Mississippi Rules of Criminal Procedure are designed to provide comprehensive and uniform practice and procedure for criminal proceedings in all Mississippi trial courts, including justice courts, municipal courts, county courts, and circuit courts, except as otherwise provided. They replace practice under formerly applicable provisions of the Uniform Rules of Circuit and County Court and the Uniform Rules of Procedure for Justice Court.

"It is now well established that 'the constitutional concept of separation of powers dictates that it is within the inherent power of this Court to promulgate procedural rules to govern judicial matters.' Thus, when a statute conflicts with this Court's rules regarding matters of judicial procedure, our rules control." *State v. Delaney*, 52 So. 3d 348, 351 (Miss. 2011) (internal citations omitted). (Effective July 1, 2017.)

## Rule 1.2. Purpose and construction.

These Rules are to be interpreted to provide for the just and speedy determination of criminal proceedings, to secure simplicity in procedure and fairness in administration, to eliminate unjustifiable delay and expense, and to protect the rights of individuals while protecting the public.

**HISTORY: Effective July 1, 2017.**

## Rule 1.3. Computation and enlargement of time.

(a) *Computation.* — In computing any period of time prescribed or allowed by these Rules, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, as defined by statute, or any other day when the court clerk's office is in fact closed, whether with or without legal authority, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, a legal holiday, or any other day when the court clerk's office is in fact closed. In the event any legal holiday falls on a Sunday, the next day shall be a legal holiday. When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

(b) *Enlargement.* — When by these Rules or by order of court an act is required or allowed to be done at or within a specified time, the court may at any time:

(1) with or without motion, and for cause shown, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or

(2) upon motion made after the expiration of the specified period, permit the act to be done where failure to act was the result of excusable neglect or good cause shown.

But a court may not, except as provided elsewhere in these Rules, extend the time for making a motion for directed verdict, a motion for new trial, a motion to vacate judgment, or for taking an appeal.

(c) *Unaffected by expiration of term.* — The doing of any act or the taking of any action permitted by these Rules is not affected or limited by the existence or expiration of a term of court. However, a criminal sentence cannot be modified, altered, or vacated after the end of the term of court in which the defendant was sentenced, except as provided by law.

(d) *Motions regarding computation and enlargement of time.* — A written motion, other than one which may be heard *ex parte*, and notice of the hearing thereof, shall be served not later than five (5) days before the time fixed for the hearing, unless a different period is fixed by these Rules or by order of the court. Such an order may, for cause shown, be made on *ex parte* application. Service shall be accomplished in accordance with Rule 1.7.

(e) *Additional time after service by mail.* — Whenever a party has the right or is required to do some act or take some action within a prescribed period after the service of a notice or other paper and the notice or paper is served by mail, three (3) days shall be added to the prescribed period.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 1.3 is derived from Rule 6 of the Mississippi Rules of Civil Procedure.

Section (b) provides the court with wide discretion to enlarge various time periods both before and after the actual termination of the allotted time, with the notable exceptions of motions for directed verdict (Rule 21), motions for new trial (Rule 25.1), motions to vacate judgment (Rule 25.2), or appeals (Rules 29 and 30). Importantly, such enlargement is to be made only for cause shown. If the application for additional time is made before the period expires, the request may be made *ex parte*; if it is made after the expiration of the period, notice of the motion shall be given to other parties and the only cause for which extra time can be allowed is "excusable neglect or good cause shown."

Section (c) does not abolish court terms. This Rule merely provides greater flexibility to the courts in attending the myriad functions they must perform, many of which were previously possible only during term time. The Rule is also consistent with provisions elsewhere herein that prescribe a specific number of days for taking certain actions rather than linking time expirations to the opening day, final day, or any other day of a term of court. The rule recognizes that judges do not have the authority to modify, alter, or vacate a criminal sentence after the end of the term of court during which the sentence was given, except as otherwise provided by law. *See Creel v. State*, 944 So. 2d 891 (Miss. 2006); *Miss. Comm'n of Jud. Performance v. Russell*, 691 So. 2d 929 (Miss. 1997). (Effective July 1, 2017)

**Cross References** — Computation and enlargement of time in civil proceedings, see M.R.C.P. 6.

Computation and extension of time in appellate proceedings, see M.R.A.P. 26.

## Rule 1.4. Definitions.

Unless otherwise defined in a particular Rule, whenever they appear in these Rules, the terms below shall have the following meanings:

(a) "Bill of information" means a written statement charging the defendant(s) named therein with the commission of an indictable offense, made on oath, signed, and presented to the court by the district attorney, without action by the grand jury.

(b) "Capias" means a writ commanding law enforcement officers to take into custody a defendant for whom a grand jury has returned an indictment.

(c) "Charge" means a charging affidavit, indictment, or bill of information.

(d) "Charging affidavit" means a written statement made upon oath before a judge, clerk of the court, or other officer authorized by law to administer oaths, setting forth essential underlying facts and circumstances constituting an offense and alleging that the defendant committed the offense.

(e) "Indictment" is a written statement charging the defendant(s) named therein with the commission of an indictable offense, presented to the court by a grand jury, endorsed "A True Bill," and signed by the foreperson. It includes a true bill from the grand jury or a bill of information in lieu thereof.

(f) "Offense" means conduct for which a fine, a sentence to a term of imprisonment, or the death penalty may be imposed pursuant to any law of this State or by any law or ordinance of a political subdivision of this State.

(g) "*Pro se*" means a party who represents himself or herself and is not represented by an attorney.

(h) "Prosecuting Attorney" means any municipal or county attorney, district attorney, attorney general, or other attorney(s) acting under their specific direction and authority, or such other person appointed or charged by law with the responsibility for prosecuting an offense.

(i) "Search warrant" means a written order based upon a finding of probable cause, in the name of the State, county, or municipality, signed by a judge authorized by law to issue search warrants, directed to any authorized law enforcement officer, commanding the officer to search for and seize a person and/or thing.

(j) "Sentencing Court" includes the court which imposes the sentence and any court to which jurisdiction has been transferred.

(k) "Summons" means a written order notifying an individual that he or she has been charged with an offense and directing the individual to appear in court to answer the charge.

**HISTORY: Effective July 1, 2017.**

## Rule 1.5. Information on each pleading and motion.

(a) *Pleadings filed by counsel.* — All pleadings, motions, or other applications to the court shall bear the name, address, bar association number, email address, and office phone number of the attorney who will try the case and, if different from the attorney who will try the case, the name, address, bar association number, email address, and office phone number of the attorney who will be prepared to argue the pleading, motion or other application.

(b) *Pleadings filed pro se.* — All pleadings, motions, or other applications to the court shall bear the name, address, email address, and phone number of the party proceeding *pro se*.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 1.5(a) continues practice under former Rule 1.05 of the Uniform Rules of Circuit and County Court. Rule 1.5(b) addresses *pro se* pleadings. *See* Miss. Const. art. 3, § 26 ("[i]n all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both"). (Effective July 1, 2017.)

### Rule 1.6. Size of paper.

All papers filed in any proceeding governed by these Rules shall be on paper measuring eight and one-half (8½) inches by eleven (11) inches. Notwithstanding the foregoing, exhibits or attachments to pleadings may be folded and fastened to pages of the specified size. An exhibit or attachment not in compliance with the foregoing provisions may be filed only if it appears that compliance is not reasonably practicable.

**HISTORY: Effective July 1, 2017.**

### Rule 1.7. Service and filing of pleadings and certificate of service.

(a) *Service: when required.* — Unless otherwise ordered by the court, any person filing a pleading, motion, or application to the court, except the initial pleading or an indictment, shall:

(1) serve a correct copy of that pleading, motion, or application to the court on all attorneys of record in the case, and any unrepresented defendant, pursuant to section (b) of this rule; and

(2) file with the court an original certificate of service certifying that a correct copy of the pleading, motion, or application to the court has been served on all attorneys of record in the case, and on any unrepresented defendant, pursuant to section (b) of this rule; stating the manner of service; and identifying on whom it was served.

(b) *Service how made.* —

(1) *Generally.* — Whenever under these Rules service is required or permitted to be made upon a party who is represented by an attorney of record in the proceedings, the service shall be made upon such attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by:

(A) personally handing a copy to the attorney/party;

(B) transmitting it to the attorney/party by electronic means; or

(C) mailing it to the attorney/party at the last known address.

Service by electronic means is complete when the electronic equipment being used by the attorney or party being served acknowledges receipt of the material. If the equipment used by the attorney or party being served does not automatically acknowledge the transmission, service is not complete until the sending party obtains an acknowledgment from the recipient. Service by mail is complete upon mailing.

(2) *Electronic court system service.* — Where a court has, by local rule, adopted the Mississippi Electronic Court System, service which is required or permitted under these Rules shall be made in conformity with the Mississippi Electronic Court System procedures.

(c) *Filing with the court defined.* —

(1) *Generally.* — The filing of pleadings and other papers with the court as required by these Rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk.

(2) *Electronic filing.* — A court may, by local rule, allow pleadings and other papers to be filed, signed, or verified by electronic means in conformity

with the Mississippi Electronic Court System procedures. Pleadings and other papers filed electronically in compliance with the procedures are written papers for purposes of these Rules.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 1.7(a) carries forward applicable provisions of former Rule 2.06 of the Uniform Rules of Circuit and County Court. Sections (b) and (c) track provisions in Rule 5(b) and (e) of the Mississippi Rules of Civil Procedure. (Effective July 1, 2017.)

## Rule 1.8. Interactive audiovisual devices.

(a) *General provisions.* — When the appearance of a defendant or counsel is required in circuit, county, municipal or justice court, subject to the provisions of this Rule, the appearance may be made by the use of interactive audiovisual equipment, including video conferencing equipment. Interactive audiovisual equipment shall at a minimum operate so as to enable the court and all parties to view and converse with each other.

(b) *Requirements.* — In using interactive audiovisual equipment, the following are required:

(1) a full record of the proceedings shall be made as provided in applicable rules;

(2) the court shall determine that the defendant knowingly, intelligently, and voluntarily agrees to appear at the proceeding by interactive audiovisual means; and

(3) provisions shall be made to allow for confidential communications between the defendant and counsel before and during the proceeding. Defense counsel shall be present at the location with the defendant during the proceedings.

(c) *Permissible proceedings.* — Appearance by interactive audiovisual equipment, including video conferencing, may be permitted in the discretion of the court at any proceeding except that this Rule shall not apply to any trial, probation violation hearing, or any felony plea and/or sentencing.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Section (a) is taken from former Rule 6.08 of the Uniform Rules of Circuit and County Court. Section (b) preserves a defendant's right to be present personally under Rule 10.1(a), by providing that a defendant must consent to appear by interactive audiovisual means. While section (c) generally puts the use of such technology in the discretion of the court, Rule 1.8 is inapplicable to trials, probation violation hearings, and felony pleas and sentencing. (Effective July 1, 2017.)

## Rule 1.9. Local court rules.

(a) *When permissible.* — Any court by action of a majority of the judges thereof may hereafter make local rules and amendments thereto concerning practice in their respective courts not inconsistent with these Rules. In the event there is no majority, the senior judge shall have an additional vote.

(b) *Procedure for approval.* — All such local rules shall be submitted to the Supreme Court of Mississippi for approval before taking effect. Such submissions shall comply with the requirements of Rule 27(f) of the Mississippi Rules of Appellate Procedure and should include the text of the proposed new rule or of the rule to be amended with deletions indicated by strikeouts and additions shown underlined. The submissions shall also be accompanied by a copy of the motion and of the proposed rule or rule amendment in an electronically formatted medium (such as a USB Flash Drive or CD-ROM). Upon receipt of such proposed rules and before any approval of the same, the Supreme Court may submit them to the Supreme Court Advisory Committee on Rules for advice as to whether any such rules are consistent or in conflict with these Rules or any other rules adopted by the Supreme Court.

(c) *Publication.* — All local rules hereinafter approved by the Supreme Court shall be submitted for publication on the Court's website, in the Southern Reporter (Mississippi cases), and in the Mississippi Rules of Court.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 1.9 largely tracks Rule 83 of the Mississippi Rules of Civil Procedure. Rule 1.9 guarantees the right of trial judges to prescribe local rules of court, not inconsistent with these Rules. Consistent with Rule 27(f) of the Mississippi Rules of Appellate Procedure, all local rules shall be filed in motion form with the Supreme Court of Mississippi and are not effective until approved by the Supreme Court. (Effective July 1, 2017.)

### Rule 1.10. Recordation of proceedings where official court reporter not provided.

Any attorney of record or *pro se* litigant in a court which does not provide an official court reporter may record or have recorded any court proceeding by audio-recording device or stenographically. Any expenses incident thereto shall be borne by the party or parties.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 1.10 is consistent with current practice and Mississippi Code Section 9-13-32. (Effective July 1, 2017.)

## RULE 2. COMMENCEMENT OF CRIMINAL PROCEEDINGS

### Rule 2.1. Commencement of criminal proceedings.

(a) *Commencement.* — All criminal proceedings shall be commenced either by charging affidavit, indictment, or bill of information.

(b) *Docketing the case.* —

(1) *Charging affidavit.* — Anyone bringing a criminal charge in municipal court or justice court shall lodge a charging affidavit with the judge or clerk of the court. The clerk of the court shall record all charging affidavits on the docket.

(2) *Indictment.* — After the grand jury returns an indictment, the circuit clerk shall mark the indictment "filed" and such entries shall be dated and signed by the circuit clerk. The circuit clerk shall, within ten (10) days after adjournment of the term of court, record the indictments in the "Secret Record of Indictments," which shall be indexed and kept secret. The circuit clerk shall issue a capias to the sheriff of the county where the indictment was returned. A copy of the indictment shall be attached to the capias. Upon the execution of the capias and the officer's return thereon, the case shall be assigned a cause number in the criminal docket and this cause number shall be put on the capias instanter.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Under Rule 2.1(a), the procedure for commencing a criminal proceeding is either by charging affidavit or by indictment. By definition, "indictment" includes "a bill of information in lieu thereof." *See* Rule 1.4(e). This is in accord with article 3, section 27, of the Mississippi Constitution of 1890, and consistent with Mississippi Code Section 99-1-7.

The procedures for docketing the case provided in (b) are consistent with Mississippi Code Sections 9-7-175, 99-7-9, 99-7-13, 99-9-1, and 99-33-2. Additional rules regarding the grand jury are found in Rule 13, and rules regarding indictments are found in Rule 14. (Effective July 1, 2017.)

## Rule 2.2. Duty of judge upon making of a charging affidavit.

(a) *Probable cause determination.* — If it appears from the charging affidavit and the evidence submitted that there is probable cause to believe that the offense complained of has been committed and that there is probable cause to believe that the defendant committed it, the judge shall proceed under Rule 3.1. Before ruling on a request for a warrant, the judge may examine under oath the affiant and any witnesses the affiant may produce.

(b) *Evidence.* — The finding of probable cause shall be based upon evidence, which may be hearsay in whole or in part provided there is a basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished.

**HISTORY: Effective July 1, 2017.**

### COMMENT

The purposes served by Rule 2.2 are in accord with Mississippi law and the mandates of the Fourth Amendment to the United States Constitution. As the United States Supreme Court stated in *Giordenello v. United States*, 357 U.S. 480, 78 S. Ct. 1245, 2 L. Ed. 2d 1503 (1958):

> [t]he purpose of the [charging affidavit], then, is to enable the [judge] . . . to determine whether the "probable cause" re-

quired to support a warrant exists. The [judge] must judge for himself the persuasiveness of the facts relied on by a[n] [affiant] to show probable cause. [The judge] should not accept without question the [affiant's] mere conclusion that the person whose arrest is sought has committed a crime.

*Id.* at 486. *See also* Miss. Code Ann. § 99-3-28 (regarding "[w]arrants against teachers, jail officers or counselors at adolescent offender programs"); *State v. Delaney*, 52 So. 3d 348 (Miss. 2011). (Effective July 1, 2017.)

# RULE 3. ARREST WARRANT OR SUMMONS UPON COMMENCEMENT OF CRIMINAL PROCEEDINGS

## Rule 3.1. Issuance of arrest warrant or summons.

(a) *Issuance.* — Upon a finding of probable cause made pursuant to Rule 2.2, or upon a finding that such a determination has previously been made, the judge shall immediately cause to be issued an arrest warrant or, where not prohibited by law, a summons. More than one (1) summons or warrant may issue on the same charging affidavit.

(b) *Summons; subsequent issuance of arrest warrant.* —

(1) *Summons.* — Unless otherwise prohibited by law, the judge may issue a summons if:

(A) the defendant is not in custody;

(B) the offense charged is bailable as a matter of right; and

(C) there is no reasonable cause to believe that the defendant will not obey the summons.

(2) *Subsequent issuance of arrest warrant.* — After the issuance of a summons, the judge shall issue an arrest warrant if:

(A) the defendant, having been duly summoned, fails to appear;

(B) there is reasonable cause to believe that the defendant will fail to appear; or

(C) the summons cannot be served or delivered for any reason.

(c) *Traffic citations unaffected.* — The use of tickets, citations, or affidavits for misdemeanor traffic violations shall be as otherwise provided by law.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 3.1(a) contemplates that a summons, where not prohibited by law, or arrest warrant shall issue upon a finding that a probable cause determination has been made, for example, by a competent court of another jurisdiction. *See* Miss. Code Ann. § 99-21-1.

Rule 3.1(b) gives the judge discretion to cause a summons to be issued, where not prohibited by law, in those cases in which an arrest warrant is not necessary to secure the presence of the defendant and there is little concern that the defendant will flee. Rule 3.1(b) makes no distinction between felony and misdemeanor cases.

Rule 3.1(c) provides that these Rules do not affect the use of tickets, citations, or affidavits for misdemeanor traffic violations. Traffic violations are governed by statute, e.g., the Uniform Traffic Ticket Law, Miss. Code Ann. § 63-9-21, and not these Rules. (Effective July 1, 2017.)

### Rule 3.2. Contents of arrest warrant or summons; execution, return.

(a) *Arrest warrant.* — An arrest warrant issued upon a charging affidavit shall be signed by the issuing judge. The arrest warrant shall:

(1) contain the complete name of the defendant, or if the name is unknown, any name or description by which the defendant can be identified with reasonable certainty;

(2) contain the location of the defendant, if known;

(3) state the offense with which the defendant is charged; and

(4) command that the defendant be arrested and brought before the issuing judge, or, if the issuing judge is unavailable, before the nearest or most accessible judge having jurisdiction. If the defendant is bailable as a matter of right, the arrest warrant may state that the defendant shall be released on his personal recognizance, subject to the mandatory conditions of release in Rule 8.4(a), and directed to appear at a specified time and place, or be released via an appearance bond or a secured appearance bond in an amount predetermined by the court.

(b) *Summons.* — The summons shall be in the same form as the arrest warrant, except that it shall summon the defendant to appear at a stated time and place within a reasonable time from the date of issuance.

(c) *Execution of arrest warrant, return.* —

(1) *By whom.* — The arrest warrant shall be directed to and may be executed by any officer authorized by law within the State of Mississippi.

(2) *Manner of execution.* — An arrest warrant shall be executed by arrest of the defendant.

(3) *Return.* — After execution, the officer returning an arrest warrant shall write thereon the manner and date of execution, shall print and sign the officer's name and state the officer's badge number, and shall promptly return the arrest warrant to the clerk of the court specified in the arrest warrant.

(d) *Service of summons.* — The summons may be served by personally delivering a copy of the summons to the defendant by any officer authorized by law to execute arrest warrants or by delivering a copy of the summons by U.S. mail, addressed to the defendant at the defendant's usual residence, business or post office address. The officer serving the summons shall make return of the summons in the same manner as provided in Rule 3.2(c)(3) for making return of an arrest warrant.

(e) *Defective arrest warrant.* — An arrest warrant shall not be invalidated nor shall any person in custody thereon be discharged because of a defect in form. The arrest warrant may be amended by the court to remedy such defect.

**HISTORY: Effective July 1, 2017; amended effective July 1, 2018.**

#### COMMENT

Where circumstances dictate issuance of an arrest warrant rather than a summons, yet there is reason for use of recognizance release, Rule 3.2(a) gives the issuing judge the flexibility of allowing a personal recognizance release, subject to the mandatory conditions of release in Rule 8.4(a). The release of an arrested defendant on recognizance would not preclude the defendant's having to appear at the initial hearing, but might preclude the defendant's spending the night in jail unnecessarily. Alternatively, the issuing judge has discretion to set an appearance bond or secured appearance bond in the warrant, if the defendant is bailable as a matter of right.

Rule 3.2(c)(1) states that an arrest warrant be directed to and executed by "any officer authorized by law within the State of Mississippi." Mississippi law authorizes a broad range of officers to make arrests. See Miss. Code Ann. §§ 99-3-1(1), 99-3-2.

Rule 3.2(d) is designed to make service of the summons as easy and expeditious as possible. The function of the summons is solely to apprise the defendant of the charges and to notify the defendant to appear. Delivery of a copy of the summons by U.S. mail is similar to the procedure utilized for summoning persons whose names are drawn for jury duty. See Miss. Code Ann. § 13-5-28. A defendant's failure to respond to a mailed summons does not provide valid grounds for the issuance of a contempt-based arrest warrant.

Under Rule 3.2(e), a mere defect in form will not invalidate an arrest warrant. Normally, aliases, fictitious names, and descriptions are matters of form and may be amended if judicially determined to be incorrect. (Effective July 1, 2017; amended effective July 1, 2018.)

# RULE 4. SEARCH WARRANTS

## Rule 4.1. Persons or things subject to search and seizure.

A search warrant may be issued for any of the following:

(1) evidence of a crime;

(2) contraband, fruits of crime, or other things unlawfully possessed;

(3) thing(s) designed for use, intended for use, or which is being or has been used in committing a crime; and

(4) a person to be arrested, or who is unlawfully restrained.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Generally, Rule 4 protects the rights guaranteed by article 3, section 23, of the Mississippi Constitution ("The people shall be secure in their persons, houses, and possessions, from unreasonable seizure or search; and no warrant shall be issued without probable cause, supported by oath or affirmation, specially designating the place to be searched and the person or thing to be seized."). The Rule is broad enough to embrace the issuance of anticipatory search warrants; a warrant to search for things that are not within the jurisdiction when the warrant is issued, but that are expected to be within the jurisdiction when the search is conducted, is valid if it otherwise complies with the United States Constitution, the Mississippi Constitution, and Rule 4. *See United States v. Grubbs*, 547 U.S. 90, 126 S. Ct. 1494, 164 L. Ed. 2d 195 (2006).

Rule 4.1 describes the persons and/or things that may be seized with a lawfully-issued search warrant. Issuance of a search warrant to search for items of solely "evidential value" is authorized. *Warden, Md. Penitentiary v. Haden*, 387 U.S. 294, 300-01, 87 S. Ct. 1642, 1647, 18 L. Ed. 2d 782 (1967). Section (b)(4) permits issuance of a warrant to search for a person under two circumstances: when there is probable cause to arrest that person or when that person is being unlawfully restrained. There may be instances in which a search warrant would be required to conduct a search in either of these circumstances. Even when a search warrant would not be required to enter a place to search for a person, a procedure for obtaining a warrant should be available so that law enforcement officers will be encouraged to resort to the preferred alternative of acquiring "an objective predetermination of probable cause." *Katz v.*

*United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). (Effective July 1, 2017.)

## Rule 4.2. Warrant on affidavit.

(a) *In general.* — No search warrant shall issue except upon affidavit presented to the issuing judge authorized by law to issue search warrants, establishing grounds for issuing the warrant.

(b) *Issuance.* — If the judge finds probable cause exists, the judge shall issue a warrant naming or describing the person or thing to be seized, and naming or describing the person or place to be searched.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Under section (b), probable cause for the issuance of a search warrant should be assessed under the totality-of-circumstances test. *See Jordan v. State*, 995 So. 2d 94 (Miss. 2008); *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). (Effective July 1, 2017.)

## Rule 4.3. Contents of search warrants.

Every search warrant issued by the court shall:

(1) command the law enforcement officer to search, within a specified time not to exceed ten (10) days, the person(s) or place(s) named in the search warrant and to return the warrant and an inventory of the thing(s) seized to the court as designated in the warrant;

(2) designate the court to which the warrant and an inventory of the thing(s) seized shall be returned; and

(3) be signed and dated by the judge, showing the exact time and date and the name of the law enforcement officer to whom the warrant was delivered for execution.

**HISTORY: Effective July 1, 2017.**

### COMMENT

The ten (10) day requirement in [sub-]section (a)[(1)] is consistent with the longstanding holding that "some date, within a reasonable time after the issuance of the warrant, be fixed for its return, and that it should be executed within the time within which it is, by its terms, a live process." *Taylor v. State*, 137 Miss. 217, 102 So. 267, 268 (1924). The Court has also recognized that search warrants shall be returnable instanter or on a day stated. *See Meyer v. State*, 309 So. 2d 161, 165-66 (Miss. 1975) (return two (2) days after the search warrant was served was not a breach of the statutory requirement that warrant be executed and returned within ten (10) days and was not an unreasonable delay); *Jordan v. State*, 147 Miss. 24, 112 So. 590 (1927) (the requirement that the warrant should be returned instanter only required that it should be executed and returned within a reasonable time under the circumstances of the case, and that the execution of a search warrant on the day following the date of its issuance sufficiently complies with the mandate that it be executed and returned instanter). The requirement that a search warrant be executed within a reasonable time prevents the search warrant from being "held by an officer as a weapon, to be used at his discretion." *Taylor*, 102 So. at 268. Pursuant to Rule 4.3, even an anticipatory search warrant must be executed within ten (10) days of the date the search warrant was issued. (Effective July 1, 2017.)

### Rule 4.4. Execution and return with inventory; return of papers to court; custody of things.

(a) *Receipt and inventory.* — The law enforcement officer conducting the search under the search warrant shall give to the person from whom or from whose premises the things were taken, or shall leave at the place from which the things were taken, a copy of the search warrant together with a copy of an inventory of the things taken. The inventory shall be made in the presence of the person from whose possession or premises the things were taken, if that person is present, and shall be verified by the law enforcement officer executing the search warrant.

(b) *Return of papers to court.* — The law enforcement officer executing the search warrant shall promptly return the search warrant, along with any inventory of things seized, to the court specified in the search warrant. Unexecuted search warrants shall be returned to the court.

(c) *Custody of things.* — All things taken pursuant to a search warrant shall be retained in the custody of the seizing officer or agency, subject to court order.

**HISTORY: Effective July 1, 2017.**

#### COMMENT

Section (a) is intended to make clear that a copy of the warrant and an inventory receipt for things taken shall be left at the premises at the time of the search or with the person, if present, from whose premises the things are taken. Section (b) requires prompt return of the executed warrant and inventory. *See Brown v. State*, 534 So. 2d 1019 (Miss. 1988) (describing return as ministerial act and noting improper return does not invalidate search). (Effective July 1, 2017.)

## RULE 5. ARREST AND INITIAL APPEARANCE

### Rule 5.1. Procedure upon arrest.

(a) *Telephone call.* — Any person under arrest shall be afforded a reasonable opportunity to make a telephone call to, or otherwise make effective communication with, any person the accused may choose.

(b) *On arrest without a warrant.* — A person arrested without a warrant:

(1) may, unless prohibited by law, be released upon the defendant's personal recognizance after being notified in writing to appear at a specified time and place; or

(2) shall be released upon execution of an appearance bond set according to Rule 8, unless the charge upon which the person was arrested is not a bailable offense, and directed to appear at a specified time and place; or

(3) if not released pursuant to subsections (b)(1) or (b)(2), the accused shall be taken without unnecessary delay, and in no event later than forty-eight (48) hours after arrest, before a judge for an initial appearance. If the person arrested is not taken before a judge as so required then, unless the offense for which the person was arrested is not a bailable offense, the

person shall be released upon execution of an appearance bond in the amount of the minimum bail specified in Rule 8, and shall be directed to appear at a specified time and place.

In the event the defendant is released on the minimum amount provided in the bail schedule, the prosecuting attorney may file a motion with the court to reconsider the bond amount and the conditions of release, and the procedures thereafter shall be in accordance with Rule 8.

(c) *On arrest with a warrant.* —

(1) If provision for bail or personal recognizance has been made by the judge issuing the arrest warrant, a person arrested with a warrant shall be released and directed to appear at a specified time and place.

(2) If the person arrested cannot meet the conditions of release provided in the warrant, or if no such conditions are prescribed:

(A) if such person was arrested pursuant to a warrant issued on a charging affidavit, the accused shall be taken without unnecessary delay, and in no event later than forty-eight (48) hours after arrest, before a judge for an initial appearance. If the person arrested has not been taken before a judge as required herein, unless the charge upon which the person was arrested is not a bailable offense, such person shall be released upon execution of an appearance bond in the amount of the minimum bail specified in Rule 8, and shall be notified in writing to appear at a specified time and place; or

(B) if such person was arrested pursuant to a capias issued upon an indictment, the accused shall be taken without unnecessary delay before a judge, who shall proceed as provided in Rule 8.

(3) The defendant shall be given a copy of the charging document.

**HISTORY: Effective July 1, 2017.**

## COMMENT

Rule 5.1(a) gives official sanction to common existing practice. The opportunity to make a telephone call represents the minimum requirement and use of other appropriate means of communication, electronic or otherwise, may be allowed. Fundamental fairness dictates that a person who has been taken into custody be allowed to communicate to another that the accused is being held by the police and charged with a crime. Rule 5.1(a) thus serves to protect an accused's state and federal constitutional rights to bail, counsel, and due process.

Rule 5.1(b) lists the options available to law enforcement officers in the case of warrantless arrests. An officer may: (1) release the offender on personal recognizance and issue a notice requiring the person to appear at a specified time and place; (2) release the offender on execution of an appearance bond set according to Rule 8 and direct the person to appear at a specified time and place; or (3) take the offender into custody and provide the person with an opportunity to make bail. A person may not be released on personal recognizance where prohibited by law. *See, e.g.,* Miss. Code Ann. § 99-5-37 (regarding arrest for listed domestic violence offenses).

Under Rule 5.1(b)(3), if a person is taken into custody, the person shall be taken without unnecessary delay, and in no event later than forty-eight (48) hours after arrest, before a judge who shall proceed with an initial appearance. If the person arrested is not taken before a judge within forty-eight (48) hours, the person detained shall be released on execution of an appearance bond in the minimum amount set pursuant to Rule 8 and directed to appear at a specified time and place. Rule 5.1(b)(3) conforms to the

United States Supreme Court's holdings in *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975), and *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991). (Effective July 1, 2017.)

## Rule 5.2. Initial appearance.

(a) *Generally.* — Every person in custody and not under indictment shall be taken, without unnecessary delay and in accordance with Rule 5.1, before a judge for an initial appearance. At the defendant's initial appearance, the judge shall:

(1) ascertain the defendant's true name, age, and address, and amend the formal charge if necessary to reflect this information, instructing the defendant to notify the court promptly of any change of address;

(2) inform the defendant of the charges and provide the defendant with a copy of the charging affidavit;

(3) if the arrest has been made without a warrant, determine whether there was probable cause for the arrest and note the probable cause determination for the record. If there was no probable cause for the warrantless arrest, the defendant shall be released;

(4) if the defendant is unrepresented, advise of the right to assistance of an attorney, and that if the defendant is unable to afford an attorney, an attorney will be appointed as required by law. If the indigent defendant is unrepresented and desires representation, counsel shall be appointed pursuant to Rule 7.2, Rule 7.3 and local rule promulgated pursuant to Rule 1.9; and

(5) advise the defendant of:

(A) the right to remain silent and that any statements made may be used against the defendant;

(B) the right to communicate with an attorney, family or friends, and that reasonable means will be provided to enable the defendant to do so; and

(C) the conditions, if any, under which the defendant may obtain release.

(b) *Felony cases.* — When a defendant is charged with commission of a felony, the judge shall also:

(1) inform the defendant of the right to a preliminary hearing and the procedure by which that right may be exercised; and

(2) if requested, set the time for a preliminary hearing in accordance with Rule 6.1.

(c) *Initial appearance not required.* — In all cases where the defendant is released from custody, or has been indicted by a grand jury, the defendant shall not be entitled to an initial appearance.

**HISTORY: Effective July 1, 2017.**

### COMMENT

The purpose of Rule 5.2 is to insert the judicial process between the police and the defendant at the earliest practicable time in order to minimize the effects of carelessness, abuse of power, or unavoidable error in the police function. Rule 5.2 insures procedural compliance with *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and *Escobedo v. Illinois*, 378 U.S. 478, 84 S. Ct.

1758, 12 L. Ed. 2d 977 (1964), and provides for the prompt determination of the conditions for release. This continues the policy contained in Mississippi Code Section 99-3-17 and former Rule 6.03 of the Uniform Rules of Circuit and County Court.

Pursuant to Rule 1.8, with the defendant's consent, initial appearances may be held via interactive audiovisual devices.

Rule 5.2(c) underscores that a defendant who has been released from custody, or who has been indicted, is not entitled to an initial appearance. This continues the practice provided in former Rule 6.05 of the Uniform Rules of Circuit and County Court. (Effective July 1, 2017.)

# RULE 6. PRELIMINARY HEARING

## Rule 6.1. Right to a preliminary hearing; waiver; postponement.

(a) *Right to a preliminary hearing.* —

(1) *Generally.* — A defendant who has been charged with a felony is entitled to a preliminary hearing upon request. But a defendant who has been indicted by a grand jury is not entitled to a preliminary hearing.

(2) *When commenced.* — The preliminary hearing shall be held within fourteen (14) days following the demand for preliminary hearing unless:

(A) the charging affidavit has been dismissed;

(B) the hearing is subsequently waived, as provided in section (b);

(C) the hearing is postponed as provided in section (d); or

(D) before commencement of the hearing, an indictment charging the same offense has been returned by the grand jury.

(b) *Waiver.* — A preliminary hearing, once demanded, may be subsequently waived in open court or by written waiver, signed by the defendant and defendant's counsel, if any.

(c) *Delay.* —

(1) *Release on recognizance.* — If a preliminary hearing has not been commenced within fourteen (14) days as required by subsection (a), unless postponed as provided in subsection (d), the defendant shall be released on recognizance.

(2) *Non-bailable offenses; notice to circuit court.* — However, if the defendant is charged with a non-bailable offense, or if release is prohibited by Article 3, Section 29(2) of the Mississippi Constitution of 1890, the court, the attorneys, or the accused, if *pro se*, shall immediately notify a judge of that circuit of the delay and the reasons therefor. The circuit judge shall thereupon order the hearing be set for a specified time.

(d) *Postponement.* — Upon motion of any party, or upon the judge's own initiative, the preliminary hearing may be postponed beyond the time limits specified in subsection (a) upon a finding that circumstances exist that justify delay and, in that event, the court shall enter a written order detailing the reasons for the finding, include a date certain for the postponed hearing, and shall give the parties prompt notice thereof.

**HISTORY: Effective July 1, 2017.**

COMMENT

Rule 6.1(a) grants an accused charged with a felony (and not under indictment) the right to a preliminary hearing upon request. *See Mayfield v. State*, 612 So. 2d 1120, 1129 (Miss. 1992) (the principal purpose of a preliminary hearing is to determine whether probable cause exists). The provision that a defendant who has been indicted by a grand jury is not entitled to a preliminary hearing is consistent with former Rule 6.05 of the Uniform Rules of Circuit and County Court.

Rule 6.1(c) states that if a preliminary hearing is not commenced within fourteen (14) days as required by subsection (a), and is not postponed as allowed by subsection (d), the defendant shall be released on recognizance, unless the offense is non-bailable or release is prohibited by Article 3, Section 29(2) of the Mississippi Constitution of 1890. (Effective July 1, 2017.)

### Rule 6.2. Proceedings at preliminary hearing.

(a) *Procedure.* — At a preliminary hearing the judge shall determine probable cause and the conditions for release, if any. All parties shall have the right to cross-examine the witnesses testifying and, subject to the provisions herein, introduce evidence. Only evidence relevant to these questions shall be adduced.

At the close of the prosecution's case, including cross-examination of prosecution witnesses by the defendant, the judge shall determine and state for the record or state in open court whether the prosecution's case establishes probable cause. The defendant may then make a specific offer of proof, including the names of witnesses who would testify, or the defendant may produce the evidence offered.

(b) *Process.* — Unless otherwise ordered by the court for good cause shown, process shall issue to secure the attendance of witnesses requested by the defendant or the prosecuting attorney.

(c) *Hearsay evidence.* — The findings by the court shall be based on substantial evidence, which may be hearsay, in whole or in part, provided there is a basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished.

(d) *Suppression motions inapplicable.* — Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary hearing.

(e) *Amendment of charging affidavit.* — The charging affidavit may be amended at any time to conform to the evidence, unless substantial rights of the defendant would be prejudiced.

(f) *Binding over the case to the grand jury.* — If, from the evidence, it appears that there is probable cause to believe that a felony has been committed, and that the defendant committed it, the judge shall bind the defendant over to await action of the grand jury.

(g) *Discharge of the defendant.* — If, from the evidence, it appears that there is no probable cause to believe that a felony has been committed or that the defendant committed it, the defendant shall be discharged from custody. The discharge of the defendant shall not preclude the state from presenting the same offense to a grand jury.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 6.2(a) limits the issues at a preliminary hearing to probable cause and the conditions of release. A defendant is permitted to cross-examine witnesses and present testimony and evidence. Rule 6.2(b) complements these rights by providing defendants with process to secure the attendance of witnesses, unless otherwise ordered by the court on a showing of good cause.

Rule 6.2(c) notes the admissibility of hearsay, which is in accord with Rule 1101(b)(4) of the Mississippi Rules of Evidence (except for rules pertaining to privileges, the rules of evidence are inapplicable in probable cause hearings in criminal cases). There is no constitutional requirement that hearsay evidence be excluded from a probable cause hearing. *See Conerly v. State*, 760 So. 2d 737, 740-41 (Miss. 2000) (determination of probable cause may be based on corroborated and substantiated hearsay); *Costello v. United States*, 350 U.S. 359, 76 S. Ct. 406, 100 L. Ed. 397 (1956) (upholding a grand jury indictment based solely on hearsay testimony). (Effective July 1, 2017.)

# RULE 7. COUNSEL

## Rule 7.1. Right to counsel; waiver.

(a) *Right to be represented by counsel.* — A defendant shall be entitled to be represented by counsel in any criminal proceeding. The right to be represented shall include the right to consult in private with an attorney or the attorney's agent, without unnecessary delay, after a defendant is taken into custody, at reasonable times thereafter, and sufficiently in advance of a proceeding to allow adequate preparation therefor.

(b) *Right to appointed counsel.* — An indigent defendant shall be entitled to have an attorney appointed in any criminal proceeding which may result in punishment by loss of liberty, in any other criminal proceeding in which the court concludes that the interests of justice so require, or as required by law. The determination of the right to appointed counsel, and the appointment of such counsel, is to be made no later than at the indigent defendant's first appearance before a judge.

(c) *Waiver of right to counsel.* — When the court learns that a defendant desires to act as his/her own attorney, the court shall conduct an on-the-record examination of the defendant to determine if the defendant knowingly and voluntarily desires to act as his/her own attorney. The court shall inform the defendant that:

1. The defendant has a right to an attorney, and if the defendant cannot afford an attorney, then the court will appoint one free of charge to defend or assist the defendant in his/her defense.
2. The defendant has the right to conduct the defense and may elect to do so and allow whatever role (s)he desires to his/her attorney.
3. The court will not relax or disregard the rules of evidence, procedure or courtroom protocol for the defendant and that the defendant will be bound by and have to conduct himself/herself within the same rules as an attorney, that these rules are not simple and that without legal advice his/her ability to defend himself/herself will be hampered.
4. The right to proceed *pro se* usually increases the likelihood of a trial outcome unfavorable to the defendant.
5. Other matters as the court deems appropriate.

After informing the defendant and ascertaining that the defendant understands these matters, the court will ascertain whether the defendant still wishes to proceed *pro se* or if the defendant desires an attorney to assist him/her in his/her defense. If the defendant desires to proceed *pro se*, the court should determine whether the defendant has exercised this right knowingly and voluntarily and, if so, make the finding a matter of record. At the time of accepting a defendant's waiver of the right to counsel, the court shall inform the defendant that the waiver may be withdrawn and counsel appointed or retained at any stage of the proceedings. Additionally, the court may appoint an attorney to assist the defendant on procedure and protocol, even if the defendant does not desire an attorney. Such advisory counsel shall be given notice of all matters of which the defendant is notified.

(d) *Withdrawal of waiver.* — A defendant may withdraw a waiver of the right to counsel at any stage of the proceedings but will not be entitled to repeat any proceeding previously held or waived solely on the grounds of the subsequent appointment or retention of counsel.

(e) *Unreasonable delay in retaining counsel.* — If a non-indigent defendant appears without counsel at any proceeding after having been given reasonable time to retain counsel, the cause may proceed. If an indigent defendant who has refused appointed counsel in order to obtain private counsel appears without counsel at any proceeding after having been given reasonable time to retain counsel, the court shall appoint counsel unless the indigent defendant waives the right under section (c). If the indigent defendant continues to refuse appointed counsel, the cause may proceed.

**HISTORY: Effective July 1, 2017.**

## COMMENT

Rule 7.1 establishes guidelines for the representation of both indigent and non-indigent criminal defendants. The basis of Rule 7.1 is the right of an accused to be represented by counsel in all criminal prosecutions. *See* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."); Miss. Const. art. 3, § 26 ("In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both . . . .").

For the purposes of subsection (a), the term "criminal proceeding" includes any stage of the criminal process, without regard to whether a "criminal proceeding" has or has not been commenced under Rule 2.1. The provision that a defendant may consult with the attorney's agent is added for the attorney's convenience.

Rule 7.1(b) is adopted from *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972); and Mississippi Code Section 99-15-15. *See also Alabama v. Shelton*, 535 U.S. 654, 661-62, 122 S. Ct. 1764, 1769-70, 152 L. Ed. 2d 888 (2002).

Under section (b), there are two pertinent inquiries in determining when counsel is to be appointed to represent an indigent defendant. The first inquiry is whether the right to appointed counsel arises at all. *See Dunn v. State*, 693 So. 2d 1333, 1339 (Miss. 1997) (citing *Scott v. Illinois*, 440 U.S. 367, 374, 99 S. Ct. 1158, 1162, 59 L. Ed. 2d 383 (1979)). The second inquiry is if the defendant is entitled to appointed counsel, at what point in the process is counsel to be appointed. Regarding this second inquiry, Mississippi law provides that "[t]he accused shall have such representation at every critical stage of the proceedings . . . where a substantial right may be affected." Miss. Code Ann. § 25-32-9(2). Specifically:

[u]nder Mississippi law, the right to

counsel attaches earlier than does the sixth amendment right. *Williamson [v. State]*, 512 So. 2d [868,] 876 [(Miss. 1987)]; *Page v. State*, 495 So. 2d 436, 439 (Miss. 1986). This right attaches "once the proceedings against the defendant reach the accusatory stage." *Williamson*, 512 So. 2d at 876; *Page*, 495 So. 2d at 439. The "accusatory stage" is defined by Mississippi law to occur when a warrant is issued or, "by binding over or recognizing the offender to compel his appearance to answer the offense, as well as by indictment or affidavit." Miss. Code Ann. § 99-1-7 (1972). This right to counsel [also] "attaches at the point in time when 'the initial appearance . . . *ought to have been held. . . .*' " *Veal [v. State]*, 585 So.2d [693,] 699 [(Miss. 1991)] (emphasis added).

*Ormond v. State*, 599 So. 2d 951, 956 (Miss. 1992). *See also Weeks v. State*, 804 So. 2d 980, 995 (Miss. 2001); *Sanders v. State*, 801 So. 2d 694, 700 (Miss. 2001) (citing *Johnson v. State*, 631 So. 2d 185, 187-88 (Miss. 1994)) ("The Sixth Amendment right to counsel attaches once the proceedings reach the accusatory stage.").

Rule 7.1(c) provides the standards for waiver of the right to counsel, applicable throughout these rules. It is derived from former Rule 8.05 of the Uniform Rules of Circuit and County Court and adopts the constitutional standard set down in *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938); *Von Moltke v. Gillies*, 332 U.S. 708, 68 S. Ct. 316, 92 L. Ed. 309 (1948); and *Argersinger*, and followed by the Mississippi Supreme Court in *Conn v. State*, 251 Miss. 488, 170 So. 2d 20 (1964). *See also Bradley v. State*, 58 So. 3d 1166, 1170 (Miss. 2011); *Patton v. State*, 34 So. 3d 563, 565-69 (Miss. 2010).

Subsection (c) also allows, but does not require, the court to appoint advisory or standby counsel. Although a criminal defendant has an absolute right to defend pro se under the Sixth Amendment, there may be instances where a court will deem the appointment of standby counsel advisable and in the defendant's best interest. *See Patton*, 34 So. 3d at 567; *McKaskle v. Wiggins*, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984); *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *United States v. Theriault*, 474 F. 2d 359 (5th Cir. 1973), cert. denied, 411 U.S. 984 (1973).

Under Rule 7.1(d), the defendant can decide at any stage of the proceedings that it was a mistake to waive counsel. The court should encourage an unrepresented defendant, at all stages, to obtain counsel. But while the defendant's right to withdraw waiver of counsel is unlimited, a defendant is not allowed to use late appointment or retention of counsel to disrupt orderly and timely processing of the case. Thus, a defendant cannot delay a scheduled proceeding, nor repeat one already held, solely because of a change of heart concerning the need for counsel.

Rule 7.1(e) protects the court against dilatory tactics by the defendant in retaining counsel while at the same time preserving the defendant's right to counsel. *See Sample v. State*, 320 So. 2d 801, 804 (Miss. 1975) ("We recognize that the defendant must be given a reasonable opportunity to employ and consult with the attorney of his choosing."). It allows an indigent defendant the opportunity to make a good faith, though unsuccessful, effort to obtain private counsel, even though the proceeding may be delayed. *See McConnell v. United States*, 375 F. 2d 905 (5th Cir. 1967); *Cleveland v. United States*, 322 F. 2d 401 (D.C. Cir. 1963), cert. denied, 375 U.S. 884 (1963). (Effective July 1, 2017.)

## Rule 7.2. Procedure for appointment of counsel for indigent defendants; appearance; withdrawal.

(a) *Procedure for appointment of counsel for indigent defendants.* —

(1) *Generally.* — A procedure shall be established in each circuit, county, municipal, and justice court for the appointment of counsel for each indigent defendant entitled thereto.

(2) *Appointment of multiple attorneys.* — In all death penalty trial proceedings, the court shall appoint two (2) attorneys pursuant to the

standards in Rule 7.4. At the time of the appointment, and subject to court approval, the appointed attorney may recommend co-counsel so long as co-counsel is willing to accept the appointment and meets all of the requirements of Rule 7.4. If the appointed attorney does not recommend co-counsel upon accepting an appointment, the court shall select co-counsel. In non-death penalty cases, the appointment of multiple attorneys is within the discretion of the court.

(b) *Entry of appearance.* — At or before a first appearance in any court on behalf of a defendant, an attorney, whether privately retained or court-appointed, shall file an entry of appearance or, in lieu thereof, the court shall note the attorney's appearance on the record.

(c) *Duty of continuing representation.* — Counsel representing a defendant at any stage following indictment shall continue to represent that defendant in all further proceedings in the trial court, including filing a notice of appeal, unless counsel withdraws for good cause as approved by the court.

(d) *Withdrawal.* — When an attorney makes an appearance for any party in a case, that attorney will not be allowed to withdraw as attorney for the party without the permission of the court. The attorney making the request shall give notice to his/her client and to all attorneys in the cause and certify the same to the court in writing. The court shall not permit withdrawal without prior notice to his/her client and all attorneys of record.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 7.2(a) requires that each circuit shall establish governing local procedures for the appointment of counsel for indigent defendants. Local court rules are promulgated pursuant to Rule 1.9.

Rule 7.2(c) contemplates that the usual procedure will be that, following indictment, counsel will continue to represent the defendant through all stages of the trial proceedings, including filing a notice of appeal. *See* M.R.A.P. 6(b). In addition to being familiar with the case, continued representation guarantees that a defendant's right of appeal is not lost in the period between termination of trial counsel's responsibilities and retention or appointment of appellate counsel.

Rule 7.2(d) is consistent with former Rule 1.13 of the Uniform Rules of Circuit and County Court Practice. Normally, appointed counsel will not be permitted to withdraw prior to filing a notice of appeal. If the court allows counsel to withdraw, the court shall see that new counsel is retained or appointed, unless the right to counsel has been properly waived pursuant to Rule 7.1(c). In this way, subsection (d) maintains the integrity of the trial date, while also protecting the interests of the defendant and aiding the trial court in providing continuity in legal representation.

Nothing in Rules 7.2(c) or (d) limits the ability of a court to appoint an attorney to represent a defendant for a limited purpose or time, after which another attorney is appointed or retained to represent the defendant for subsequent proceedings. (Effective July 1, 2017.)

## Rule 7.3. Determination of indigency; appointment of counsel; compensation.

(a) *Standard for indigency.* — The term "indigent" as used in these Rules means a person who is financially unable to employ counsel.

(b) *Affidavit or sworn testimony of substantial hardship.* — A defendant desiring to proceed as an indigent may complete an affidavit concerning the defendant's financial resources on a court-approved form. In lieu of an affidavit, or together with an affidavit, the defendant may be examined under oath regarding defendant's financial resources by the judge responsible for determining indigency. Before said questioning, the defendant shall be advised of the penalties for perjury as provided by law.

(c) *Reconsideration.* — Following a determination of indigency or non-indigency, if there has been a material change in circumstances, the defendant, the appointed attorney, or the prosecutor may move for reconsideration.

(d) *Order of appointment.* — Whenever counsel is appointed, the court shall enter an order to that effect, a copy of which shall be provided to the defendant, the appointed attorney, and the prosecutor.

(e) *Appointment of public defender.* — In counties or municipalities which have a public defender, the public defender shall represent all defendants entitled to appointed counsel whenever authorized by law and able to do so.

(f) *Other appointments.* — If the public defender is not appointed, a private attorney shall be appointed to the case. All criminal appointments shall be made in a manner fair and equitable to the members of the bar, taking into account the skill likely to be required in handling a particular case.

(g) *Appointment of counsel during appeal following withdrawal.* — When prior counsel is permitted to withdraw, the trial or appellate court shall appoint new counsel for a defendant legally entitled to such representation on appeal.

(h) *Compensation.* — A private attorney appointed to represent an indigent defendant is entitled to compensation for services rendered as provided by law. Other than compensation for services rendered as provided by law, no appointed counsel may request or accept any payment or promise of payment for assisting in the representation of a defendant.

(i) *Expenses.* — Appointed counsel shall be entitled to reasonable and necessary expenses incurred in defense of an indigent client, including fees and expenses of expert or professional persons, provided that such expenses are approved in the sound discretion of the court. Extraordinary expenses, including expert expenses, shall be approved in advance by the court.

**HISTORY: Effective July 1, 2017.**

## COMMENT

Rule 7.3 establishes a procedure for the determination of indigency. In making a determination of indigency, the court should consider factors such as the defendant's income and sources of income; employment status; real or personal property owned; outstanding obligations; and the number and age(s) of any dependant(s). *See* Miss. Code Ann. § 25-32-9(1). The court shall not consider the fact that the defendant has been released on bond, or the financial ability of friends or relatives not legally responsible for the defendant.

Rule 7.3(e) establishes the rule for appointment of public defenders rather than private counsel in counties or municipalities that have a public defender's office. *See* Miss. Code Ann. § 25-32-9(1). When the public defender's office cannot represent an indigent defendant (e.g., when there is a conflict of interest or the public defender is unable to provide prompt and adequate representation), private counsel shall be appointed. *See* Miss. Code Ann. § 25-32-13.

Rule 7.3(g) provides for continuity of representation by requiring the trial or appellate court to appoint new counsel for a defendant legally entitled to such representation on appeal, when prior counsel is permitted to withdraw. *See* M.R.A.P. 6(b); *Jones v. State*, 355 So. 2d 89, 91 (Miss. 1978) ("An accused is not only entitled to counsel at trial, but he is entitled to counsel on appeal from a conviction on the merits. If he is indigent and unable to afford an attorney, then he is entitled to a court-appointed attorney at trial and on appeal.").

Rule 7.3(h) is consistent with existing law regarding the compensation of appointed counsel. *See* Miss. Code Ann. § 99-15-17. Rule 7.3(i) addresses the reimbursement of reasonable and necessary expenses to appointed counsel. *See* Miss. Code Ann. §§ 99-15-17, 99-15-21; *Howell v. State*, 989 So. 2d 372, 390 (Miss. 2008) (quoting *Ruffin v. State*, 447 So. 2d 113, 118 (Miss. 1984)) ("[a]n indigent's . . . right to defense expenses . . . is conditioned upon a showing that such expenses are needed to prepare and present an adequate defense"); *Hansen v. State*, 592 So. 2d 114, 125 (Miss. 1991) (State must pay for "non-legal personnel needed by the defense" on showing of "substantial need"); *Wilson v. State*, 574 So. 2d 1338, 1341 (Miss. 1990). (Effective July 1, 2017.)

## Rule 7.4. Standards for appointment of trial and appellate counsel in death penalty cases.

(a) *In general.* — To be eligible for appointment in a death penalty case, an attorney:

(1) shall have been a member in good standing of the State Bar of Mississippi for at least five (5) years immediately preceding the appointment, or admitted *pro hac vice* pursuant to an order entered under Rule 46 of the Mississippi Rules of Appellate Procedure and be a member in good standing of that attorney's home jurisdiction for a like period immediately preceding the appointment;

(2) shall have practiced in the area of state criminal litigation for three (3) years immediately preceding the appointment;

(3) shall have in the three (3) years before appointment completed twelve (12) hours of training or educational programs in the area of death penalty defense through a program accredited by the Mississippi Commission on Continuing Legal Education or the American Bar Association; and

(4) shall have demonstrated the necessary proficiency and commitment to zealous advocacy which exemplify the quality of representation appropriate to death penalty cases.

(b) *Additional qualification requirements.* — At least one (1) appointed attorney must meet the qualifications set forth in section (a) and the following:

(1) shall have practiced in the area of state criminal litigation for five (5) years immediately preceding the appointment; and

(2) shall have been counsel in at least five (5) felony jury trials that were tried to completion, including at least one (1) death penalty murder jury trial that was tried to completion in which the attorney participated.

(c) *Appellate counsel.* — To be eligible for appointment as appellate counsel on behalf of a defendant sentenced to death, an attorney must meet the qualifications set forth in section (a) and, within five (5) years immediately preceding the appointment, have been counsel in an appeal or post-conviction proceeding in a case in which a death sentence was imposed, as well as have experience as counsel in the appeal of at least three (3) felony convictions. Alternatively, an attorney must have been counsel in the appeal of at least six (6) felony convictions, at least two (2) of which were appeals from murder convictions.

(d) *Exceptional circumstances.* — In exceptional circumstances enumerated by the trial judge on the record, an attorney may be appointed who does not meet the qualifications set forth in sections (a)(1)-(3), (b) and/or (c), provided that the attorney's experience, stature and record in a different type of practice (e.g., civil litigation, academic work, or work for a court or prosecutor) enable the court to conclude that the attorney's ability meets or exceeds the standards set forth in this Rule.

**HISTORY: Effective July 1, 2017.**

### COMMENT

The purpose of Rule 7.4 is to establish standards for appointment of counsel for indigent defendants in the trial and appellate stages of capital litigation. The provisions of this rule generally parallel the qualifications set forth in Rule 22 of the Mississippi Rules of Appellate Procedure regarding qualifications for capital post-conviction counsel.

Rule 7.4(b) establishes elevated standards for at least one (1) of the appointed attorneys. Rule 7.4(c) sets out standards for counsel in appellate proceedings. (Of course, Rule 22 of the Mississippi Rules of Appellate Procedure, not Rule 7.4(c), governs appointment of capital post-conviction counsel.) Rule 7.2(a)(2) requires that co-counsel be appointed in all death penalty trial proceedings; co-counsel should ordinarily be appointed at the appellate stage as well. (Effective July 1, 2017.)

## RULE 8. RELEASE

### Rule 8.1. Definitions and requirements.

Whenever the terms below appear in these Rules, they shall have the following meanings:

(a) *Personal recognizance.* — A release on defendant's "personal recognizance" means release without any condition relating to, or a deposit of, security.

(b) *Unsecured appearance bond.* — An "unsecured appearance bond" is an undertaking to pay a specified sum of money to the clerk of the circuit, county, justice, or municipal court, for the use of the State of Mississippi or the municipality, on the failure of a person released to comply with its conditions.

(c) *Secured appearance bond.* — A "secured appearance bond" is an appearance bond secured by deposit with the clerk of security equal to the full amount thereof.

(d) *Cash deposit bond.* — A "cash deposit bond" is an appearance bond secured by deposit with the clerk of security, in the form of a cash deposit or certified funds, in an amount set by the judge. The following requirements shall be met for a cash deposit bond:

(1) The accused must never have been convicted in any court of this state, another state or a federal court, of a crime punishable by more than one (1) year's imprisonment, currently is not charged with or previously been convicted of escape, or had an order nisi entered on a previous bond;

(2) The amount of the bond must be set by the proper authority;

(3) A return date must be set by the proper authority;

(4) The accused must tender to the clerk of the circuit court ten percent

(10%) of the amount of the bond as set, in cash, or $250.00 in cash, whichever is greater;

(5) The accused must sign an appearance bond guaranteeing his/her appearance and binding himself/herself unto the State of Mississippi in the full amount of the bond as set to be used in the case of default;

(6) The accused, by affidavit duly notarized, must swear in substantially the following form:

State of Mississippi
County of ______________

Personally appeared before me, the undersigned authority in and for said county and state, ___________, who after being duly sworn states:

(a) I have never been convicted in any court of this state, another state, or a federal court of a crime punishable by more than one (1) year's imprisonment. I am not charged with escape and I have never been convicted of escape. I have had no order *nisi* entered on a bail bond executed by me.

(b) The proper authority has set the sum of $_______ as the amount of bail bond to be executed by me. This bond was set by ___________.

(c) A return date has been set for this bond. Its return date is ___________ and was set by ___________.

(d) I have tendered to the clerk of the Circuit Court of ______________ County, Mississippi, ten percent (10%) of the amount of said bond in cash, which sum is not less than $250.00. Said cash is my property. I authorize the clerk of said court to dispose of the same as follows: If the bond is forfeited, the cash tendered will be paid by the clerk, less a fee of not more than $10.00, to the county, and the amount so paid will be credited on the bond forfeited. If I appear on the return day and a final disposition is made of the case, the amount deposited with the clerk, less a fee of not more than $10.00 to be retained by the clerk, will be disposed of as ordered by the court.

(e) I agree to report to the clerk of the court by telephone, or in person, and in writing on the first Monday of each month as to my current address and telephone number. If I fail to do so, I agree that the bond may be declared in default.

(7) The amount of money tendered under this rule shall not be disbursed to any person except on written order of the court. The money deposited with the clerk shall be disbursed in the following manner: first, to pay any court costs assessed against the defendant; second, to pay any restitution the defendant has been ordered to make; third, to pay any fines imposed against the defendant; fourth, to pay any assignment of the sum made by the defendant to defendant's attorney; and fifth, any refund to the defendant or other disbursements as allowed by the court.

(e) *Security*. — "Security" is cash, certified funds, or a surety's undertaking deposited with the clerk to secure an appearance bond.

(f) *Surety.* — A "surety" is someone (other than the person seeking release) who executes an appearance bond and is therefore bound to pay its amount, if the person released fails to appear for any proceeding as ordered by the court. A surety, except one governed by Mississippi Code Section 83-39-1 et seq. , shall file with the appearance bond an affidavit or sworn certification:

(1) stating that the surety is not an attorney, judicial official, or person authorized to accept bail;

(2) stating that the surety owns property in this state, which property, standing alone or when aggregated with that of other sureties, is worth the amount of the appearance bond (provided, that the property shall be exclusive of property exempt from execution and its value equaling the amount of the appearance bond shall be above and over all liabilities, including the amount of all other outstanding appearance bonds entered into by the surety) and specifying that property and the exemptions and liabilities thereon; and

(3) specifying the number and amount of other outstanding appearance bonds entered into by the surety.

Generally, an attorney, judicial official, or person authorized to accept bail (e.g., a sheriff) may not be a surety. However, an attorney, judicial official, or person authorized to accept bail may be a surety for a member of the surety's immediate family. For purposes of this Rule, the term "immediate family" shall be limited to include only: a spouse, a sibling, a spouse's sibling, a lineal ancestor or descendant, a lineal ancestor or descendant of a spouse, or a minor or incompetent person dependent upon the surety for more than one-half (½) of his/her support. In such cases, the attorney, judicial official, or person authorized to accept bail shall file with the appearance bond an affidavit stating the surety's position, the surety's relationship to the person seeking release, and the information required in Rule 8.1(f)(2) and (3).

(g) *Bail.* — "Bail" is a monetary amount for or condition of pretrial release from custody, normally set by a judge at the initial appearance.

(h) *Insurer.* — The terms "insurer," "professional bail agent," "soliciting bail agent," "bail enforcement agent," and "personal surety agent" shall be defined as in Mississippi Code Section 83-39-1, et seq.

(i) *Compliance required.* — All agents and insurers shall comply fully with Mississippi Code Sections 83-39-1, et seq., and 99-5-1, et seq., and all related statutes and regulations.

**HISTORY: Effective July 1, 2017.**

## COMMENT

Rule 8.1 provides definitions for use in Rule 8 and throughout these Rules, and replaces practice under former Rule 6.02 of the Uniform Rules of Circuit and County Court. The statutory provisions currently governing professional bail bond companies regulated by the Mississippi Commissioner of Insurance, as provided in Mississippi Code Section 83-39-1 et seq., are unaffected by Rule 8. This Rule is intended to complement existing statutory provisions governing bail matters in the courts, as provided in Mississippi Code Section 99-5-1 et seq. The forms required by Mississippi Code Sections 99-5-1 and 99-5-3 are unaffected.

A release on personal recognizance pursuant to section (a) is distinguishable from release conditioned on the posting of bond or other security.

Section (b) describes a type of bond not previously used in state court practice, but used extensively in federal criminal cases pursuant to 18 U.S.C. § 3142(b).

Sections (c) and (d) reflect current practice. *See* Miss. Code Ann. § 99-5-9. The form of a cash deposit bond previously prescribed by Rule 6.02(C.) of the Uniform Rules of Circuit and County Court is retained.

Section (f) clarifies the procedure when a person is arrested and permitted to post an appearance bond secured by sureties who may own equity in real property.

Sections (h) and (i) make clear that the statutory requirements and procedures related to professional bond companies and their bail bonds continue in full force. (Effective July 1, 2017.)

### Rule 8.2. Right to pretrial release on personal recognizance or on bond.

(a) *Right to release.* — Any defendant charged with an offense bailable as a matter of right shall be released pending or during trial on the defendant's personal recognizance or on an appearance bond unless the court before which the charge is filed or pending determines that such a release will not reasonably assure the defendant's appearance as required, or that the defendant's being at large will pose a real and present danger to others or to the public at large. If such a determination is made, the court shall impose the least onerous condition(s) contained in Rule 8.4 that will reasonably assure the defendant's appearance or that will eliminate or minimize the risk of harm to others or to the public at large. In making such a determination, the court shall take into account the following:

(1) the age, background and family ties, relationships and circumstances of the defendant;

(2) the defendant's reputation, character, and health;

(3) the defendant's prior criminal record, including prior releases on recognizance or on unsecured or secured appearance bonds, and other pending cases;

(4) the identity of responsible members of the community who will vouch for the defendant's reliability;

(5) violence or lack of violence in the alleged commission of the offense;

(6) the nature of the offense charged, the apparent probability of conviction, and the likely sentence, insofar as these factors are relevant to the risk of nonappearance;

(7) the type of weapon used (e.g., knife, pistol, shotgun, sawed-off shotgun, assault or automatic weapon, explosive device, etc.);

(8) threats made against victims or witnesses;

(9) the value of property taken during the alleged commission of the offense;

(10) whether the property allegedly taken was recovered or not, and damage or lack of damage to the property allegedly taken;

(11) residence of the defendant, including consideration of real property ownership, and length of residence in the defendant's domicile;

(12) in cases where the defendant is charged with a drug offense, evidence of selling or distribution activity that should indicate a substantial increase in the amount of bond;

(13) consideration of the defendant's employment status and history, the

location of defendant's employment (e.g., whether employed in the county where the alleged offense occurred), and the defendant's financial condition;

(14) sentence enhancements, if any, included in the charging document; and

(15) any other fact or circumstance bearing on the risk of nonappearance or on the danger to others or to the public.

(b) *Specific statutory limits apply.* — When a statute limits a judge's bail authority, such statutory limits shall apply to the extent any of the amounts listed in section (c) are in conflict therewith.

(c) *Bond guidelines.* — The following is established as a general guide for circuit, county, justice, and municipal courts in setting bail for persons charged with bailable offenses. Except in situations where release is required in the minimum scheduled amount pursuant to Rule 5.1(b) or (c), or any other Rule, courts may and should exercise discretion in setting bail above or below the scheduled amounts, as supported by consideration of the factors listed in Rule 8.2(a).

## SECURED OR UNSECURED APPEARANCE BOND GUIDELINES

| | *Recommended Range* |
|---|---|
| **FELONIES** | |
| Capital felony | $25,000 to No Bail Allowed |
| Manslaughter (or any other non-capital crime involving loss of human life) | $10,000 to $1,000,000 |
| Drug Distribution and Trafficking | $ 5,000 to $1,000,000 |
| All other non-capital felonies | |
| — punishable by maximum 20 years or more | $20,000 to $250,000 |
| — punishable by maximum 10 years to 20 years | $10,000 to $100,000 |
| — punishable by maximum up to 10 years | $ 5,000 to $50,000 |
| **MISDEMEANORS** (not included elsewhere in the schedule): | |
| — punishable by maximum 1 year | $500 to $2,000 |
| — punishable by maximum 6 mos. | $250 to $1,000 |
| — punishable by less than 6 mos. | $100 to $500 |
| — punishable by fine only | $50 to Max. Fine/ Costs* |
| Misdemeanor DUI and DWLS | $500 to $2,000 |
| Municipal Ordinance Violations | $100 to $1,000 |

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*Maximum amount of fine(s), court costs, and statutory assessments which might be due upon conviction.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 8.2 embodies the guarantee against excessive bail provided by article 3, section 29, of the Mississippi Constitution, within the limitations stated therein. Rule 8.2 is based on the presumption of innocence of the accused, the constitutional right of a defendant charged with a noncapital offense to be released on bail, and the policy that a defendant should be released pending trial whenever possible. Under section (a), a defendant charged with an offense that is bailable as a matter of right is eligible for a personal recognizance release unless the judge determines that the defendant's presence would not be reasonably assured or that the defendant poses a real and present danger of harm to others. *See United States v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1986) (upholding the constitutionality of pretrial detention based on dangerousness). Section (a) makes it possible to release on bail indigent defendants on non-financial conditions that make it reasonably likely that the defendant will appear. *See Bandy v. United States*, 81 S. Ct. 197, 5 L. Ed. 2d 218 (1960) (questioning constitutionality of holding indigent defendant in custody for no reason other than the inability to raise money for bail).

Sections (a)(1)-(15) provide detailed guidance for the judge setting bond as to the range of inquiries that should be made prior to setting the conditions on, or the amount of, any personal recognizance or appearance bond. While no prior rule or statute required the inquiry described in section (a), such an inquiry has always been within the sound discretion and inherent power of a court setting terms of release. *See Lee v. Lawson*, 375 So. 2d 1019, 1024 (Miss. 1979) (suggesting similar inquiry). Section (a) is intended to provide a helpful, nonexhaustive list for any court making such an inquiry, and is written to ensure that a judge not give inordinate weight to the nature of the present charge.

Section (b) provides that, in the event of a conflict with the amounts listed in (c), statutory limits on a judge's bail authority will control. *See, e.g.*, Miss. Code Ann. § 99-5-37 (defendant charged with certain domestic violence offenses).

While section (c) makes clear that the judge retains discretion to set any amount of bail above or below the suggested range, the bond guidelines set forth in section (c) should help reduce the disparities between courts who previously set bail without the guidance of a scheduled range. "Capital felony" is defined in Mississippi Code Section 1-3-4. (Effective July 1, 2017.)

## Rule 8.3. Release after conviction and sentencing.

A convicted defendant shall be entitled to bail pending appeal as prescribed by Mississippi Code Section 99-35-115. A condition of the appeal bond shall be that the defendant will obey every order and judgment of the Supreme Court or Court of Appeals or every order and judgment of the trial court affirmed by the Supreme Court or Court of Appeals. The sheriff shall not accept the appeal bond unless the appeal has been perfected. If a defendant is admitted to bail pending appeal, the trial court clerk shall so notify the clerk of the Supreme Court.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 8.3 generally tracks former Rule 12.01 of the Uniform Rules of Circuit and County Court. Release after conviction and sentencing is governed by statute and uniform rule. *See, e.g.*, Rules 29 (Appeals from Justice or Municipal Court), 30 (Appeals from County Court), and M.R.A.P. 9 (Release in Criminal Cases). (Effective July 1, 2017.)

### Rule 8.4. Conditions of release.

(a) *Mandatory Conditions.* — Every order of release under this Rule shall contain the conditions that the defendant:

(1) appear in court, when required, and comply with all orders of the court;

(2) commit no crime;

(3) promptly notify the court of any change of address; and

(4) meet with your public defender or retained attorney, as directed.

(b) *Additional conditions.* — An order of release may include any one (1) or more of the following conditions reasonably necessary to secure a defendant's appearance or to protect the public:

(1) execution of an appearance bond in an amount specified by the court, either with or without requiring that the defendant deposit with the clerk security in an amount as required by the court;

(2) execution of a secured appearance bond;

(3) placing the defendant in the custody of a designated person or organization agreeing to supervise the defendant;

(4) restrictions on the defendant's travel, associations, or place of abode during the period of release;

(5) restrictions on the defendant's direct or indirect contact with any specified person(s);

(6) return to custody after specified hours;

(7) participation in, and successful completion of, any drug, alcohol, anger management, mental health, or other treatment required by the court, and/or substance testing;

(8) participation in General Educational Development (GED ® ) classes and testing or in any other educational activities required by the court;

(9) electronic monitoring; or

(10) any other conditions which the court deems reasonably necessary.

**HISTORY: Effective July 1, 2017.**

#### COMMENT

Rule 8.4 adds specific conditions of release drawn from portions of 18 U.S.C. § 3142(c) and from practice in various Mississippi courts in the exercise of their discretion and experience in such matters. Section (b)(10) vests the judge setting bond conditions with broad latitude to insure appearance of the defendant and protection of the public, and gives the judge flexibility in fashioning conditions of release. (Effective July 1, 2017.)

### Rule 8.5. Procedure for determination of release conditions.

(a) *Initial decision.* — When a defendant is brought before a court for initial appearance, a determination of the conditions of release shall be made. The judge shall issue an order containing the conditions of release and shall inform the defendant of the conditions, the possible consequences of their violation, and that a warrant for the defendant's arrest may be issued immediately upon report of a violation.

(b) *Amendment of conditions.* — The court may, for good cause shown, on its own initiative or on application of either party, modify the conditions of release, after first giving the parties an adequate opportunity to respond to the proposed modification.

(c) *Review by circuit court.* — No later than seven (7) days before the commencement of each term of circuit court in which criminal cases are adjudicated, the official(s) having custody of felony defendants being held for trial, grand jury action, or extradition within the county (or within the county's judicial districts in which the court term is to be held) shall provide the presiding judge, the district attorney, and the clerk of the circuit court the names of all defendants in their custody, the charge(s) upon which they are being held, and the date they were most recently taken into custody. The senior circuit judge, or such other judge as the senior circuit judge designates, shall review the conditions of release for every felony defendant who is eligible for bail and has been in jail for more than ninety (90) days.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 8.5 establishes a mechanism for setting bail, and for periodically reviewing bail which has been set but has not been posted. These notice and review requirements should enhance the procedure for ensuring speedy trials or other timely dispositions of criminal cases, and should help avoid the possibility that a person in detention is overlooked by those having custody of that person.

The conditions of release will usually be set on the arrest warrant at the time of its issuance, pursuant to Rule 3.2(a). If not, or if the defendant cannot meet the conditions, the defendant will be afforded a release hearing at the initial appearance as provided by Rules 5.1 and 5.2. Thereafter, under section (b), the conditions can be modified, to be made either more or less stringent, depending on the circumstances. Section (c) is particularly important in requiring that the court and other interested personnel in the judicial system receive notice prior to each court term of the identities of those being held in custody, either without bail or without the ability to post bail. The clerk of the circuit court shall maintain the lists required by section (c). Section (c) also requires a review of the detention or bail status of those who have remained in custody for more than ninety (90) days. (Effective July 1, 2017.)

## Rule 8.6. Review of conditions; revocation of bail.

(a) *Issuance of warrant.* — If it is alleged that a defendant previously released has committed a material breach of the conditions of release, then the court having jurisdiction over the defendant may procure the defendant's presence in court by issuing an order to appear before the court to show cause, or by issuing an arrest warrant under Rule 3.1. Such action shall be predicated upon a motion of the prosecuting attorney, or the court's own motion, which states with particularity:

(1) the facts or circumstances alleged to constitute a material breach of the conditions of release;

(2) that material misrepresentations or omissions of fact were made in securing the defendant's release; or

(3) that revocation is otherwise required by law.

If action is taken on motion of the prosecuting attorney, then a copy of the motion shall be served with the order or warrant, and a hearing shall be held on the motion without unnecessary delay.

(b) *Hearing; review of conditions; revocation of release.* — If, after a hearing on the matters set forth in the motion, the court finds that the released defendant has materially breached the conditions of release, the court may modify the conditions or revoke the release. If a ground alleged for revocation of the release is that the defendant has committed a criminal offense or has made misrepresentations or omissions in informing the court of other charges pending against the defendant, the court may modify the conditions of release or revoke the release, if the court finds that there is probable cause to believe that the defendant committed the other pending offense(s).

(c) *Cases governed by Article 3, Section 29(2) of the Mississippi Constitution.* — In cases governed by Article 3, section 29(2) of the Mississippi Constitution of 1890, on motion of the prosecuting attorney or on the court's own motion, a court having jurisdiction over the defendant may revoke the defendant's bail.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 8.6(a) permits either a warrant or a summons to be issued to take the person into custody for bail review or revocation proceedings. Section (c) is in accordance with article 3, section 29(2) of the Mississippi Constitution and governs situations where one previously admitted to bail for a felony has been charged with a new felony offense punishable by more than five (5) years of imprisonment. Upon finding probable cause for the new offense, either by the reviewing court or another court with jurisdiction (such as the court in which the new charge has been filed), this constitutional provision requires revocation of the prior bail and directs that the person will not be admitted to further bail. *See Dendy v. State*, 931 So. 2d 608, 614-15 (Miss. Ct. App. 2005), cert. denied, 933 So. 2d 303 (Miss. 2006). (Effective July 1, 2017.)

## Rule 8.7. Transfer and disposition of bond.

(a) *Transfer upon supervening indictment.* — An appearance bond or release order issued to assure the defendant's presence for proceedings following the filing of a charging affidavit shall automatically be transferred to the same, related, or lesser charge subsequently prosecuted by indictment unless, following indictment, the judge presiding, for good cause, shall order revocation or modification of the conditions of release, as provided in Rule 8.6(a) and (b).

(b) *Filing and custody of appearance bonds and security.* — Appearance bonds and security shall be filed with the clerk of the court in which the case is pending. Whenever the case is transferred to another court, any appearance bond and security shall be transferred also.

(c) *Surrender of defendant by surety.* — The surrender of the defendant by a surety shall be governed by Mississippi Code Sections 99-5-27 and 99-5-29. In the event that a Professional Bail Agent, Soliciting Bail Agent, or Insurer has provided a surety bond or other form of bail for a defendant without first obtaining payment in full for the premium on the bond, that defendant may not be surrendered because the defendant, or anyone assuming financial responsibility for the bond premium on the defendant's behalf, has failed to make any payment to the surety following release of the defendant.

(d) *Forfeiture.* — If at any time it appears to the court that a defendant has failed to appear, the court shall proceed as appropriate pursuant to Mississippi Code Sections 99-5-25, 21-23-8, or 99-5-11, and any related statutes or regulations which may apply.

(e) *Cancellation of bond.* — At any time that the court finds there is no further need for an appearance bond, the court shall cancel the appearance bond and order the return of any security deposited with the clerk.

**HISTORY: Added effective July 1, 2017; amended effective July 1, 2017.**

### COMMENT

Rule 8.7(a) is consistent with current Mississippi practice regarding appearance bonds. The last sentence of section (c) addresses the situation where a bail bond company attempts to surrender the principal solely on the basis of nonpayment of the fee or commission, or any portion thereof, which was not collected at the time of issuance of the bond. Mississippi Code Section 83- 39-25 plainly directs that the professional bail agent "shall charge and collect" the premium, commission, or fee due. However, if the bail agent nevertheless elects to contract with the principal to issue bail on the payment of less than the full amount due, any subsequent collection effort is merely a contractual matter which may be resolved in civil court, not in criminal court by means of incarceration for nonpayment. *See Brooks v. Pennington*, 995 So. 2d 733 (Miss. Ct. App. 2007). The statutes governing bail permit wide latitude to the surety to surrender a person on bail; however, nonpayment of a contractual obligation between the principal and professional bail agent is not, standing alone, a proper basis for surrender. Section (d) defers to the extensive statutory procedure governing forfeiture of bail bonds provided in Mississippi Code Sections 99-5-25, 21-23-8, and 99-5-11. (Added effective July 1, 2017; amended effective July 1, 2017.)

# RULE 9. TRIAL SETTING

## Rule 9. Trial Setting.

(a) *Trial docket.* — Within sixty (60) days after arraignment (or waiver thereof), the court shall enter an order setting a date for trial. Trial shall be set for no later than two-hundred-and-seventy (270) days after arraignment (or waiver thereof). A docket of cases set for trial shall be maintained by the clerk or the court administrator. Cases set by the judge for trial must be ready at the appointed time.

(b) *Criminal docket to have priority.* — Insofar as is practicable, trials of criminal cases shall have priority over trials of civil cases.

(c) *Continuance of trial date.* — For good cause shown, a continuance may be granted by written order of the court on its own motion, or on the motion of a party stating, with specificity, the reasons for the continuance.

**HISTORY: Effective July 1, 2017.**

# RULE 10. PRESENCE OF DEFENDANT, WITNESSES, AND SPECTATORS

## Rule 10.1. Right of defendant to be present; waiver.

(a) *Right to be present.* — The defendant has the right to be present at the arraignment and at every stage of the proceedings. A corporate criminal defendant may appear by counsel for all purposes at any proceeding.

(b) *Waiver of the right to be present.* —

(1) Except as provided in subsection (2), a defendant may waive the right to be present at any proceeding in the following manner:

(A) with the consent of the court, by a knowing, intelligent, and explicit waiver in open court or by a written waiver executed by the defendant and by the defendant's attorney of record, filed in the case; or

(B) by the defendant's absence from any proceeding, if the court finds that such absence was voluntary and constitutes a knowing and intelligent waiver of the right to be present.

(2) A defendant may not waive the right to be present:

(A) during the imposition of his/her sentence in a felony case; or

(B) if the defendant is not represented by counsel, except in minor misdemeanor cases where the potential punishment is a fine only and carries no potential for the loss of liberty.

(c) *Effect.* — If the defendant waives the right to be present, the trial may proceed to completion, including the return of the verdict.

(d) *Unexcused defendant.* — If a defendant is not present at the trial, or any stage of the proceedings, and the defendant's presence has not been waived or the absence has not been excused, the court, by order, may direct law enforcement officers forthwith to bring the defendant before the court.

**HISTORY: Effective July 1, 2017.**

### COMMENT

The right of the defendant to be present protects various rights of the accused. *See* Miss. Const. art. 3, § 26 ("In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both [and] to be confronted by the witnesses against him").

Section (b) allows a defendant to waive the right to be present, consistent with prior practice. The standards for waiver are those required for waiver of other constitutional rights. *See Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938) ("an intentional relinquishment or abandonment of a known right or privilege").

The defendant may make an express waiver or the defendant may waive the right through voluntary absence from the proceeding. *See Wales v. State*, 73 So. 3d 1113 (Miss. 2011); *Taylor v. United States*, 414 U.S. 17, 94 S. Ct. 194, 38 L. Ed. 2d 174 (1973).

A defendant deemed to have waived the right to be present pursuant to subsection (b)(1)(B) might still be involuntarily absent and should be permitted to prove that fact in a subsequent or collateral proceeding. The decision to proceed in light of a voluntary waiver pursuant to subsection (b)(1)(B) is discretionary with the court. The court is in no instance required to proceed. (Effective July 1, 2017.)

## Rule 10.2. Consequences of defendant's disruptive behavior.

(a) *Disruptive conduct.* — A defendant who engages in disruptive or disorderly conduct may be removed and shall forfeit the right to be present at that proceeding.

(b) *Restoration of right.* — The court shall grant any defendant so removed reasonable opportunities to return to the court upon the defendant's personal assurance of good behavior and/or such other conditions as the court may require. Any subsequent disruptive conduct on the part of the defendant may result in removal.

(c) *Continuing duty of court.* — If feasible, the court shall employ reasonable means to enable a defendant removed from a proceeding under this Rule to hear, observe or be informed of the further course of the proceeding, and to consult with counsel at reasonable intervals.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 10.2 is based upon *Illinois v. Allen*, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970), *r'hg den*. 398 U.S. 915. Under Rule 10.2(a), a defendant, by disruptive conduct, may forfeit the right to be present, even in circumstances where the right could not be waived under Rule 10.1(b)(2). If the defendant is pro se, the court should consider appointing advisory counsel even if the defendant had refused to accept appointed counsel.

Section (c) is intended to encourage use of any practical audiovisual devices in communicating the progress of the proceeding to the defendant.

The court's contempt power also is applicable to such situations. *See* Rule 32. (Effective July 1, 2017.)

## Rule 10.3. Presence of witnesses and spectators.

(a) *Witnesses.* — Pursuant to Rule 615 of the Mississippi Rules of Evidence, the court may, and at the request of either party shall, exclude prospective witnesses from the courtroom. The court also shall direct witnesses not to communicate with each other concerning the case until all have testified. If the court finds that a party's claim that a person is a prospective witness is not made in good faith, the person may be allowed to remain in the courtroom. Once a witness has testified on direct examination and has been made available to all parties for cross-examination and excused by the court, the witness shall be allowed to remain in the courtroom unless the court finds, upon application of a party or witness, that the presence of the witness would be prejudicial to a fair trial. This Rule does not authorize excluding a person whose presence a party shows to be essential to presenting the party's claim or defense.

(b) *Spectators.* —

(1) *Proceedings to be open.* — All proceedings shall be open to the public unless the court finds, upon application of the defendant, that an open proceeding presents a danger to the defendant's right to a fair trial by an impartial jury.

(2) *Exception for certain crimes.* — Pursuant to Article 3, Section 26 of the Mississippi Constitution, the court may exclude from the courtroom all persons except those necessary in the conduct of the trial.

(3) *Victims.* — Pursuant to Article 3, Section 26A of the Mississippi Constitution, the alleged victim has the right to be present throughout all criminal proceedings when authorized by law. If the alleged victim is a witness, then Rule 10.3(a) controls.

(c) *Removal.* — Any or all individuals may be removed from the courtroom for engaging in disorderly, disruptive, or contemptuous conduct, or when their conduct or presence constitutes a threat or menace to the court, parties, attorneys, witnesses, jurors, officials, members of the public, or a fair trial.

(d) *Electronic coverage of proceedings.* — Electronic coverage of judicial proceedings shall be governed by the Mississippi Rules for Electronic and Photographic Coverage of Judicial Proceedings.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 10.3(a) is consistent with Rule 615 of the Mississippi Rules of Evidence. The policy underlying the sequestration rule is that, by preventing a witness from hearing the testimony of another witness, the risk of fabrication, collusion, inaccuracy, and shaping of testimony is minimized. Because it is only at the designated phases where exclusion promotes the truth-finding process, prospective witnesses are permitted to attend during other phases, such as jury selection and legal argument. It is believed that the rule harmonizes the interest of a fair trial with the interest of witnesses in being personally present at the trial. The trial court retains discretion to exclude witnesses from the courtroom in those rare cases where it can be demonstrated that a fair trial cannot be held without such exclusion.

Rule 10.3(b)(1) sets forth the right of a defendant to a public trial as guaranteed by Article 3, Section 26, of the Mississippi Constitution, and subsection (b)(2) sets forth the exception for certain crimes contained therein. Rule 10.3(b)(3) embodies an alleged victim's right to be present set forth in Article 3, Section 26A, of the Mississippi Constitution and Mississippi Code Section 99-43-21. Mississippi Code Section 99-43-3(t) defines "victim" to mean "a person against whom the criminal offense has been committed, or if the person is deceased or incapacitated, the lawful representative." Mississippi Code Section 99-43-3(h) defines "criminal proceeding" as "a hearing, argument or other matter scheduled by and held before a trial court but does not include a lineup, grand jury proceeding or other matter not held in the presence of the court."

Section (c) gives the judge clear authority to clear the courtroom of any and all persons whose conduct is disruptive of the proceedings or whose presence poses a threat to others or to the proceedings. (Effective July 1, 2017.)

## RULE 11. CHANGE OF THE PLACE OF TRIAL

### Rule 11.1. Change of venue.

(a) *Grounds.* — The trial judge, for good cause, may grant the defendant a change of venue. Good cause includes a satisfactory showing made to the court in writing, supported by the affidavits of two (2) or more credible persons, that the defendant cannot have a fair and impartial trial in the county where the offense is charged to have been committed.

(b) *Prejudicial pretrial publicity.* — Whenever the grounds for change of venue are based on pretrial publicity, the trial judge shall consider the level of adverse publicity (both in extent of coverage and its inflammatory nature) and the potential effect of such publicity on the venire.

(c) *Time for filing motion.* — A motion for change of venue should be made at the earliest opportunity after learning of the cause for challenge.

(d) *Venue upon remand.* — When an action is remanded by an appellate court for a new trial or jury sentencing, all rights to request a change of venue may be asserted *de novo*.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 11.1(a) is in accord with Article 3, Section 26 of the Mississippi Constitution, Mississippi Code Section 99-15-35, and former Rule 6.06 of the Uniform Rules of Circuit and County Court. If the request for a change of venue is based on pretrial publicity, section (b) requires the trial judge to consider the level of adverse publicity and its potential effect on the venire. *See McCune v. State*, 989 So. 2d 310, 317 n.14 (Miss. 2008).

Under section (d), an application for change of venue may be made when the matter is remanded by an appellate court for a new trial or jury sentencing. See *Maye v. State*, 49 So. 3d 1124, 1133 (Miss. 2010) (citing *State v. Caldwell*, 492 So. 2d 575, 577 (Miss. 1986)). (Effective July 1, 2017.)

## Rule 11.2. Transfer to another county.

(a) *Proceedings on transfer.* — If a change of venue is granted pursuant to Rule 11.1, the judge shall direct that a certified copy of the order granting the change of venue be transmitted to the circuit clerk of the county to which the venue has been changed. The circuit clerk of the county to which the venue has been changed must file the certified order and designate a docket number for said case for future reference. Unless otherwise directed by the judge, all pleadings, motions, orders of the court, and other matters thereafter filed shall bear both the original number of the county of original venue and the assigned number of the county of changed venue, and shall be filed with the circuit clerk of the county of original venue. The judge may hear or determine all pretrial and post-trial matters in the county to which venue has been changed or in any county of the judge's district.

(b) *Place of trial.* — In all cases in which venue has been changed, it shall be within the judge's discretion, after the jury has been selected, to conduct the trial in the county of original venue or in the county to which venue has been transferred.

(c) *Costs.* — All costs of a trial transferred from one county to another county, including the cost of transporting the jury from one county to another where the same is ordered, shall be borne by the county of original venue. The clerk of the county of original venue shall handle any appeal.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 11.2 continues the practice under former Rule 6.06 of the Uniform Rules of Circuit and County Court, as well as prior statutory practice. See Miss. Code. Ann. §§ 99-15-37, 99-15-45. (Effective July 1, 2017.)

# RULE 12. MENTAL EXAMINATION

## Rule 12.1. Mental competency; Definition.

(a) *Mental competency.* — There is a presumption of mental competency. In order to be deemed mentally competent, a defendant must have the ability to perceive and understand the nature of the proceedings, to communicate rationally with the defendant's attorney about the case, to recall relevant facts, and to testify in the defendant's own defense, if appropriate. The presence of a mental illness, defect, or disability alone is not grounds for finding a defendant incompetent to stand trial. If as a result of mental illness, defect, or disability, a defendant lacks mental competency, then the defendant shall not be tried, convicted, or sentenced for a criminal offense.

(b) *Mental illness, defect, or disability.* — Mental illness, defect, or disability means a psychiatric or neurological disorder that is evidenced by behavioral or emotional symptoms, including congenital mental conditions, conditions resulting from injury or disease, or developmental disabilities.

**HISTORY: Effective July 1, 2017.**

### COMMENT

"[T]he criminal trial of an incompetent defendant violates due process." *Cooper v. Oklahoma*, 517 U.S. 348, 354, 116 S. Ct. 1373, 1376, 134 L. Ed. 2d 498 (1996) (citation omitted). *See also Caylor v. State*, 437 So. 2d 444, 445 (Miss. 1983) (citing *Emanuel v. State*, 412 So. 2d 1187, 1188 (Miss. 1982)). The Mississippi Supreme Court has outlined the requisite abilities for a defendant to be deemed mentally competent. *See Jay v. State*, 25 So. 3d 257, 261 (Miss. 2009); *Martin v. State*, 871 So. 2d 693, 697-98 (Miss. 2004). In that analysis, there is a presumption of mental competency. *See Evans v. State*, 725 So. 2d 613, 660 (Miss. 1997). Rule 12.1 addresses only the defendant's competency to stand trial, and not the defendant's possible insanity at the time of the alleged offense. *See Parker v. State*, 30 So. 3d 1222, 1230-31 (Miss. 2010); *Medina v. California*, 505 U.S. 437, 448, 112 S. Ct. 2572, 2579, 120 L. Ed. 2d 353 (1992) ("there are significant differences between a claim of incompetence and a plea of not guilty by reason of insanity."); *Caylor*, 437 So. 2d at 447 n.1. If reasonable grounds exist to doubt the defendant's competence to stand trial, the procedures in Rules 12.2 through 12.6 should be followed. (Effective July 1, 2017.)

### JUDICIAL DECISIONS

#### ANALYSIS

Presumption of competency.
Request for psychological examination denied.

**Presumption of competency.**

Trial court did not err in denying defendant's request for a psychological examination because defendant failed to meet his burden and to overcome the presumption that he was competent to stand trial as defendant presented no evidence to raise any doubt about his competency to stand trial or to rationally aid in his defense because, after questioning defendant, the trial court found no reasonable grounds to support that defendant was mentally incompetent; and, in fact, the trial court found the opposite – that defendant was coherent and rational. King v. State, 269 So. 3d 98, 2018 Miss. LEXIS 462 (Miss. 2018).

**Request for psychological examination denied.**

Trial court did not err in denying defendant's request for a psychological examination because defendant failed to meet his burden and to overcome the presumption that he was competent to stand trial as defendant presented no evidence to raise any doubt about his competency to stand trial or to rationally aid in his defense because, after questioning defendant, the trial court found no reasonable grounds to support that defendant was mentally incompetent; and, in fact, the trial court found the opposite – that defendant was coherent and rational. King v. State, 269 So. 3d 98, 2018 Miss. LEXIS 462 (Miss. 2018).

## Rule 12.2. Examination of defendant's mental condition.

(a) *Competency to stand trial or be sentenced.* — If at any time before or after indictment, the court, on its own motion or the motion of any party, has reasonable grounds to believe that the defendant is mentally incompetent, the court shall order the defendant to submit to a mental examination.

(b) *Insanity defense.* — If the defendant has timely raised a defense of insanity pursuant to Rule 17.4(b), the court, on its own motion or the motion of any party, may order the defendant to submit to a mental examination to investigate the defendant's mental condition at the time of the offense.

(c) *Intellectual disability in death penalty cases.* — If at any time the court, on its own motion or the motion of any party, has reasonable grounds to believe that the defendant's intellectual disability bars imposition of a sentence of death, the court may order the defendant tested and/or examined to determine whether the defendant is intellectually disabled.

(d) *Contents of motion; order.* — The motion shall state the facts upon which the mental examination is sought. The mental examination shall be conducted by a competent psychiatrist and/or psychologist approved by the court.

(e) *Medical and criminal history record.* — All available medical and criminal history records shall be provided to the examining mental health expert as and when ordered by the court. A certificate of compliance shall be filed with the court documenting that the records were submitted as ordered.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 12.2 includes standards provided in former Rules 9.06 and 9.07 of the Uniform Rules of Circuit and County Court. The determination of the defendant's mental competency should be made at the earliest practicable date. The United States Supreme Court has held that the failure to make a determination of competency when there are reasonable grounds to doubt such is fundamental constitutional error. *See Drope v. Missouri*, 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); *Pate v. Robinson*, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966). *See also House v. State*, 754 So. 2d 1147, 1152 (Miss. 1999).

Sections (a) and (b) make clear that the determination of the defendant's competency to stand trial is separate and distinct from the determination of the defendant's sanity at the time of the offense. An examination to investigate competency may be combined with an examination to investigate the defendant's sanity at the time of the offense, provided that the judicial order makes a clear distinction between the two purposes for evaluation to ensure that the correct legal criteria are applied. While the test for competency is distinct, as a matter of law, from the test for sanity at the time of the offense, the reports prepared may contain information having a substantial bearing on both issues.

Section (c) extends this process to cases in which there are reasonable grounds to believe the defendant's intellectual disability precludes the imposition of a death sentence. *See Chase v. State*, 873 So. 2d 1013, 1027 (Miss. 2004) (citing *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)). (Effective July 1, 2017.)

## JUDICIAL DECISIONS

### ANALYSIS

Under former URCCC 9.06.
– Abandoned motion.
– Death penalty cases.
– Effectiveness of counsel.
– Grounds for mental examination.

**Under former URCCC 9.06.**

**– Abandoned motion.**

There was no evidence that defendant's substantive right not to be convicted while incompetent was violated, as, not only did the trial court have a statement by an officer of the court that a report found defendant competent, but the trial judge was accorded numerous opportunities to observe defendant in pretrial hearings, at many of which defendant himself addressed the court. Evans v. State, 226 So. 3d 1, 2017 Miss. LEXIS 249 (Miss. 2017), cert. denied, — U.S. —, 138 S. Ct. 2567, 201 L. Ed. 2d 1104, 2018 U.S. LEXIS 4033 (U.S. 2018).

Because the motion for appointment of a psychiatrist to conduct a psychiatric evaluation was never pursued to a decision, the matter was procedurally barred. Trammell v. State, 62 So. 3d 424, 2011 Miss. App. LEXIS 6 (Miss. Ct. App. 2011).

**– Death penalty cases.**

In defendant's capital murder case, court properly conducted a hearing to determine defendant's competency to stand trial where it gave an extensive order concerning defendant's competency before trial. The trial judge considered such things as expert testimony, defendant's behavior, and medical reports. Evans v. State, 226 So. 3d 1, 2017 Miss. LEXIS 249 (Miss. 2017), cert. denied, — U.S. —, 138 S. Ct. 2567, 201 L. Ed. 2d 1104, 2018 U.S. LEXIS 4033 (U.S. 2018).

**– Effectiveness of counsel.**

Because of defendant's vast history of mental health issues, sufficient evidence existed to raise doubts as to defendant's mental condition and ability to stand trial. After the mental evaluation of defendant was requested and ordered, defense counsel should have requested a competency hearing. Goodin v. State, 102 So. 3d 1102, 2012 Miss. LEXIS 616 (Miss. 2012).

Counsel was not deficient for failing to allege that defendant was incompetent to stand trial for aggravated assault where defendant admitted that before trial he had started to take his medicine again and could now think straight. Furthermore, defendant participated in his defense, made a closing argument, and discussed his case and the insanity defense with his cellmate. Epps v. State, 984 So. 2d 1042, 2008 Miss. App. LEXIS 111 (Miss. Ct. App. 2008).

At the evidentiary hearing on defendant's motion for a psychiatric evaluation, the trial judge found that defendant had not presented sufficient evidence to warrant a granting of defendant's motion, and because the trial judge did not find that a reasonable ground existed to suspect that defendant was mentally incompetent to stand trial, the trial court was not required to order a competency hearing pursuant to Miss. Unif. Cir. & County Ct. Prac. R. 9.06; thus, the trial court did not err in failing to grant defendant's motion for a hearing to determine competency. Evans v. State, 984 So. 2d 308, 2007 Miss. App. LEXIS 641 (Miss. Ct. App. 2007), cert. denied, 984 So. 2d 277, 2008 Miss. LEXIS 289 (Miss. 2008).

**– Grounds for mental examination.**

Trial court did not abuse its discretion in denying defendant's petition to determine competency because when defendant's attorney moved for a competency hearing under Miss. Unif. Cir. & Cty. R. 9.06 the circuit court had information that supported either granting or denying the motion, but it found, on balance, more information supported denying the motion; defendant's own testimony at trial showed that the circuit court was correct in determining that he was competent to aid his own defense and understand the nature of the charge against him. Bradley v. State, 116 So. 3d 1093, 2013 Miss. App. LEXIS 19 (Miss. Ct. App.), cert. denied, 109 So. 3d 567, 2013 Miss. LEXIS 99 (Miss. 2013).

Inmate's guilty plea to murder was valid as: (1) the inmate offered no evidence questioning his competency; (2) the key phrase in Miss. Unif. Cir. & Cty. R. 9.06 in determining whether a competency hearing was required was reasonable ground to believe that the defendant was incompetent; and (3) the trial court took great measures to ensure that the inmate understood his actions in pleading guilty and also the consequences of doing so. Higginbotham v. State, 114 So. 3d 9, 2012 Miss. App. LEXIS 595 (Miss. Ct. App. 2012), cert. denied, 116 So. 3d 1072, 2013 Miss. LEXIS 317 (Miss. 2013), dismissed, — So. 3d —, 2020 Miss. App. LEXIS 79 (Miss. Ct. App. 2020).

Defendant failed to present evidence to bring his competency reasonably in question, Miss. Unif. Cir. & Cty. R. 9.06, and he entered a voluntary, knowing, and intelligent guilty plea. Higginbotham v. State, 122 So. 3d 1205, 2013 Miss. App. LEXIS 78 (Miss. Ct. App.), cert. denied, 123 So. 3d 450, 2013 Miss. LEXIS 529 (Miss. 2013).

There was no abuse in the trial court's determination that defendant, who suffered from mental deficiencies, was incompetent to stand trial where the trial court believed that defendant was exaggerating his mental deficiencies during the plea colloquy and determined from defendant's demeanor and conduct during several court appearances and based on a tape-recorded confession that no ground existed to order a mental evaluation of defendant to determine his competency to stand trial. Harden v. State, 59 So. 3d 594, 2011 Miss. LEXIS 210 (Miss. 2011).

Trial court was not required by Miss. Unif. Cir. & Cty. R. 9.06 to sua sponte conduct a competency hearing to determine whether defendant was capable of providing a knowing and intelligent waiver of his right to counsel: (1) defendant precisely stated the State's burden of proof in defendant's opening statement and included the elements of the crime; (2) defendant's withdrawal of a self-defense instruction did not indicate that he did not understand the nature of the proceedings because there was no basis in the evidence for the instruction; (3) defendant did not explain how his brain surgery for an aneurysm affected his competency; and (4) although defendant did not possess the skill and competency of an attorney he, with the assistance of a court-appointed attorney, performed reasonably. Hairston v. State, 4 So. 3d 403, 2009 Miss. App. LEXIS 134 (Miss. Ct. App.), cert. dismissed, 12 So. 3d 531, 2009 Miss. LEXIS 242 (Miss. 2009).

Trial court was not required by Miss. Unif. Cir. & Cty. R. 9.06 to sua sponte conduct a competency hearing to determine whether defendant was capable of providing a knowing and intelligent waiver of his right to counsel. Whatever may have been defendant's initial understanding of the application of Miss. Code Ann. § 99-19-81, the enhanced sentencing statute, defendant was able to understand what was communicated to him by the court regarding how it applied to him. Hairston v. State, 4 So. 3d 403, 2009 Miss. App. LEXIS 134 (Miss. Ct. App.), cert. dismissed, 12 So. 3d 531, 2009 Miss. LEXIS 242 (Miss. 2009).

In an aggravated assault case, a trial court did not err by denying the motion for a mental examination under Miss. Unif. Cir. & County Ct. Prac. R. 9.06 and Miss. Code Ann. § 99-13-11; even though defendant's mother testified that he suffered from psychosis, there were no medical records or documentation submitted. Further, despite his suffering from psychological ailments, defendant was competent enough to assist counsel in his previous cases, and he was receiving medication at the time of the hearing. Epps v. State, 984 So. 2d 1042, 2008 Miss. App. LEXIS 111 (Miss. Ct. App. 2008).

Trial court did not err by denying defendant's motion for a mental evaluation to determine his competence to stand trial under Miss. Unif. Cir. & County Ct. Prac. R. 9.06 because (1) his mother, his former human resource manager, and a co-worker testified that defendant had no history or did not exhibit any mental problems; (2) a deputy testified that, while defendant was upset on the night of the crime, he was able to understand and answer questions normally; (3) a corrections officer testified that from her observations at the jail, defendant was communicative and did not exhibit any signs of mental problems; and (4) defendant exhibited reluctance, rather than an inability, to assist in his own defense. Staten v. State, 989 So. 2d 938, 2008 Miss. App. LEXIS 76 (Miss. Ct. App.), cert. denied, 993 So. 2d 832, 2008 Miss. LEXIS 400 (Miss. 2008).

In a manslaughter case, there was no showing that defendant was incompetent based on the fact that she was pregnant, and allegedly had been mistreated in custody, and was experiencing stomach pains; defendant did not raise the issue until the fifth day of trial, and she was able to give rational testimony when she took the stand. Brown v. State, 970 So. 2d 1300, 2007 Miss. App. LEXIS 826 (Miss. Ct. App. 2007).

Where only one mention was made of defendant's prior mental illness, a trial court did not err by failing to provide a competency hearing during sentencing since one was not required; defendant stated he was able to understand his plea given during sentencing, defendant's attorney stated that defendant was able to proceed, and the trial court had an opportunity to observe defendant during a two-day trial. Nichols v. State, 955 So. 2d 962, 2007 Miss. App. LEXIS 279 (Miss. Ct. App. 2007).

Though geared towards competency to stand trial, Miss. Unif. Cir. & County Ct. Prac. R. 9.06 may be applied to a defendant's entry of a guilty plea. The standard of competency necessary to enter a plea of guilty is the same as that for determining competency to stand trial. Smith v. State, 831 So. 2d 590, 2002 Miss. App. LEXIS 683 (Miss. Ct. App. 2002).

Where defendant offered no evidence at plea hearing to demonstrate his incompetence due to the taking of his medications, and defendant was questioned regarding his understanding of the charged crime, there was no reason to reopen the incompetence issue. Smith v. State, 831 So. 2d 590, 2002 Miss. App. LEXIS 683 (Miss. Ct. App. 2002).

The trial judge did not err in failing on his own motion to order a hearing to determine the defendant's competence to stand trial notwithstanding the assertion that the defendant exhibited bizarre behavior that included failing to cooperate with attorneys, admitting guilt to the jury, and calling a witness who incriminated him, and that one of his lawyers filed a motion alleging that the defendant was delusional, where the court responded to the attorney's motion by stating that the defendant appeared to be rational, testified logically from the witness stand and was not delusional. Taylor v. State, 812 So. 2d 1056, 2001 Miss. App. LEXIS 111 (Miss. Ct. App. 2001).

The trial court did not err in denying the defendant's motion for a psychiatric evaluation where, (1) the initial hearing on the motion occurred just one day after counsel was appointed, and the defendant's counsel presented by affidavit evidence that the defendant was uncooperative and even was in a "complete rampage " during their meeting, (2) the court denied the motion on the evidence presented, but invited the defense to present additional evidence in a week's time, and (3) the defendant failed to produce further evidence or testimony of incapacity. Ficklin v. State, 758 So. 2d 457, 2000 Miss. App. LEXIS 133 (Miss. Ct. App. 2000).

The trial court justly concluded that a mental examination was unnecessary in spite of the defendant's assertion that he suffered from periodic loss of memory and occasional blackouts, where the record indicated that the trial judge directed a series of questions to the defense to ensure that the defendant was capable to stand trial and that, after addressing these questions, the judge concluded that the circumstance indicated that the defendant was fully competent to stand trial. Benish v. State, 733 So. 2d 855, 1999 Miss. App. LEXIS 23 (Miss. Ct. App. 1999).

The court did not err in failing to order, sua sponte, a competency hearing, even though two medical reports before the court raised serious competency concerns; there was nothing in the record which led to the conclusion that the defendant could not understand the proceedings, appreciate their significance or rationally aid his attorney in his defense. Richardson v. State, 722 So. 2d 481, 1998 Miss. LEXIS 455 (Miss. 1998).

Trial court was advised of defendant's special education background, his history of mental illness and disease, his organic brain damage, that he had been taking medications, and that the prosecution and defense had agreed to have defendant undergo a mental evaluation; the rule does not provide for retroactive mental evaluation to determine a defendant's competency to stand trial, and the circuit court abused its discretion in not ordering a mental evaluation and conducting a mental competency hearing prior to accepting defendant's plea. Brasso v. State, 195 So. 3d 856, 2016 Miss. App. LEXIS 211 (Miss. Ct. App. 2016).

Defendant's petition for post-conviction collateral relief was properly dismissed as the circuit court did not err in failing to conduct a full evidentiary hearing to determine defendant's competency because, at the plea colloquy, the circuit court asked whether defendant suffered from any mental illness or disorder and he responded that he received treatment for depression and took medication for his depression, but that was the only indication of any mental disorder; defendant stated that he understood the charges and the proceedings, spoke with his counsel concerning the charges, and recalled relevant facts; and defendant's counsel indicated that defendant perceived the nature and severity of the crime and his guilty plea. Rogers v. State, 205 So. 3d 660, 2015 Miss. App. LEXIS 648 (Miss. Ct. App. 2015), cert. denied, 205 So. 3d 1085, 2016 Miss. LEXIS 519 (Miss. 2016).

Trial court committed reversible error in ordering a mental evaluation but failing to hold a hearing on defendant's competency pursuant to Miss. Unif. Cir. & Cty. R. 9.06. Once the mental evaluation was ordered, a competency hearing was mandatory. Hollie v. State, 174 So. 3d 824, 2015 Miss. LEXIS 488 (Miss. 2015), overruled in part, Pitchford v. State, 240 So. 3d 1061, 2017 Miss. LEXIS 420 (Miss. 2017).

In a murder case, the trial court committed reversible error in failing to conduct a competency hearing pursuant to Miss. Unif. Cir. & Cty. R. 9.06. Although the trial court attempted to schedule the competency hearing, for reasons unclear in the record, the hearing never occurred. Silvia v. State, 175 So. 3d 533, 2015 Miss. App. LEXIS 284 (Miss. Ct. App. 2015).

Remand for an evidentiary hearing on the issue of why the trial court ordered a mental evaluation of defendant was appropriate because significant ambiguity surrounded the reason the court ordered the evaluation. If it was determined that the purpose of the court-ordered mental evaluation was to determine defendant's competency to stand trial, defendant's conviction could not stand, and defendant had to be either retried or institutionalized following a mental evaluation and competency hearing. Smith v. State, 149 So. 3d 1027, 2014 Miss. LEXIS 544 (Miss. 2014), overruled, overruled in part, Pitchford v. State, 240 So. 3d 1061, 2017 Miss. LEXIS 420 (Miss. 2017).

In a murder case, the trial court followed all requirements of Miss. Unif. Cir. & Cty. R. 9.06 in determining that defendant was competent to stand trial. The trial court's determination was not manifestly against the overwhelming weight of the evidence. Beasley v. State, 136 So. 3d 393, 2014 Miss. LEXIS 28 (Miss. 2014).

Defendant was entitled to a new competency hearing because the trial court should have alerted to the possibility that defendant was incompetent where the trial court misinterpreted the term "rule out " in a psychiatrist's report and the psychiatrist stated multiple times in the report that he doubted defendant's ability to assist in his defense. Rickman v. State, 129 So. 3d 960, 2014 Miss. App. LEXIS 1 (Miss. Ct. App. 2014).

Doctor's report finding that appellant was competent to go to trial or enter a guilty plea, along with defense counsel's confirmation of appellant's competency at the plea hearing, was sufficient to establish that he was competent to enter his guilty pleas. Montalto v. State, 119 So. 3d 1087, 2013 Miss. App. LEXIS 227 (Miss. Ct. App.), cert. dismissed, 127 So. 3d 1115, 2013 Miss. LEXIS 635 (Miss. 2013).

As neither appellant nor his attorney expressed concern about the lack of a competency hearing when appellant entered his guilty pleas, and the trial court made an implicit, if not explicit, finding that appellant was competent to enter a plea, it did not err in failing to hold a separate competency hearing under Miss. Unif. Cir. & Cty. R. 9.06. Montalto v. State, 119 So. 3d 1087, 2013 Miss. App. LEXIS 227 (Miss. Ct. App.), cert. dismissed, 127 So. 3d 1115, 2013 Miss. LEXIS 635 (Miss. 2013).

Petitioner failed to show that counsel was ineffective for failing to request a mental competency hearing because counsel observed and interacted with petitioner prior to trial, the court granted a mental examination, and the results showed petitioner's ability to understand the nature of the proceedings against him and that he did not need any additional testing or psychiatric treatment. Hood v. King, 2014 U.S. Dist. LEXIS 42093 (S.D. Miss. Mar. 28, 2014).

There were no reasonable grounds for the trial court to order a competency hearing because there was no evidence to support defendant's assertions that he was mentally incompetent at the time he entered his guilty plea; none of defendant's lawyers ever raised any competency issues before the trial court, and the trial judge was able to observe defendant's demeanor and behavior, and found him competent to understand the nature of the criminal offense to which he pleaded guilty. Whatley v. State, 123 So. 3d 461, 2013 Miss. App. LEXIS 28 (Miss. Ct. App.), cert. denied, 123 So. 3d 450, 2013 Miss. LEXIS 530 (Miss. 2013).

Trial court's finding defendant was competent to stand trial for murder was not against the overwhelming weight of evidence because defendant understood the severity of the consequences he faced, was able to adequately assist in his own defense, and took the stand and testified in his own defense; at the pretrial hearing, the trial court extensively questioned defendant, defendant's mother, and two law enforcement officers who observed defendant during his pretrial incarceration. Kuykendall v. State, 50 So. 3d 376, 2010 Miss. App. LEXIS 679 (Miss. Ct. App. 2010).

Trial court did not err in failing to conduct a formal competency hearing prior to accepting defendant's Alford plea to manslaughter because, at the sentencing hearing, an independent psychiatrist testified on defendant's behalf and stated that defendant was very calm and collected during the evaluation and that the psychiatrist did not see anything that would suggest that defendant had a major mental disorder. Dillon v. State, 75 So. 3d 1045, 2010 Miss. App. LEXIS 629 (Miss. Ct. App. 2010), cert. dismissed, 2011 Miss. LEXIS 577 (Miss. Nov. 28, 2011).

Trial court's failure to hold a competency hearing violated Miss. Unif. Cir. & Cty. R. 9.06 and defendant's constitutional rights and, thus, required reversal of his multiple drug convictions. Whether his absence at trial was the result of willful, voluntary, and deliberate actions could not be answered because the question turned on his competency at the time of trial. Jay v. State, 25 So. 3d 257, 2009 Miss. LEXIS 527 (Miss. 2009).

Although the circuit court granted defendant's motion for a psychiatric evaluation before trial, his murder conviction was reversed and remanded for a new trial because the trial court erred in failing to conduct a competency hearing pursuant to Miss. Unif. Cir. & Cty. R. 9.06, and the doctor's report did not address defendant's competency. Sanders v. State, 9 So. 3d 1132, 2009 Miss. LEXIS 261 (Miss. 2009), overruled, Pitchford v. State, 240 So. 3d 1061, 2017 Miss. LEXIS 420 (Miss. 2017).

Trial court did not err in denying defendant a competency hearing where a clinical psychologist reflected that defendant appeared to have the mental faculties to work with his attorney and the trial judge indicated that defendant had been fully examined by the court at the time of his guilty plea. Smith v. State, 910 So. 2d 635, 2005 Miss. App. LEXIS 151 (Miss. Ct. App. 2005).

Defendant's murder conviction was proper even though a second competency hearing was not held pursuant to Miss. Unif. Cir. & County Ct. Prac. R. 9.06 because there was sufficient evidence, from the doctors' letter and from defendant's testimony, from which the trial court could have determined that defendant was competent to stand trial. Tutor v. State, 933 So. 2d 1003, 2006 Miss. App. LEXIS 524 (Miss. Ct. App. 2006).

Trial court did not err in failing to conduct a mental competency hearing pursuant to Miss. Unif. Cir. & County Ct. Prac. R. 9.06 after ordering defendant to undergo a competency examination at the Mississippi State Hospital because it was within the trial court's discretion to decide whether to hold a competency hearing and the trial judge was in the best position to make the determination whether there existed a reasonable ground for the trial court to order a competency hearing on its own initiative. The hospital filed its mental evaluation report on defendant, finding him to be mentally competent to stand trial, and after observing defendant's actions and demeanor both before and during the trial, the trial judge did not find it necessary to order a competency hearing. Jones v. State, 902 So. 2d 593, 2004 Miss. App. LEXIS 1011 (Miss. Ct. App. 2004), cert. denied, 901 So. 2d 1273, 2005 Miss. LEXIS 336 (Miss. 2005).

Court did not abuse its discretion in not holding a competency hearing where defendant, who claimed to be a paranoid schizophrenic, said he understood what was going on at trial and was aware of the consequences of a conviction, showed no overt physical symptoms, and produced no statements from the doctors who treated him for his condition. Cox v. State, 793 So. 2d 591, 2001 Miss. LEXIS 188 (Miss. 2001).

Trial court was not unreasonable in not holding a competency hearing prior to the trial where the defendant failed to assert that he was in fact unable to stand trial or assist his counsel with a defense due to any mental incapacity, he failed to make the findings of the psychiatrist who examined him part of the appellate record, and the trial judge was present to observe his demeanor. Coleman v. State, 1999 Miss. App. LEXIS 488 (Miss. Ct. App. July 27, 1999), aff'd, 786 So. 2d 397, 2001 Miss. LEXIS 149 (Miss. 2001).

Circuit court was within its discretion to conclude that there were not reasonable grounds to believe that defendant was incompetent to stand trial, and the circuit court did not err in denying defendant's motion requesting a mental examination because defendant indicated that he clearly understood the role of the attorneys and the role of the judge; defendant was able to articulate complete answers to all of the court's questions and was able to explain his medical problems to the judge; he testified that he would be able to provide his attorneys with everything they needed to defend him; and defense counsel was allowed to participate and offer any additional information for the court to consider. Prokasy v. State, 189 So. 3d 703, 2016 Miss. App. LEXIS 206 (Miss. Ct. App. 2016).

Trial judge was able to observe defendant's behavior, including his ability to consult with counsel, to understand the proceedings, and to question witnesses and conduct cross-examination, and did not err in finding that he was not incompetent at the time of trial. Wash v. State, 129 So. 3d 247, 2013 Miss. App. LEXIS 763 (Miss. Ct. App. 2013).

## Rule 12.3. Appointment of experts.

(a) *Grounds for appointment.* — If the court determines that reasonable grounds for a mental examination exist, it shall appoint a competent psychiatrist and/or psychologist to examine the defendant and, if necessary, to testify regarding the defendant's mental condition. The court has discretion to appoint more than one (1) examiner.

(b) *Examination; commitment.* — The court may order that a defendant be examined in an appropriate mental health facility, and it may commit a defendant to the Mississippi State Hospital or other appropriate mental health facility for no longer than reasonably necessary to conduct the examination if:

(1) the defendant cannot be examined on an outpatient basis;

(2) examination in an outpatient setting is unavailable; or

(3) commitment for examination is indispensable to a clinically valid diagnosis and report.

The examination and inpatient consultation shall be in the least restrictive appropriate setting.

(c) *Reports.* —

(1) *Opinion on competency.* — A psychiatrist and/or psychologist appointed by the court pursuant to this Rule shall submit a report containing an opinion as to whether the defendant is competent, and the basis therefor. The report may also include additional findings and opinions concerning whether the defendant's mental condition creates a present danger to the defendant and/or others.

(2) *Cause and treatment of incompetency.* — If the opinion referenced in (c)(1) is that the defendant is incompetent under the standards in Rule 12.1, the report shall also state the psychiatrist's and/or psychologist's opinion of:

(A) the condition causing the defendant's incompetency and the nature thereof;

(B) the treatment, if any, required for the defendant to attain competency;

(C) the most appropriate form and place of treatment, in view of the defendant's therapeutic needs and potential danger to the defendant and/or others, and an explanation of appropriate treatment alternatives;

(D) the likelihood of the defendant's attaining competency under treatment and the probable duration of the treatment; and

(E) the availability of the various types of acceptable treatment in the local geographic area, specifying the agencies or the settings in which the treatment might be obtained and whether the treatment would be available on an outpatient basis.

(3) *Opinion on mental condition at time of the offense.* — In addition, if the court so orders, the report shall contain a statement of the psychiatrist's and/or psychologist's opinion of the following:

(A) the mental condition of the defendant at the time of the alleged offense;

(B) if the psychiatrist's and/or psychologist's opinion is that at the time of the alleged offense the defendant suffered from a mental disease or defect, the relation, if any, of such to the alleged offense, including:

(i) whether the defendant knew the nature and quality of the defendant's actions; and

(ii) if so, whether the defendant knew that the actions were wrong. and

(C) such other matters as the court may deem appropriate.

(4) *Opinion on intellectual disability in death penalty cases.* — In addition, if the court so orders in a death penalty case, the report shall contain a statement of the psychiatrist's and/or psychologist's opinion as to whether the defendant is intellectually disabled and, if so, to what extent.

(d) *Additional expert assistance.* — For good cause shown, the court may appoint additional experts and order the defendant to submit to physical, neurological, psychiatric, or psychological examinations, if necessary for an adequate determination of the defendant's mental condition.

(e) *Costs.* — Any cost or expense in connection with the court-ordered mental examination(s) shall be paid by the county in which such criminal action originated.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Consistent with former Rule 9.06 of the Uniform Rules of Circuit and County Court and Mississippi Code Section 99-13-11, Rule 12.3(a) provides that where "reasonable grounds" exist, the court must appoint a competent psychiatrist and/or psychologist to examine the defendant and testify regarding the defendant's mental condition.

Section (b) ensures that a defendant will not be subjected to confinement in a mental health facility, unless a less restrictive alternative (such as local outpatient services) is unavailable, and it ensures that any confinement will be for only the minimum time required to conduct necessary examinations. *See Jackson v. Indiana,* 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972) (indefinite commitment based solely on incompetence to stand trial is unconstitutional). Once a court-ordered examination is completed, the examiner's report shall be filed with the court clerk, as provided in Rule 12.4.

Because the Rule 12.3 examination may also provide information concerning a possible insanity defense, the psychologist and/or psychiatrist may be required, pursuant to Rule 12.3(c)(3), to report on the mental condition of the defendant at the time of the alleged offense and on the relationship, if any, of the defendant's mental disease or defect to the alleged criminal act. Rule 12.3(c)(3) is not intended to establish a new legal test for insanity, or to change the test that was in use before adoption of these Rules. *See Nolan v. State,* 61 So. 3d 887, 895-97 (Miss. 2011) (citations omitted) ("Mississippi follows the *M'Naghten* standard for determining whether a defendant was sane at the time of the crime[,]" and has repeatedly declined to abandon that standard). Rule 12.3 merely requires the psychiatrist and/or psychologist to describe the defendant's mental condition in broad medical language. See *Roundtree v. State,* 568 So. 2d 1173 (Miss. 1990). Whether a person is mentally ill, and to what extent, is a medical judgment that a psychologist and/or psychiatrist should make; whether the defendant is sufficiently ill to be exonerated of criminal responsibility, i.e., whether the defendant is legally insane, is a legal judgment for the jury or trier of fact to make after proper instructions. Section (c)(4) extends these procedures to the question of the defendant's possible intellectual disability in death penalty cases. *See Chase v. State,* 873 So. 2d 1013, 1027 (Miss. 2004) (citing *Atkins v. Virginia,* 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)).

Section (e) expressly provides for payment of the expenses of such professionals, within limits provided by law. *See* Miss. Code Ann. § 99-13-11. *Ake v. Oklahoma,* 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985), which holds that an indigent defendant is constitutionally entitled to a psychiatrist provided at state expense, is applicable when the defendant demonstrates to the trial judge that the defendant's sanity (or insanity) at the time of the offense is to be a significant factor at trial or that the defendant's mental state is likely to be a significant factor. Where a defense-consultant psychologist and/or psychiatrist is constitutionally required, such an expert may be appointed under Rule 12.3(a). (Effective July 1, 2017.)

### Rule 12.4. Disclosure of mental health evidence; reports of appointed experts.

(a) *Generally.* — The reports of experts made pursuant to Rule 12.3 shall be submitted to the court clerk within ten (10) working days of the completion of the examination. All original reports shall be filed with the clerk, under seal. Upon receipt, the clerk shall copy and distribute the expert's report to the trial judge and to defense counsel. Defense counsel may redact any statements of the defendant (or summaries thereof) concerning the offense charged. A copy of the redacted report must be returned to the clerk within five (5) working days of its receipt and made available to the State. Any dispute regarding the extent of redaction shall be resolved by the trial judge.

(b) *Mandatory disclosure.* — If the defendant raises the affirmative defense of insanity, the State shall be furnished unredacted copies of the reports of experts made pursuant to Rule 12.3.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Under Rule 12.4, all expert reports produced pursuant to Rule 12 are to be disclosed to the court, to the defendant's attorney, and to the prosecuting attorney. Only one item of the report is excepted – the defendant's statements concerning the actual offense charged. The United States Supreme Court has recognized that use of a defendant's statements during a court-ordered examination may compromise the defendant's right against self-incrimination. *See Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981) (defendant's privilege against self-incrimination was violated when he was not advised of right to remain silent during court-ordered examination and prosecution introduced statements). *See also* MRE 503 cmt. ("No statement made by an accused in the course of an examination into competency to stand trial is admissible on the issue of guilt"). Thus, the prosecution may not make use of evidence obtained by compulsory mental examination of the defendant unless the defendant offers, either directly or through cross-examination, evidence in support of the affirmative defense of insanity. *See Powell v. Texas*, 492 U.S. 680, 683-84, 109 S. Ct. 3146, 3149, 106 L. Ed. 2d 551 (1989) (defendant waives the privilege if the defendant introduces expert testimony on mental condition). (Effective July 1, 2017.)

## Rule 12.5. Hearing and orders.

(a) *Hearing.* — After submission of the reports, the court, upon its own motion or the motion of any party, shall promptly hold a hearing to determine the defendant's competency. The parties may introduce other evidence regarding the defendant's mental condition or, by stipulation (either written or stated on the record in open court), submit the matter on the experts' reports.

(b) *Procedure.* — The competency hearing is a critical stage of the proceedings, at which the defendant shall be represented by counsel. The defendant shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses, and to confront and cross-examine witnesses who appear at the hearing.

(c) *Finding of competence.* — If the court finds that the defendant is competent to stand trial, then the court shall make the finding a matter of record and order the case to proceed to trial.

(d) *Finding of incompetence.* — If the court finds that the defendant is incompetent to stand trial, then the court may commit the defendant to the Mississippi State Hospital, other appropriate mental health facility, or other place of treatment, either inpatient or outpatient, based on the report of a psychiatrist or psychologist pursuant to Rule 12.3(c)(2)(C) and (E). The order of commitment shall be filed with the court clerk and shall require that the defendant be examined by staff psychiatrist(s) and/or psychologist(s), and a written report be furnished to the court not less than every four (4) calendar months, stating:

(1) Whether there is a substantial probability that the defendant will become mentally competent to stand trial within the foreseeable future; and

(2) Whether progress toward competency is being made.

(e) *Release from commitment.* — If, within a reasonable time after entry of a commitment order, there is neither a determination that there is a substantial probability that the defendant will become mentally competent to stand trial nor progress toward competency, the court shall order that civil proceedings as provided in Mississippi Code Section 41-21-61, et. seq., be instituted. Said proceedings shall advance notwithstanding that the defendant has criminal charges pending against him/her. The defendant shall remain in custody until determination of the civil proceedings.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Under Rule 12.5(a), upon the court's own motion or the motion of any party, a competency hearing shall be conducted. But in the absence of such motion, a hearing is permissible, but not mandatory. This represents a departure from practice under former Rule 9.06 of the Uniform Rules of Circuit and County Court.

Under section (d), if the court finds the defendant to be incompetent, it shall commit the defendant to an appropriate mental health facility or other place of treatment. No order made under this section is to be effective for longer than four (4) months, thereby insuring a frequent review of each incompetent defendant's status and progress. *See O'Connor v. Donaldson*, 422 U.S. 563, 575, 95 S. Ct. 2486, 2493, 45 L. Ed. 2d 396 (1975) ("even if . . . involuntary confinement was initially permissible, it could not constitutionally continue after that basis no longer existed"); *Jackson v. Indiana*, 406 U.S. 715, 720, 92 S. Ct. 1845, 1849, 32 L. Ed. 2d 435 (1972) (a state "cannot constitutionally commit [a] petitioner for an indefinite period simply on account of his incompetency to stand trial on the charges filed against him"). Sections (d) and (e) largely continue the procedure applicable under former Rule 9.06 of the Uniform Rules of Circuit and County Court. (Effective July 1, 2017.)

## Rule 12.6. Subsequent hearings.

(a) *Grounds.* — The court shall hold a hearing to assess the defendant's competency:

(1) on receiving a written report from a treating mental health professional stating that, in his/her opinion, the defendant has become competent to stand trial;

(2) on motion of either party, accompanied by the certificate of a mental health expert stating that, in the expert's opinion, the defendant is competent to stand trial; or

(3) on the court's own motion.

The parties may, by stipulation (either written or stated on the record in open court), submit the matter on the experts' reports.

(b) *Finding of competency.* — If the court finds that the defendant is competent to stand trial, the regular proceedings shall recommence without delay. The defendant shall be entitled to a rehearing of any proceeding if there are reasonable grounds to believe the defendant was prejudiced by the defendant's previous incompetency.

(c) *Finding of continuing incompetency.* — If the court finds that the defendant remains incompetent, the court shall proceed in accordance with Rules 12.5(d) or (e).

**HISTORY: Effective July 1, 2017.**

### COMMENT

Section (c) directs the court, upon finding that the defendant remains incompetent, to reconsider the alternatives presented in Rules 12.5(d) and (e).*Jackson v. Indiana*, 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972), held that the continuing commitment of a defendant must be justified by an appropriate showing by the state. Accordingly, the initial findings of the trial court are not relevant at this point, and questions regarding the continued incompetency of the defendant are to be considered by the trial court *de novo*. (Effective July 1, 2017.)

# RULE 13. THE GRAND JURY

## Rule 13.1. Selection and preparation of grand jurors.

(a) *Summons.* — Grand jurors shall be summoned and impaneled as provided by law.

(b) *Service of grand jury.* —

(1) *Generally.* — Grand juries may be impaneled and serve both in term time and vacation.

(2) *Number of grand jurors.* — The grand jury shall consist of at least fifteen (15) persons, but not more than twenty-five (25) persons, the exact number to be within the discretion of the judge impaneling the jury. If during the service of a grand jury the number of grand jurors able to serve on the grand jury shall become less than fifteen (15), then the circuit judge may have additional grand jurors summoned, impaneled, and charged in the same manner as the original grand jurors.

(3) *Convening the grand jury.* — Upon impanelment, a grand jury may be convened and reconvened by order of the court. The grand jury will continue to serve until the next grand jury is impaneled and it may return indictments to court in term time or vacation notwithstanding intervening terms of court between the time the grand jury is impaneled and the time an indictment is returned.

(c) *Impanelment of grand jury.* — Before swearing grand jurors as such, the grand jurors shall be examined by the court, on oath, touching their qualifications. After the grand jurors have been sworn and impaneled, no objection shall be raised, by plea or otherwise, to the grand jury, but the impaneling of the grand jury shall be conclusive evidence of its competency and qualifications. However, any party interested may challenge or except to the array for fraud.

**HISTORY: Effective July 1, 2017.**

### COMMENT

"Historically and at present, a grand jury is an independent body empowered with the authority to investigate potential crimes and, if probable cause is found, to indict for criminal offenses." *Entergy Mississippi, Inc. v. State*, 132 So. 3d 568, 572 (Miss. 2014).

Rule 13.1 follows former Rule 7.02 of the Uniform Rules of Circuit and County Court, and incorporates the procedure for summoning and impaneling grand juries provided in Mississippi Code Section 13-5-1, et. seq. See Miss. Const. art. 14, § 264 ("The Legislature shall, by law, provide for the qualifications of grand and petit jurors. The Legislature shall provide, by law, for procuring a list of persons so qualified, and the drawing therefrom of grand and petit jurors"). Rule 13.1(c) tracks the language in Mississippi Code Section 13-5-43. (Effective July 1, 2017).

## Rule 13.2. Instructions, duties, and powers of grand jury.

(a) *Charge to the grand jury.* —

(1) *By whom.* — Only the circuit judge may deliver the charge to the grand jury, except that the circuit clerk or deputy court clerk may read the charge as proposed by the circuit judge when the judge shall be unable to deliver the charge by reason of physical infirmity.

(2) *Charge.* — The circuit judge shall charge the grand jury according to the matters required by law as the judge deems fit and proper. A sample charge which may be used is attached as an Appendix to these Rules.

(b) *Examination of county records.* — The grand jury shall have free access at all proper hours to the papers, records, accounts and books of all county officers for all examinations which it may see fit to make, and may make report to the court in relation thereto.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 13.2(a) is largely derived from former Rule 7.01 of the Uniform Rules of Circuit and County Court. Rule 13.2(b) incorporates the provisions of Mississippi Code Section 13-5-57. *See also Entergy Mississippi, Inc. v. State*, 132 So. 3d 568, 572 (Miss. 2014) (quoting *Ex parte Jones County Grand Jury, First Judicial Dist.*, 705 So. 2d 1308, 1315 (Miss. 1997)) ("Grand juries have 'broad investigative power and wide latitude in conducting an investigation' "). (Effective July 1, 2017.)

## Rule 13.3. Grand jury foreperson.

(a) *Selection of foreperson; oath.* —

(1) *Foreperson.* — The court shall appoint a foreperson of the grand jury to whom the following oath shall be administered in open court, in the presence of the other grand jurors:

> You, as foreperson of this grand inquest, shall diligently inquire into, and true presentment make, of all such matters and things as shall be given you in charge, or otherwise come to your knowledge, touching the present service. The counsel of the state, your fellows, and your own you will keep secret. You shall not present any person through malice, hatred or ill will, nor shall you leave any person unpresented through fear, favor or affection, or for any reward, hope or promise thereof, but in all your

> presentments, you shall present the truth, the whole truth, and nothing but the truth, to the best of your skill and understanding. So help you God.

(2) *Oath of Other Grand Jurors.* — The following oath shall be administered to the other grand jurors:

> The same oath that your foreperson has now taken before you on the foreperson's part, you, and each of you, shall well and truly observe, and keep on your respective parts. So help you God.

(3) *Replacement of foreperson.* — If a foreperson becomes unable to continue service as a grand juror, the court shall appoint another member of the grand jury as replacement. The fact that the original foreperson was replaced shall not be grounds for attacking the validity of the acts or indictments of the grand jury.

(b) *Powers and duties of foreperson.* — The foreperson is empowered to preside over the grand jury proceedings, issue or cause to be issued subpoenas (*ad testificandum and duces tecum*), and swear all witnesses. A record shall be kept by the foreperson and returned to court, certified and signed by the foreperson, of the names of all witnesses sworn before the grand jury. The foreperson shall also submit a written report of the proceedings of the grand jury to the court or clerk; endorse any indictment returned by the grand jury as a "True Bill" and sign the foreperson's name thereto; and return a "No True Bill" list to the circuit clerk, to be kept under seal, although the clerk is allowed to disclose to a defendant that his/her case has received a "No True Bill."

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 13.3 is based, in part, on former Rule 7.02 of the Uniform Rules of Circuit and County Court. The oaths in this Rule are taken from Mississippi Code Section 13-5-45. Such oaths may be administered to all grand jurors at the same time. The powers and duties of the foreperson are derived from Mississippi Code Section 13-5-63 and *Entergy Mississippi, Inc. v. State*, 132 So. 3d 568, 574 (Miss. 2014). They should be included in the charge to the grand jury. (Effective July 1, 2017.)

## Rule 13.4. Recalcitrant witnesses; contempt.

(a) *Recalcitrant witnesses.* — When a witness under examination before the grand jury refuses to testify, to answer a question or to give evidence, the foreperson and/or the district attorney shall present to the court the question or evidence requested and the refusal of the witness. If, after inquiry, the court decides that the witness is bound to testify, answer, or give the evidence, the court shall so inform the witness. If the witness persists in refusing to testify, answer the question, or give evidence, the court shall proceed with the witness as in cases of similar refusal in other judicial proceedings.

(b) *Request for contempt proceedings.* — The foreperson and/or the district attorney may request the court to initiate a contempt proceeding against any person whose conduct violates these Rules or disrupts the grand jury proceedings.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 13.4(a) is derived from former Rule 7.05 of the Uniform Rules of Circuit and County Court. Rule 13.4(b) authorizes the foreperson and/or the district attorney to request the court to employ its enforcement powers to secure compliance with these Rules through a contempt proceeding under Rule 32.3. (Effective July 1, 2017.)

## Rule 13.5. Persons authorized to be present during sessions of the grand jury; grand jury secrecy.

(a) *Persons authorized to be present.* — No person other than the grand jurors, the witness under examination, prosecutors authorized to present evidence, and the interpreter, if any, shall be present during sessions of the grand jury. No person other than the grand jurors shall be present during their deliberation and voting.

(b) *Grand jury secrecy.* —

(1) *Generally.* — A grand juror, except when called as a witness in court, shall keep secret the proceedings and actions taken in reference to matters brought before the grand jury for six (6) months after final adjournment of the grand jury, and the name and testimony of any witness appearing before the grand jury shall be kept secret.

(2) *Announcements concerning deliberations prohibited.* — No attorney general, district attorney, county attorney, other prosecuting attorney, or other officer of the court shall announce to any unauthorized person what the grand jury will consider in its deliberations. If such information is disclosed, the disclosing person may be found in contempt of court punishable by fine or imprisonment.

(3) *Disclosure of indictments prohibited.* — No grand juror, witness, attorney general, district attorney, county attorney, other prosecuting attorney, clerk, sheriff or other officer of the court shall disclose to any unauthorized person that an indictment is being found or returned into court against a defendant or disclose any action or proceeding in relation to the indictment before the finding of an indictment, within six (6) months thereafter, or before the defendant is arrested or gives bail or recognizance.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 13.5(b) preserves former Rule 7.04 of the Uniform Rules of Circuit and County Court and Mississippi Code Section 13-5-61. Rule 13.5(b)(2) authorizes the court to employ its contempt powers pursuant to Rule 32.3 to punish unauthorized disclosure of grand jury deliberations. *See* Miss. Code Ann. § 13-5-61. Rule 13.5(b)(3) does not preclude a prosecutor from informing a victim on the status of a charge, pursuant to Mississippi Code Section 99-7-9. (Effective July 1, 2017.)

## Rule 13.6. Grand jury proceedings.

(a) *Number of grand jurors necessary to indict; grand jury not to do certain things.* — A grand jury has the power to indict any person upon affirmative vote of twelve (12) or more grand jurors. The grand jury report should not accuse any person by name of an offense, malfeasance, or misfeasance unless an indictment is returned. If accusations are included in a grand jury report, the comments may be expunged upon the motion of the individual or on motion of the court.

(b) *Return of indictment.* — When an indictment is found, it must be endorsed "A True Bill," shall be signed by the foreperson, and may be signed by one of the prosecuting attorneys.

(c) *Presentment of indictments and grand jury reports.* — All indictments and grand jury reports must be presented to the clerk of the circuit court by the foreperson or the foreperson's designee, must be endorsed with the foreperson's name, and must be accompanied by the foreperson's affidavit that all indictments were concurred in by twelve (12) or more members of the grand jury and that at least fifteen (15) grand jurors were present during all deliberations. Indictments and grand jury reports must be marked "filed," and such entries must be dated and signed by the clerk. Unless the party indicted is in custody or on bond or recognizance, entry of the indictment shall be by number only, and no publicity may be given to the existence of the indictment. An arrest warrant (capias) for the person indicted shall immediately issue and be served. After the arrest of the person indicted, and before arraignment, a copy of the indictment shall be served on such person.

(d) *Notice of indictment.* — If the defendant has previously been released on bond or recognizance, or had an initial appearance under Rule 5.2, the court or the circuit clerk may notify the defendant, defendant's counsel, and/or defendant's bondsperson of the indictment in lieu of arrest.

(e) *Failure to return an indictment.* — If the grand jury fails to return an indictment on a charge presented to it, the foreperson shall promptly so report to the court in writing. Unless the court shall order otherwise, the defendant:

(1) if held in custody, shall be released forthwith; or

(2) if previously conditionally released, shall be relieved of any obligation made in connection with such conditional release, along with the surety.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 13.6(a) preserves former Rule 7.03 of the Uniform Rules of Circuit and County Court. *See also* Miss. Code Ann. § 99-7-11. Rule 13.6(c) largely embodies the statutory requirements contained in Mississippi Code Section 99-7-9. (Effective July 1, 2017.)

## Rule 13.7. Appearance of persons under investigation; immunity and privilege.

(a) *Appearance.* — A person under investigation by the grand jury may be invited or compelled to appear before the grand jury or, upon that person's written request, may be permitted by the grand jury to appear. Unless immunity has been granted to the person under investigation as provided in section (b), he/she shall be advised:

(1) of the right to remain silent, that anything he/she says may be used against him/her in a court of law;

(2) that he/she has the right to consult in private with an attorney outside the grand jury room at reasonable intervals while giving testimony;

(3) that, if he/she is unable to employ counsel because of indigency as defined in Rule 7.3, the court will appoint an attorney to represent him/her, and

(4) that he/she may at any time stop giving testimony and refuse to answer further questions.

(b) *Immunity and privilege.* — In any investigation before a grand jury, the prosecuting attorney may present, for court approval, a written agreement for a person under investigation to be granted immunity from prosecution for the offense(s) under investigation and any related or lesser-included offense(s) thereof.

**HISTORY: Effective July 1, 2017.**

## COMMENT

Rule 13.7(a) permits a person under investigation by the grand jury to appear before that body by written request. *See United States v. Levinson*, 405 F. 2d 971, 980 (6th Cir. 1968), cert. denied, 395 U.S. 958, 89 S. Ct. 2097, 23 L. Ed. 2d 744 (1969) ("One accused of crime may oftentimes, by himself testifying before the grand jury, clear up the charges against him so that no indictment is returned"). The rule is discretionary, and does not create an absolute right on the part of a person under investigation to appear before the grand jury. Federal courts have long held that a potential defendant has no absolute right to appear before a grand jury. *See, e.g., Duke v. United States*, 90 F. 2d 840, 841 (4th Cir. 1937), cert. denied, 302 U.S. 685, 58 S. Ct. 33, 82 L. Ed. 528 (1937) ("There is no right on the part of one whose conduct is being investigated by a grand jury to petition the grand jury or to appear before it, which is guaranteed by the Constitution or otherwise"). Consistent with practice in federal courts, a person under investigation is given the right to consult with an attorney outside the grand jury room, as a means of safeguarding the right against self-incrimination. *See, e.g., United States v. Corallo*, 413 F. 2d 1306, 1329-30 (2d Cir. 1969), cert. denied, 396 U.S. 958, 90 S. Ct. 431, 24 L. Ed. 2d 422 (1969).

Section (b) provides that the prosecuting attorney shall furnish any immunity agreement to the court, in writing, for approval. *See* Miss. Code Ann. § 99-15-53; *Wright v. McAdory*, 536 So. 2d 897, 899 (Miss. 1988) (enforceability of immunity agreement predicated upon obtaining "approval of the circuit court"). Transactional immunity is extended to the person under investigation in such circumstances. *See Wright*, 536 So. 2d at 904-05 ("we hold that Article 3, Section 26 of the Mississippi Constitution requires a transactional immunity grant[,]" as "[o]nly such broad immunity will make the individual as secure as if he had remained silent"; the lone exception pertains to perjury); *Kellum v. State*, 194 So. 2d 492, 493 (Miss. 1967) ("Witnesses who voluntarily appear before grand juries and other investigative bodies have a constitutional right not to be required to testify against themselves"); *State v. Milam*, 210 Miss. 13, 48 So. 2d 594, 596 (1950) ("It is well settled in Mississippi and elsewhere that the constitutional privilege against self-incrimination applies to proceedings before a grand jury").

A person under investigation granted immunity may not refuse to testify based on the privilege against self-incrimination. *See Wright*, 536 So. 2d at 903-04. The enforcement of this duty to testify is pursuant to the court's contempt powers under Rule 32. (Effective July 1, 2017.)

# RULE 14. INDICTMENT

## Rule 14.1. Nature and contents.

(a) *Contents generally.* —

(1) *Elements and notice.* — The indictment upon which the defendant is to be tried shall be a plain, concise and definite written statement of the essential facts and elements constituting the offense charged and shall fully notify the defendant of the nature and cause of the accusation. Formal and technical words are not necessary in an indictment, if the offense can be substantially described without them.

(2) *Other matters.* — An indictment shall also include the following:

(A) the name of the accused;

(B) the date on which the indictment was filed in court;

(C) a statement that the prosecution is brought in the name and by the authority of the State of Mississippi;

(D) the county and, in two-district counties, the judicial district in which the indictment is brought;

(E) the date and, if applicable, the time at which the offense was alleged to have been committed;

(F) the signature of the foreperson of the grand jury issuing it; and

(G) the words "against the peace and dignity of the state."

(3) *Surplusage.* — The court, upon motion, may strike from the indictment any surplusage, including unnecessary allegations or aliases.

(b) *Enhanced punishment for subsequent offenses.* — When an indictee may be eligible for enhanced punishment because of one (1) or more prior convictions, the State shall either:

(1) specify such prior conviction(s) in the indictment, identifying each such prior conviction by the name of the crime, the name of the court in which each such conviction occurred and the cause number(s), the date(s) of conviction, and, if relevant, the length of time the accused was incarcerated for each such conviction; or

(2) after indictment, and at least thirty (30) days before trial or entry of a plea of guilty, file with the court formal notice of such prior conviction(s). The notice shall be served upon the defendant or the defendant's attorney and shall contain the same information specified in subsection (1) of this rule. An untimely-filed formal notice is permitted only when the thirty (30) day requirement is expressly waived, in writing, by the defendant. Clerical mistakes in such formal notice may, with leave of the court, be amended prior to the pronouncement of sentence.

(c) *Charging the offense.* — The indictment shall state for each count the citation of the statute or other provision of law which the defendant is alleged to have violated.

(d) *Incorporation by reference.* — A count may incorporate by reference facts alleged in a previous count.

(e) *Notice of necessarily included offenses.* — Specification of an offense in an indictment shall constitute notice of a charge of that offense and of all lesser offenses included therein.

(f) *Admonishment.* — The indictment shall neither be shown to the jury, admitted into evidence, nor sent into the jury room.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 14.1(a) is based upon former Rule 7.06 of the Uniform Rules of Circuit and County Court. The rule now provides that, in addition to the essential facts constituting the offense charged, the indictment must also include the essential elements of the offense charged. This includes all facts and elements necessary to enhance a sentence that are required to be found by a jury. *See Apprendi v. United States*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63, 147 L. Ed. 2d 435 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt"). *See, e.g.*, Miss. Code Ann. § 41-29-142 (providing an enhanced penalty for drug crimes that occur in close proximity to a school, church, public park, etc.).

Ten (10) counties contain two (2) judicial districts. Rule 14.1(a)(2)(D) requires the indictment to state whether it is brought in the first or second judicial district of that county.

Rule 14.1(b) builds on practice under former Rule 11.03 of the Uniform Rules of Circuit and County Court. Prior conviction(s) utilized to enhance punishment shall be included in either the indictment or a formal notice filed at least thirty (30) days before trial or the entry of a guilty plea, absent written waiver of the thirty (30) day requirement by the defendant.

Rule 14.1(e) provides that allegations of facts constituting an offense will also encompass all lesser offenses, without the need for an explicit statement to that effect. *See Downs v. State*, 962 So. 2d 1255 (Miss. 2007); *Porter v. State*, 616 So. 2d 899 (Miss. 1993). (Effective July 1, 2017.)

## Rule 14.2. Multi-count indictments; joinder of defendants.

(a) *Joinder of offenses.* — The indictment may charge a defendant in separate counts with two (2) or more offenses triable in the same court if the offenses charged – whether felonies, misdemeanors or both – are:

(1) based on the same act or transaction; or

(2) connected with or constitute parts of a common scheme or plan.

(b) *Joinder of defendants.* — Two (2) or more defendants may be charged in the same indictment upon which they are to be tried when:

(1) Each defendant is charged with accountability for each offense charged;

(2) Each defendant is charged with conspiracy and some of the defendants are also charged with one (1) or more offenses alleged to have been committed in furtherance of the conspiracy; or

(3) All defendants are not charged in each count, but it is alleged that the several offenses charged were part of a common scheme or plan.

(c) *Trial of joined offenses.* —

(1) Where two (2) or more offenses are properly charged in separate counts of a single indictment, all such charges may be tried in a single proceeding.

(2) The trier of fact shall return a separate verdict for each count of an indictment drawn under section (a).

(d) *Sentencing.* — When a defendant is convicted of two (2) or more offenses charged in separate counts of an indictment, the court shall impose separate sentences for each such conviction. Nothing contained in this Rule, however, shall be construed to prohibit the court from exercising its authority to suspend either the imposition or execution of any sentence(s) or to prohibit the court from exercising its discretion to impose such sentences to run either concurrently with or consecutively to each other or to any other sentence(s) previously imposed upon the defendant.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 14.2 largely continues prior practice under former Rules 7.07 and 7.08 of the Uniform Rules of Circuit and County Court. (Effective July 1, 2017.)

## Rule 14.3. Severance.

(a) *Severance generally.* —

(1) *Severance in death penalty cases.* — The court shall order a severance of defendants in cases in which the State seeks the death penalty.

(2) *Severance in non-death penalty cases.* — The court may, on motion of the state or a defendant, grant a severance of defendants or offenses if it is deemed appropriate to promote the fair determination of a defendant's guilt or innocence of each offense.

(b) *Timeliness and waiver.* — A defendant's motion to sever offenses and/or defendants must be made at the earliest opportunity. The right to move for severance may be deemed to have been waived if a proper motion is not timely made.

(c) *Severance during trial.* — No severance of offenses or defendants may be ordered after trial has commenced unless the defendant consents or a mistrial has properly been declared as to such offense or defendant. Severance of offense(s) during trial, upon motion of the defendant or with the defendant's consent, shall not bar a subsequent trial of that defendant on the offense(s) severed.

**HISTORY: Effective July 1, 2017.**

### COMMENT

When deciding whether severance is appropriate, "the trial court should consider the following factors: (1) the time period between the offenses, (2) whether the evidence proving each count would be admissible to prove each of the other counts, and (3) whether the crimes are interwoven." *Richardson v. State*, 74 So. 3d 317, 324 (Miss. 2011) (citation omitted). (Effective July 1, 2017.)

## Rule 14.4. Amendment of indictments; defects in indictments.

(a) *Amendment of indictments; defects in indictments.* — For good cause shown, indictments may be amended as to form but not as to the substance of the offense charged. Amendment may be allowed only if the defendant is afforded a fair opportunity to present a defense and is not unfairly surprised.

(b) *Raising defect in indictment.* — Defects respecting the indictment shall be raised by written motion.

**HISTORY: Effective July 1, 2017.**

### COMMENT

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ." U.S. Const. amend. V. *See also* Miss. Const. art. 3, § 27.

Rule 14.4(a) allows an indictment to be amended as to form only upon a showing of good cause.

Under Rule 14.4(b), issues previously raised by demurrer or motion to quash the indictment may be brought in a motion to dismiss. See Miss. Code Ann. §§ 99-7-21, 99-7-23. A motion to dismiss the indictment also may be based upon objections to the composition of the grand jury, the legal insufficiency of, or a defect in, the indictment, or the failure of the indictment to charge an offense. (Effective July 1, 2017.)

### JUDICIAL DECISIONS

#### ANALYSIS

Amendment of indictment.
Amendment to form.

**Amendment of indictment.**

Defendant's habitual-offender indictment was proper because (1) the record did not support defendant's claim that defendant was first indicted for a parole-eligible offense and the indictment was then amended to charge a parole-ineligible offense, and, (2) in any event, the prosecutor was expressly permitted to amend the indictment. Moffite v. State, 309 So. 3d 529, 2019 Miss. App. LEXIS 581 (Miss. Ct. App. 2019), cert. denied, — So. 3d —, 2020 Miss. LEXIS 423 (Miss. 2020), cert. denied, — So. 3d —, 2020 Miss. LEXIS 459 (Miss. 2020), cert. denied, — U.S. —, 141 S. Ct. 1123, 208 L. Ed. 2d 561, 2021 U.S. LEXIS 100 (U.S. 2021).

**Amendment to form.**

Trial court did not err by ordering the indictment to be amended because any defense that defendant had was available before and after the amendment to the indictment was made, and since time was not an essential element in the crime, an amendment involving a change in date was a change in form, not substance. Spears v. State, 294 So. 3d 637, 2019 Miss. App. LEXIS 500 (Miss. Ct. App. 2019), cert. denied, — So. 3d —, 2020 Miss. LEXIS 122 (Miss. 2020), cert. denied, 291 So. 3d 1112, 2020 Miss. LEXIS 172 (Miss. 2020).

## Rule 14.5. Waiver of indictment; proceeding by information.

No person shall, for any felony, be proceeded against without indictment, except by means of an information where a defendant represented by counsel waives indictment by sworn statement in writing.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 14.5 is consistent with Article 3, Section 27 of the Mississippi Constitution. A properly executed waiver of indictment vests the trial court with full authority to dispose of the felony offense for which indictment was waived. *See Williams v. State*, 708 So. 2d 1358, 1364 (Miss. 1998). (Effective July 1, 2017.)

## Rule 14.6. Dismissal.

(a) *By the prosecutor.* — The prosecuting attorney may, with leave of the court having jurisdiction, dismiss an indictment or any count thereof.

(b) *Unnecessary delay.* — The court may dismiss an indictment or any count thereof, if unnecessary delay occurs in bringing a defendant to trial.

(c) *Effect of dismissal.* — Dismissal of a prosecution shall be without prejudice to the commencement of another prosecution, unless the court orders that the interests of justice require that the dismissal be with prejudice.

(d) *Release of defendant; discharge of bond.* — When a prosecution is dismissed, the defendant shall be released from custody, unless the defendant is in custody on some other charge, and any bail shall be released and held for naught and/or sureties discharged, or money deposited in lieu thereof shall be refunded.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 14.6(a) and (b) are derived from Federal Rule of Criminal Procedure 48. Rule 14.6(a) requires the prosecuting attorney to seek permission of the court to dismiss a prosecution, which is consistent with Mississippi Code Section 99-15-53. Rule 14.6(b) recognizes the court retains some discretion in determining what constitutes unnecessary delay.

Under Rule 14.6(c), the dismissal of a charge is without prejudice unless the court so specifies. *See Conwill v. State*, 94 So. 3d 1173, 1176 (Miss. Ct. App. 2011); *Beckwith v. State*, 615 So. 2d 1134, 1147 (Miss. 1992). (Effective July 1, 2017.)

## RULE 15. ARRAIGNMENT AND PLEAS

### Rule 15.1. Necessity of arraignment.

(a) *Service of indictment.* — Before arraignment, a copy of the indictment shall be served on the defendant. Arraignment, unless waived by the defendant, shall be held within thirty (30) days after the defendant is served with the indictment. When arraignment cannot be held within the time specified because the defendant is in custody elsewhere, it shall be held as soon as possible.

(b) *In general.* — An arraignment, unless waived, shall be conducted in open court and must consist of:

(1) ensuring that the defendant has a copy of the indictment;

(2) reading the indictment to the defendant or stating to the defendant the substance of the charge;

(3) asking the defendant to plead to the indictment;

(4) determining whether the defendant is represented by counsel and, if not, appointing counsel, if appropriate, under Rule 7;

(5) reviewing the bond previously set, if appropriate; and

(6) setting reasonable deadlines for the filing and hearing of all pretrial motions. Pretrial motions shall include, but are not limited to, motions: to dismiss, to suppress evidence, to request discovery, for continuance, for severance, for appointment of experts, for mental examination, or for any other matters which may delay the trial.

(c) *Waiving reading of indictment.* — Reading of the indictment may be waived if the defendant is represented and attended by counsel.

(d) *Waiving appearance.* — A defendant need not be present for the arraignment if the defendant, in a written waiver signed by both the defendant and the defendant's attorney, has waived appearance and has affirmed that the defendant received a copy of the indictment and that the plea is not guilty.

(e) *Video conferencing.* — Video conferencing may be used to arraign a defendant pursuant to Rule 1.8.

(f) *Codefendants.* — Defendants who are jointly charged may be arraigned separately or jointly. If codefendants are arraigned at the same time and charged with the same offense, the indictments need be read only once, with stated identification of each defendant.

(g) *Waiving arraignment.* — Arraignment is deemed waived when the defendant proceeds to trial or enters a guilty plea without objection.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 15.1 is largely derived from former Rules 8.01 and 8.02 of the Uniform Rules of Circuit and County Court. Section (a) requires that, whenever possible, arraignment be held within thirty (30) days after service of the indictment. The date of arraignment is an important point of reference for setting the date of trial under Rule 9(a) which, like former Rule 8.01 of the Uniform Rules of Circuit and County Court, provides that "[w]ithin sixty (60) days after arraignment (or waiver thereof), the court shall enter an order setting a date for trial. Trial shall be set for no later than two-hundred-seventy (270) days after arraignment (or waiver thereof)."

Section (b) is basically a checklist for the court and counsel in conducting an arraignment. Many of the items traditionally covered at the arraignment are included in the initial appearance. *See* Rule 5.2. They need not be repeated.

Section (d) permits the defendant to waive the right to appear at arraignment. It appears that the formal in-court taking of a plea of not guilty should not be required so long as the rights of the defendant are protected and an adequate record is made. Thus, the rule permits formal arraignment to be bypassed if the defendant is assisted by counsel and files a written waiver of arraignment and a plea of not guilty that also acknowledges receipt of a copy of the charge against the defendant.

Section (e) permits video conferencing of an arraignment pursuant to Rule 1.8. (Effective July 1, 2017.)

### Rule 15.2. Proceedings at arraignment.

(a) *Pleas.* — A defendant may plead not guilty, guilty, or, with leave of the court in misdemeanor cases, *nolo contendere*.

(b) *Failure or refusal to plead.* — If the defendant, on arraignment, refuses or neglects to plead, stands mute, or pleads evasively, the court will enter a plea of not guilty and will set the case for trial.

(c) *Absence of defendant.* — If the defendant is released on bail or recognizance, and does not appear to be arraigned, or as required by the bond or recognizance, the court may, in addition to forfeiture of bail, direct the clerk to issue a bench warrant to bring the defendant before the court.

**HISTORY: Effective July 1, 2017.**

## COMMENT

Rule 15.2 is largely based upon former Rules 8.03 and 8.04 of the Uniform Rules of Circuit and County Court. *See also* Miss. Code Ann. § 99-15- 23.

The pleas enumerated in Rule 15.2(a) embrace the use of "best interest" or *Alford* pleas. *See Sims v. State*, 134 So. 3d 300, 302 n.3 (quoting *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)) ("under a 'best interest plea,' the accused 'may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime'"). But *Alford* added that:

> [b]ecause of the importance of protecting the innocent and of insuring that guilty pleas are a product of free and intelligent choice, various state and federal court decisions properly caution that pleas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea, . . . and until the judge taking the plea has inquired into and sought to resolve the conflict between the waiver of trial and the claim of innocence.

*Alford*, 400 U.S. at 38 n.10 (internal citations omitted). Rule 15.3(c) requires that "[b]efore the trial court may accept a plea of guilty, the court must determine that the plea is voluntarily and intelligently made and that there is a factual basis for the plea."

In Mississippi, *nolo contendere* pleas are unavailable in felony cases. *See Welch v. State*, 958 So. 2d 1288, 1289 (Miss. Ct. App. 2007); *Bush v. State*, 922 So. 2d 802, 805 (Miss. Ct. App. 2005); *Keyes v. State*, 312 So. 2d 7, 10 (Miss. 1975) (citing *Bruno v. Cook*, 224 So. 2d 567 (Miss. 1969)) ("the plea of *nolo contendere* is only available in light or petty misdemeanor cases, not in felony cases"); Miss. Code Ann. § 21-23-7(8). The entry of a *nolo contendere* plea also requires leave of the court. *See Williams v. State*, 130 Miss. 827, 94 So. 882, 884 (1923) (quoting 1 Bishop's New Criminal Procedure, § 802) (*nolo contendere* "is pleadable only by leave of court"). (Effective July 1, 2017.)

## Rule 15.3. Entry of plea of guilty or Nolo Contendere.

(a) *Defendant's presence at plea.* —

(1) *Defendants generally.* — A defendant charged with the commission of a felony, who wishes to plead guilty, is required to plead personally. The court may require the personal appearance of a defendant charged with a misdemeanor.

(2) *Organizational defendants.* — An organizational defendant need not be present if represented by counsel who is present.

(b) *Entry of plea.* — A person charged with a criminal offense in county or circuit court, who is represented by counsel, may appear before the court at any time the judge may fix, be arraigned, enter a plea of guilty to the offense charged or, with leave of the court in misdemeanor cases, *nolo contendere*, and be sentenced at that time or some future time set by the court.

(c) *Voluntariness.* — Before the trial court may accept a plea of guilty, the court must determine that the plea is voluntarily and intelligently made and that there is a factual basis for the plea. A plea is not voluntary if induced by fear, violence, deception, or improper inducements. A showing that the plea of guilty was voluntarily and intelligently made must appear in the record.

(d) *Advice to the defendant.* — When the defendant is arraigned and wishes to plead guilty to a felony or a misdemeanor with the possibility of incarceration, the defendant may be placed under oath and it is the duty of the trial court to address the defendant personally in open court to inquire and determine:

(1) That the accused is competent to understand the nature of the charge;

(2) That the accused understands the nature and consequences of the plea, and the maximum and minimum penalties provided by law;

(3) That the accused understands that, by pleading guilty, the accused waives the constitutional rights of trial by jury, the right to confront and cross-examine adverse witnesses, and the right against self-incrimination; as well as that, if the accused is not represented by an attorney, that the accused is aware of the right to an attorney at every stage of the proceeding and that one will be appointed to represent the accused, if indigent; and

(4) That the accused understands that, if the accused is not a citizen of the United States, the plea may have immigration consequences. The court shall specify that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

**HISTORY: Effective July 1, 2017.**

## COMMENT

Rule 15.3(a) and (b) are largely derived from former Rules 8.03 and 8.04 of the Uniform Rules of Circuit and County Court. They adopt the requirement that, in all felony cases, the court shall address an individual defendant personally, in open court, and in the presence of counsel (unless counsel has been waived pursuant to Rule 7.1(c)). *See McCarthy v. United States*, 394 U.S. 459, 465-66, 89 S. Ct. 1166, 1170, 22 L. Ed. 2d 418 (1969). The Rule allows an organizational defendant to plead guilty through counsel who is present in court, as in Federal Rule of Criminal Procedure 43(b)(1).

Section (c) comes directly from former Rule 8.04(A.)(3.) of the Uniform Rules of Circuit and County Court. Under section (c), the court must determine that the plea is made voluntarily with understanding of the nature of the charge; that is, that the defendant understands "what the plea connotes and . . . its consequence[,]" as required by *Boykin v. Alabama*, 395 U.S. 238, 244, 89 S. Ct. 1709, 1712, 23 L. Ed. 2d 274 (1969). The court must also satisfy itself that there is a factual basis for the plea before entering judgment. The normal consequence of a determination that there is not a factual basis for the plea would be for the court to set aside the plea and enter a plea of not guilty. The record should affirmatively reflect the questions asked and the defendant's responses, thereby providing an adequate basis for review.

Section (d) is largely derived from former Rule 8.04(A.)(4.) of the Uniform Rules of Circuit and County Court. The Rule extends to pleas involving misdemeanors with the possibility of incarceration. *See, e.g.*, Miss. Code Ann. §§ 63-11-30(2)(a) (first offense DUI), 97-3-7(1)(a) (simple assault). Section (d) prescribes the advice that the court must give to the defendant as a prerequisite to the acceptance of a guilty plea and requires the court to determine that the defendant understands the sentencing implications of that plea. Section (d) also identifies the constitutional rights that the defendant waives by the plea, which is designed to satisfy the requirements of understanding waiver set forth in *Boykin*.

Generally speaking, it is within the court's discretion as to whether and to what extent to advise the defendant of "collateral consequences" of a plea of guilty or *nolo contendere*. *See Magyar v. State*, 18 So. 3d 807, 811-12 (Miss. 2009) ("there is no requirement that a defendant be informed of the collateral consequences" of a guilty plea; duty to register as a sex offender deemed a "collateral consequence" of a guilty plea). But immigration consequences stand as an exception; under Rule 15.3(d)(4), disclosure of certain potential immigration consequences is mandatory. *See Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010) (deficient performance under the ineffective assistance of counsel standard in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), when counsel failed to advise defendant that his guilty plea made him subject to automatic deportation); Fed. R. Crim. P. 11(b)(1)(O). (Effective July 1, 2017.)

### Rule 15.4. Plea bargaining.

(a) *Entering into plea agreements.* —

(1) The prosecuting attorney is encouraged to discuss and agree on pleas which may be entered by the defendant. Any discussions or agreements must be conducted with defendant's attorney or, if defendant is unrepresented, the discussion and agreement may be conducted with the defendant.

(2) The prosecuting attorney and the defendant's attorney, or the defendant acting *pro se*, may reach an agreement that upon entry of a plea of guilty or, with leave of the court in misdemeanor cases, *nolo contendere*, to the offense charged or to a lesser or related offense, the prosecuting attorney may do any of the following:

(A) Move for a dismissal of other charges;

(B) Make a recommendation to the trial court for a particular sentence, with the understanding that such recommendation or request will not be binding upon the court; or

(C) Make a recommendation to the trial court for a particular sentence, which the court may accept or reject. If the court accepts the plea agreement, it must inform the defendant the agreed disposition will be included in the judgment. If the court rejects the recommendation, the court must do the following on the record:

(i) inform the parties that the court rejects the plea agreement;

(ii) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(iii) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(3) Defense attorneys shall not conclude any plea bargaining on behalf of the defendant without the defendant's full and complete consent, being certain that the decision to plead is made by defendant. Defense attorneys must advise the defendant of all pertinent matters bearing on the choice of plea, including likely results or alternatives.

(b) *Disclosure and consideration of plea agreement.* — The trial judge shall not participate in any plea discussion. The court may designate a cut-off date for plea discussions and may refuse to consider the recommendation after that date. After a recommended disposition on the plea has been reached, it may be made known to the court, along with the reasons for the recommendation, prior to the acceptance of the plea. The court shall require disclosure of the recommendation in open court, with the terms of the recommendation to be placed in the record.

(c) *Withdrawing a plea.* —

(1) It is within the discretion of the court to permit or deny a motion for the withdrawal of a guilty plea, except as provided in (a)(2).

(2) In order to be sufficient, a motion to withdraw a guilty plea must show good cause.

(d) *Inadmissibility of withdrawn guilty plea.* — The fact that the defendant may have entered a plea of guilty to the offense charged may not be used against the defendant at trial if the plea has been withdrawn.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 15.4(a) and (b) are largely derived from former Rule 8.04(B.) of the Uniform Rules of Circuit and County Court. Under Mississippi law, "a trial court is not bound to accept a defendant's guilty plea or enforce a plea agreement reached between the prosecutor and defendant." *Wilson v. State*, 21 So. 3d 572, 578 (Miss. 2009) (quoting *Wade v. State*, 802 So. 2d 1023, 1028 (Miss. 2001)). "Related" offenses under Rule 15.4(a)(2) means those offenses that could be joined in the same indictment under Rule 14.2(a).

Rule 15.4(c) and (d) are taken from former Rule 8.04(A.)(5.)-(7.) of the Uniform Rules of Circuit and County Court.

Rule 15.4(c) only applies in cases in which a defendant is to plead guilty or, with leave of the court in misdemeanor cases, nolo contendere, pursuant to a plea agreement. The Rule does not apply when a court imposes conditions pursuant to an offered, but unaccepted or nonadjudicated, plea under Mississippi Code Section 99-15-26. *See Brown v. State*, 533 So. 2d 1118 (Miss. 1988) (trial court not required to allow defendant to withdraw his guilty plea and enter plea of not guilty after he violated court-imposed conditions).

During the course of plea negotiations, a defendant enjoys the right to effective assistance of counsel. *See Missouri v. Frye*, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012) (counsel's performance deemed deficient as defendant entered an open plea of guilty after a more favorable plea offer expired without being communicated by defense counsel); *Lafler v. Cooper*, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012) (defense counsel rendered deficient performance in advising defendant to reject favorable plea offer and go to trial); *Burrough v. State*, 9 So. 3d 368, 375 (Miss. 2009). In *Frye*, the United States Supreme Court suggested that:

> [t]he prosecution and the trial courts may adopt some measures to help ensure against late, frivolous, or fabricated claims after a later, less advantageous plea offer has been accepted or after a trial leading to conviction with resulting harsh consequences. First, the fact of a formal offer means that its terms and its processing can be documented so that what took place in the negotiation process becomes more clear if some later inquiry turns on the conduct of earlier pretrial negotiations. Second, States may elect to follow rules that all offers must be in writing, again to ensure against later misunderstandings or fabricated charges. Third, formal offers can be made part of the record at any subsequent plea proceeding or before a trial on the merits, all to ensure that a defendant has been fully advised before those further proceedings commence.

*Frye*, 132 S. Ct. at 1409 (internal citations omitted). (Effective July 1, 2017.)

## RULE 16. PRETRIAL MOTIONS

### Rule 16.1. Motion deadline; hearings and rulings on motions.

(a) *Motion deadline.* — At arraignment or thereafter, the court may set a reasonable deadline for the filing and hearing of all pretrial motions. Pretrial motions shall include, but are not limited to, motions: to dismiss, to suppress evidence, to request discovery, for continuance, for severance, for appointment of experts, for mental examination, or for any other matters which may delay the trial.

(b) *Ruling on a motion generally.* — The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 16.1 tracks former Rule 8.02 of the Uniform Rules of Circuit and County Court. The Rule encourages the making of motions prior to trial, whenever possible, and resolution in a single hearing rather than in a series of hearings. (Effective July 1, 2017.)

## Rule 16.2. Effects of rulings.

(a) *Effect of granting motion based on defective charge.* — If the court grants a motion to dismiss based on a defect in instituting the prosecution or in the charge, the court may:

(1) order the defendant released; or

(2) upon motion of the prosecuting attorney and upon a finding by the court of probable cause, order the defendant's continued detention; or

(3) if the defendant is free on bail or recognizance, order the continuation of such bail or recognizance for a reasonable time to afford the prosecutor an opportunity to file a new charging affidavit.

(b) *Motion to suppress.* — If a motion to suppress is granted, any suppressed property that was seized shall be restored to its rightful owner, unless otherwise subject to lawful detention. However, no firearm shall be returned to a convicted felon.

(c) *Statutes of limitations tolled.* — The running of the time prescribed by an applicable statute of limitations shall be tolled by the issuance of the indictment until such time as the court grants a motion to dismiss based on a defect in the commencement of the proceedings or in the charge, unless the court, in granting the motion, finds that the state has not made a good faith effort to proceed properly and that the defendant has been prejudiced by any resulting delay.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 16.2(c) exists to avoid penalizing the state for an inadvertent technical error which has not prejudiced the defendant. Thus, if a motion to dismiss is granted due to a defect in the charge or in the institution of the prosecution, the time period for which the charging instrument was in effect is also tolled. Of course, section (c) is just one aspect of the law governing the running and tolling of a statute of limitations. See Miss. Code Ann. §§ 99-1-5 to [99-1]-9. (Effective July 1, 2017.)

# RULE 17. DISCLOSURE AND DISCOVERY

## Rule 17.1. Scope.

Rules 17.2 and 17.3 apply in felony cases and in trials of misdemeanor cases in circuit and county court. Rule 17.10 applies in municipal and justice court. The balance of Rule 17 applies in all courts.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rules 17.2 through 17.9 address discovery in the context of felony cases and trials of misdemeanor cases in circuit and county court. Rule 17.10 expands current practice and creates a limited discovery procedure in municipal and justice courts. (Effective July 1, 2017.)

## Rule 17.2. Disclosure by the prosecution.

Subject to the exceptions of Rule 17.6(a) and 17.7, the prosecution must disclose to each defendant or to the defendant's attorney, and permit the defendant or defendant's attorney to inspect, copy, test, and photograph upon written request and without the necessity of court order, the following which is in the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known to the prosecution:

(1) Names and addresses of all witnesses in chief proposed to be offered by the prosecution at trial, together with a copy of the contents of any statement (written, recorded or otherwise preserved) of each such witness and the substance of any oral statement made by any such witness;

(2) Copy of any written or recorded statement of the defendant and the substance of any oral statement made by the defendant;

(3) Copy of the criminal record of the defendant;

(4) Any reports, statements, or opinions of experts (written, recorded or otherwise preserved) made in connection with the particular case and the substance of any oral statement made by any such expert;

(5) Any physical evidence, photographs, and data or information that exists in electronic or magnetic form relevant to the case or which may be offered in evidence; and

(6) Any exculpatory material concerning the defendant.

Upon a showing of materiality to the preparation of the defense, the court may mandate such other discovery to the defendant's attorney as justice may require.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 17.2 is derived from former Rule 9.04(A.) of the Uniform Rules of Circuit and County Court. (Effective July 1, 2017.)

### JUDICIAL DECISIONS

#### ANALYSIS

No violation.
Waiver of violation.

**No violation.**

There was no discovery violation by the State because it did not have the codefendant's statement in its possession, custody, or control until both parties received it; assuming that the State possessed the statement but failed to disclose it, the trial court properly followed the procedures, gave defendant time to interview the codefendant and obtain his statement prior to trial, and allowed defendant to subpoena other witnesses. Croft v. State, 283 So. 3d 1, 2019 Miss. LEXIS 201 (Miss. 2019).

**Waiver of violation.**

Defendant waived the State's failure to produce a victim's testimony about the severity of the victim's injuries because defendant did not request a continuance. Moffite v. State, 309 So. 3d 529, 2019 Miss. App. LEXIS 581 (Miss. Ct. App. 2019), cert. denied, — So. 3d —, 2020 Miss. LEXIS 423 (Miss. 2020), cert. denied, — So. 3d —, 2020 Miss. LEXIS 459 (Miss. 2020), cert. denied, — U.S. —, 141 S. Ct. 1123, 208 L. Ed. 2d 561, 2021 U.S. LEXIS 100 (U.S. 2021).

## Rule 17.3. Disclosure by defendant.

If the defendant requests discovery under Rule 17, the defendant shall, subject to constitutional limitations, promptly disclose to the prosecutor and permit the prosecutor to inspect, copy, test, and photograph the following information and material which corresponds to that which the defendant sought and which is in the possession, custody, or control of the defendant or the defendant's attorney, or the existence of which is known, or by the exercise of due diligence may become known, to the defendant or defendant's counsel:

(1) Names and addresses of all witnesses in chief which the defendant may offer at trial, together with a copy of the contents of any statement (written, recorded or otherwise preserved) of each such witness and the substance of any oral statement made by any such witness;

(2) Any physical evidence, photographs, and data or information that exists in electronic or magnetic form which the defendant may offer in evidence; and

(3) Any reports, statements, or opinions of experts which the defendant may offer in evidence.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 17.3 tracks former Rule 9.04(C.) of the Uniform Rules of Circuit and County Court. (Effective July 1, 2017.)

## Rule 17.4. Notice of defenses.

(a) *Alibi defense.* —

(1) *In general.* — Upon the written demand of the prosecuting attorney stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten (10) days, or at such other time as the court may direct, upon the prosecuting attorney, a written notice of the

intention to offer a defense of alibi, which notice shall state the specific place(s) at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi.

Within ten (10) days thereafter, but in no event less than ten (10) days before the trial, unless the court otherwise directs, the prosecuting attorney shall serve upon the defendant or the defendant's attorney a written notice stating the names and addresses of the witnesses upon whom the State intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

If, prior to or during trial, a party learns of an additional witness whose identity, if known, should have been included in the information previously furnished, the party shall promptly notify the other party or the other party's attorney of the name and address of such additional witness.

(2) *Effect of failure to comply.* — Upon the failure of either party to comply with subsection (a)(1), the court may use such sanctions as it deems proper, including:

(A) Granting a continuance;
(B) Limiting further discovery of the party failing to comply;
(C) Finding the attorney failing to comply in contempt; or
(D) Excluding the testimony of the undisclosed witness.

(3) *Additional provisions.* — Subsections (a)(1) and (a)(2) do not limit the defendant's right to testify in the defendant's own behalf.

(b) *Insanity defense.* —

(1) *In general.* — If a defendant intends to rely upon the defense of insanity at the time of the alleged crime, the defendant shall, within the time provided for filing pretrial motions or at such later time as the court may direct, serve upon the prosecuting attorney and the clerk of the court a written notice of the intention to offer a defense of insanity.

Within ten (10) days thereafter, but in no event less than ten (10) days before the trial, unless the court otherwise directs, the defendant shall serve upon the prosecuting attorney the names and addresses of the witnesses upon whom the defendant intends to rely to establish the defense of insanity.

If a defendant intends to introduce expert testimony relating to a mental illness, defect, or other condition bearing upon the issue of whether the defendant had the mental state required for the offense charged, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, serve upon the prosecuting attorney and the clerk of the court notice of such intention, with the names and addresses of such expert witnesses upon whom the defendant intends to rely.

The prosecuting attorney shall serve notice on the defendant promptly, but in no event less than ten (10) days prior to trial, stating the names and addresses of any witnesses upon whom the State intends to rely relating to the issue of the defendant's mental condition at the time of the alleged offense or the defendant's mental state required for the offense charged.

If, prior to or during trial, either party learns of an additional witness whose identity should have been included in the notice under this rule, the party shall promptly notify the other party or the other party's attorney of the name and address of such additional witness.

(2) *Effect of failure to comply.* — If there is a failure to comply with the requirements of subsection (b)(1), the court may use such sanctions as it deems proper, including:

(A) Granting a continuance and/or assessing costs against the appropriate attorney or party;

(B) Limiting further discovery of the party failing to comply;

(C) Finding the attorney failing to comply in contempt; or

(D) Excluding the testimony of appropriate witnesses.

(c) *Exceptions.* — For good cause shown, the court may grant an exception to the requirements of sections (a) and (b).

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 17.4, based upon former Rules 9.05 and 9.07 of the Uniform Rules of Circuit and County Court, addresses the defendant's duty to provide written notice to the prosecuting attorney of any intention to introduce evidence at trial raising the defenses of alibi and/or insanity. (Effective July 1, 2017.)

### JUDICIAL DECISIONS

#### ANALYSIS

Effect of failure to comply.
Under former URCCC 9.05.
– Effect of failure to comply.

**Effect of failure to comply.**

While defendant violated this rule by failing to disclose an alibi witness within 10 days of the prosecutor's written demand, exclusion of the alibi witness was an abuse of discretion because the attorney representing defendant at the time the disclosure should have been made had an actual conflict of interesting in that he also represented an accomplice and substitute counsel disclosed the alibi within a reasonable time after learning of it. Jones v. State, 283 So. 3d 64, 2019 Miss. LEXIS 311 (Miss. 2019).

**Under former URCCC 9.05.**

**– Effect of failure to comply.**

Circuit court properly sentenced defendant to 30 years in custody for aggravated assault because, inter alia, three witnesses' descriptions of the shooter matched defendant's physical appearance, the jury instruction regarding the identification of defendant, by the single eyewitness who knew him before the shooting and identified him in a photo array and at trial, was a correct statement of law and left it to the jury to judge the witness's credibility and weigh it against the other evidence presented at trial, defendant failed to inform the trial court of the witness's alleged bias, prejudice, or interest, and he also failed to inform the prosecution of his alibi defense. Robinson v. State, 247 So. 3d 1212, 2018 Miss. LEXIS 175 (Miss. 2018).

## Rule 17.5. Depositions.

(a) *When taken.* —

(1) *In general.* — A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice. If the court orders the deposition to be taken, it may also require the deponent to

produce at the deposition any designated material that is not privileged, including any book, paper, document, record, recording, or data.

(2) *Detained material witness.* — A witness who is detained under Mississippi Code Section 99-15-7 may request to be deposed by filing a written motion and giving notice to the parties. The court may then order that the deposition be taken and may discharge the witness after the witness has signed under oath the deposition transcript.

(b) *Notice.* —

(1) *In general.* — A party seeking to take a deposition must give every other party reasonable written notice of the deposition's date and location. The notice must state the name and address of each deponent. If requested by a party receiving the notice, the court may, for good cause, change the deposition's date or location.

(2) *To the custodial officer.* — A party seeking to take the deposition must also notify the officer who has custody of the defendant of the scheduled date and location.

(c) *Defendant's presence.* —

(1) *Defendant in custody.* — The officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant:

(A) waives in writing the right to be present; or

(B) persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion.

(2) *Defendant not in custody.* — A defendant who is not in custody has the right, upon request, to be present at the deposition, subject to any conditions imposed by the court. If the State tenders the defendant's expenses as provided in section (d), but the defendant still fails to appear, the defendant – absent good cause – waives both the right to appear and any objection to the taking and use of the deposition based on that right.

(d) *Expenses.* — If the deposition was requested by the State, the court may – or, if the defendant is unable to bear the deposition expenses, must – order the State to pay:

(1) any reasonable travel and subsistence expenses of the defendant and the defendant's attorney to attend the deposition; and

(2) the costs of the deposition transcript.

(e) *Manner of taking.* — Unless these Rules or a court order provides otherwise, a deposition must be taken and filed in the same manner as a deposition in a civil action, except that:

(1) A defendant may not be deposed without that defendant's consent.

(2) The scope and manner of the deposition examination and cross-examination must be the same as would be allowed during trial.

(3) The State must provide to the defendant or the defendant's attorney, for use at the deposition, any statement of the deponent in the State's possession to which the defendant would be entitled at trial.

(4) The trial judge may preside over the taking of the deposition.

(f) *Use as evidence.* — Depositions may be used in the manner provided by Mississippi Rule of Civil Procedure 32.

(g) *Objections.* — A party objecting to deposition testimony or evidence must state the grounds for the objection during the deposition.

(h) *Depositions by agreement permitted.* — The parties may, by agreement, take and use a deposition with the court's consent.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 17.5 is based upon Federal Rule of Criminal Procedure 15. As with federal practice, taking a deposition requires a court order and a showing of "exceptional circumstances." Depositions may be ordered by the court to preserve testimony or to take the statement of a witness in order that the witness may be released from incarceration. *See* Miss. Code Ann. § 99-15-7 (detention of material witness).

Section (c) gives the defendant a right to be present, as the purpose of the deposition is perpetuation of testimony for use at trial. A deposition cannot be used at trial without the defendant's consent if the defendant was not present at its taking and did not waive the right to be present in writing. *See Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

If deposition testimony is used at trial, the rights of the defendant under the Confrontation Clauses of Federal and State Constitutions must be respected. *See Conners v. State*, 92 So. 3d 676 (Miss. 2012); *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006); *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). (Effective July 1, 2017; amended effective July 1, 2017.)

### Rule 17.6. General standards.

In all disclosures under this Rule the following shall apply:

(1) *Work Product.* — Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting or defense attorney or members of legal staff.

(2) *Informants.* — Disclosure of an informant's identity shall not be required unless the confidential informant is to be produced at a hearing or trial, a failure to disclose his/her identity will infringe the constitutional rights of the accused, and/or the informant was, or depicts himself/herself as, an eyewitness to the event(s) constituting the charge against the defendant.

(b) *Use of discovery material.* — The attorney receiving discovery material is responsible for those materials and shall not distribute them to third parties.

(c) *Advice from counsel regarding relevant information.* — Except as otherwise provided by law, or in cases where the witness would be forced to reveal self-incriminating evidence, neither an attorney for the parties nor other prosecution or defense personnel shall:

(1) advise persons having relevant information or material, except the accused, to refrain from discussing the case with, or showing any relevant material to, the opposing attorney(s), or

(2) otherwise impede the opposing attorney(s') investigation of the case.

(d) *Filing discovery material.* — Discovery material shall not be filed with the clerk unless authorized by the court.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 17.6 follows portions of former Rule 9.04(B.), (D.), (F.), and (I.) of the Uniform Rules of Circuit and County Court. (Effective July 1, 2017.)

## Rule 17.7. Excision and protective orders.

(a) *Discretion of the court to deny, restrict, or defer disclosure.* — Upon a showing of cause, the court may order that specified disclosures be denied, restricted, or deferred, or make such other order as is appropriate. For instance, the court may limit or deny disclosure if it finds that there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment resulting from such disclosure which outweighs any usefulness of the disclosure. However, all material and information to which a party is entitled must be disclosed in time to permit the party's attorney to make beneficial use thereof.

(b) *Discretion of the court to authorize excision.* — When some parts of certain materials are discoverable under these Rules and other parts are not discoverable, as much of the material should be disclosed as is consistent with the Rules.

(c) *Protective and excision order proceedings.* — In the event there are matters arguably within the scope of a party's discovery request or an order for discovery, and the opposing party is of the opinion that the requesting party is not entitled to discovery of same, the opposing party shall, as soon as is reasonably practicable, file with the clerk of the court a written statement describing the nature of the information or the materials at issue as fully as is reasonably possible without disclosure of same and stating the grounds for objection to disclosure. Subject to the limitations otherwise provided in these Rules, determinations such as whether the matters requested in discovery are relevant to the case, exculpatory, possible instruments of impeachment, and the like may be made only by the party requesting or to receive the discovery.

Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosures, or portion of such showing, to be made *in camera*. A record shall be made of such proceedings. If the court enters an order granting relief following a hearing *in camera*, the entire record of such hearing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

(d) *Preservation of record.* — Material excised pursuant to judicial order shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 17.7 is derived from portions of former Rules 9.04(B.), (G.), and (H.) of the Uniform Rules of Circuit and County Court. Section (a) gives the court broad discretion to limit the discovery required by this Rule whenever it is shown a risk of harm resulting from a specific disclosure. (Effective July 1, 2017.)

## Rule 17.8. Continuing duty to disclose.

Both the State and the defendant have a duty timely to supplement discovery. If, subsequent to compliance with these Rules or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, that party shall promptly notify the other party or the other party's attorney of the existence of such additional material or information and, if the additional material or information is discovered during trial, the court shall also be notified.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 17.8 is based upon former Rule 9.04(E.) of the Uniform Rules of Circuit and County Court. (Effective July 1, 2017.)

## Rule 17.9. Failure to disclose; sanctions.

(a) *Failure to make disclosure – Pre-Trial.* — If, at any time prior to trial, it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, or enter such other order as it deems just under the circumstances.

(b) *Failure to make disclosure – Trial.* — If, during the course of trial, the prosecution attempts to introduce evidence which has not been timely disclosed to the defense as required by these Rules and the defense objects to the introduction for that reason, the court shall:

(1) Grant the defense a reasonable opportunity to interview the newly discovered witness and/or examine the newly produced documents, photographs or other evidence.

(2) If, after such opportunity, the defense claims unfair surprise or undue prejudice and seeks a continuance or mistrial, the court shall, in the interest of justice and absent unusual circumstances, exclude the evidence, grant a continuance for a period of time reasonably necessary for the defense to meet the non-disclosed evidence, or grant a mistrial.

(3) The court shall not be required to grant either a continuance or mistrial for such a discovery violation if the prosecution withdraws its efforts to introduce such evidence.

The court shall follow the same procedure for violation of discovery by the defense.

(c) *Sanctions.* — Willful violation by an attorney of an applicable discovery rule, or an order issued pursuant thereto, may subject the attorney to appropriate sanctions by the court.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 17.9 is modeled after former Rule 9.04(I.) of the Uniform Rules of Circuit and County Court. That rule addressed "the procedure trial courts should follow when confronted with a discovery violation" in the manner set forth in *Box v.*

*State*, 437 So. 2d 19, 22-26 (Miss. 1983) (Robertson, J., specially concurring). *Galloway v. State*, 122 So. 3d 614, 633 n.3 (Miss. 2013). *See also Fulks v. State*, 18 So. 3d 803 (Miss. 2009). (Effective July 1, 2017.)

### JUDICIAL DECISIONS

**No violation.**

Trial court was within its discretion and committed no error by admitting the photographs into evidence that the State submitted to the defense 28 days prior to defendant's trial because defendant failed to show any unfair surprise or undue prejudice resulting from the introduction of the photographs. Chase v. State, — So. 3d —, 2020 Miss. App. LEXIS 47 (Miss. Ct. App. Feb. 18, 2020), cert. denied, — So. 3d —, 2020 Miss. LEXIS 432 (Miss. 2020).

There was no discovery violation by the State because it did not have the codefendant's statement in its possession, custody, or control until both parties received it; assuming that the State possessed the statement but failed to disclose it, the trial court properly followed the procedures, gave defendant time to interview the codefendant and obtain his statement prior to trial, and allowed defendant to subpoena other witnesses. Croft v. State, 283 So. 3d 1, 2019 Miss. LEXIS 201 (Miss. 2019).

### Rule 17.10. Discovery in municipal and justice courts.

(a) *Discovery by the defense.* — Upon written request made prior to trial, the prosecuting attorney shall provide to the defense the following:

(1) the names of all witnesses expected to testify for the prosecution;

(2) a copy of any written statement of the defendant;

(3) a copy of the criminal record of the defendant, if proposed for use as impeachment;

(4) a copy of laboratory reports or reports of any tests made;

(5) any physical evidence, photographs, and/or electronic data to be offered in evidence;

(6) a copy of any exculpatory material concerning the defendant; and

(7) any affidavit used to obtain a search warrant in the case.

The prosecutor has a continuing duty to supplement any disclosure previously furnished.

(b) *Reciprocal discovery.* — The prosecuting attorney is entitled to reciprocal discovery of items (a)(1)-(7).

**HISTORY: Effective July 1, 2017.**

### COMMENT

Discovery in justice and municipal court, as provided in Rule 17.10, is new to Mississippi practice. (Effective July 1, 2017.)

## RULE 18. TRIAL BY JURY; WAIVER; SELECTION AND PREPARATION OF PETIT JURY; PROHIBITED DISCLOSURES

### Rule 18.1. Trial by jury.

(a) *Generally.* —

(1) *Qualifications.* — Jurors shall have the qualifications as required by law.

(2) *Number of jurors – Felony cases.* — In felony cases, conviction requires the unanimous consent of twelve (12) impartial jurors.

(3) *Number of jurors – Misdemeanor cases.* — A six (6) person jury shall be used in all criminal misdemeanor actions tried in justice or county court (including, in county court, whether the case originated in such court or was appealed from a lower court). In such cases, the unanimous consent of six (6) impartial jurors is required for conviction. If the case is in justice court, a trial by jury may be demanded as provided by law, although there is no right to a jury trial in justice court if the potential sentence is less than six (6) months in jail. Trial by jury is not available in municipal court.

(4) *Alternate jurors.* — The court may direct the selection of a sufficient number of alternate jurors.

(b) *Waiver.* — The defendant may waive the right to trial by jury with consent of the prosecution and the court. In a death penalty case, the defendant may also waive the right to have a jury determine the penalty if the prosecution and the court concur. Regarding any such waiver:

(1) Before acceptance, the court shall address the defendant personally, advise the defendant of the right to a jury trial, and ascertain that the waiver is knowing, voluntary, and intelligent.

(2) A waiver of jury trial or sentencing under this Rule shall be made in writing or in open court on the record.

(3) For good cause shown, the court may allow the defendant to withdraw the waiver of jury trial or sentencing.

**HISTORY: Effective July 1, 2017.**

**Editor's Note** — Effective July 1, 2018, the Rule 18 heading was amended to add "Prohibited Disclosures" at the end.

## COMMENT

Article 3, Section 31 of the Mississippi Constitution provides that "[t]he right of trial by jury shall remain inviolate . . . ." Miss. Const. art. 3, § 31. Petit jurors shall be summoned and impaneled as provided by law. *See* Miss. Code Ann.§ 13-5-1, et seq. In felony cases, conviction requires the unanimous consent of twelve (12) impartial jurors. *See Markham v. State*, 209 Miss. 135, 46 So. 2d 88 (1950). Mississippi Code Section 13-5-1 sets forth the qualifications for competent jurors.

Section (a)(3) continues the practice of former Rule 10.01 of the Uniform Rules of Circuit and County Court, in permitting misdemeanor cases to be tried before a six (6) person jury. But "there shall be no jury trial" in justice court when the "potential of incarceration is less than six (6) months in jail . . . ." Miss. Code Ann. § 99-33-9. Also, consistent with former Rule 12.02(C.) of the Uniform Rules of Circuit and County Court, the constitutional right to trial by jury does not apply unless the maximum possible sentence exceeds six (6) months. *See Harkins v. State*, 735 So. 2d 317, 318 (Miss. 1999) (citing *Lewis v. United States*, 518 U.S. 322, 116 S. Ct. 2163, 135 L. Ed. 2d 590 (1996)); *Hinton v. State*, 222 So. 2d 690, 692 (Miss. 1969). Mississippi Code Section 21-23-7 does not provide for a jury trial in municipal court.

Section (b) follows common practice. *See* Fed. R. Crim. P. 23(a). Section (b)(3) provides that the court can allow a withdrawal of waiver for good cause shown. When considering the withdrawal of waiver, the court should consider the convenience of witnesses, parties, and potential jurors. (Effective July 1, 2017; amended effective July 1, 2017.)

### Rule 18.2. Jury information.

Before the *voir dire* examination, each party shall be furnished with a list of the names and addresses of the prospective jurors present and qualified to serve. Each party shall also be furnished with each prospective juror's employment status, occupation, employer, residency status, education level, prior jury duty experience, and felony conviction status. Further information may be required by the court.

**HISTORY: Effective July 1, 2017.**

#### COMMENT

Rule 18.2 provides for basic biographical information to be furnished to the parties. *See* Miss. Code Ann. § 13-5-1 (jury questionnaires). (Effective July 1, 2017.)

### Rule 18.3. Challenges.

(a) *Preliminary challenge to the jury panel.* — Any party may challenge the panel for good cause shown. Challenges to the panel shall be in writing or on the record, specifying the facts on which the challenge is based. Absent a showing of good cause, all such challenges shall be made and decided before the commencement of *voir dire*.

(b) *Challenges for cause.* — When there is reasonable ground to believe that a juror cannot render a fair and impartial verdict, the court, on its own initiative or on motion of any party, shall excuse the juror from service in the case. A challenge for cause may be made at any time, but may be denied for failure of the party making it to exercise due diligence. Challenges for cause and rulings thereon shall be made out of the hearing of the jurors, but shall be of record.

(c) *Peremptory challenges.* —

(1) *In general.* — Both parties shall be allowed the following number of peremptory challenges for the selection of jurors:

(A) *Selection of regular jurors:* — Regarding regular jurors, the defendant and the prosecution shall each have peremptory challenges, as follows:

(i) In cases wherein the punishment may be death or life imprisonment, the defendant and the prosecution each shall have twelve (12) peremptory challenges for the selection of the regular twelve (12) jurors.

(ii) In felony cases not involving the possible sentence of death or life imprisonment, the defendant and the prosecution each shall have six (6) peremptory challenges for the selection of the twelve (12) regular jurors.

(iii) The defendant and the prosecution each shall have two (2) peremptory challenges in a trial with a six (6) person jury.

These challenges may not be used in the selection of alternate juror(s).

(B) *Selection of alternate jurors:* — When the court has elected to impanel alternate juror(s), the defendant and the prosecution shall each have peremptory challenges, as follows:

(i) In death penalty cases, the peremptory challenges shall equal the number of alternate jurors the court has ordered to be selected.

(ii) In all other cases, the peremptory challenges shall be one (1) challenge for each two (2) alternate jurors, or part thereof, ordered by the court to be selected.

These challenges for alternate jurors may not be used in the selection of regular jurors.

(2) *Joint trial of several defendants.* — When two (2) or more defendants are jointly tried, two (2) additional challenges shall be allowed to the defense and to the prosecuting attorney for each additional defendant. When two (2) or more defendants are jointly tried and cannot agree on the allocation of the peremptory challenges, they shall be exercised in the manner prescribed by the court.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Under section (b), "a juror who may be removed on challenge for cause is one against whom a cause for challenge exists that would likely [affect the juror's] competency or . . . impartiality at trial." *Evans v. State*, 725 So. 2d 613, 653 (Miss.1997), cert. denied, 525 U.S. 1133 (1999) (quoting *Billiot v. State*, 454 So. 2d 445, 457 (Miss. 1984)). Section (b) permits a challenge for cause to be made whenever the cause appears. The trial court may deny the challenge if not seasonably made, but there is no absolute time limitation imposed by rule.

Section (c)(1) is consistent with former Rule 10.01 of the Uniform Rules of Circuit and County Court. Section (c)(1)(A)(iii) continues the practice in justice court regarding the number of peremptory challenges allowed. *See former* Uniform Rules of Procedure for Justice Court 1.19 (allowing two (2) peremptory challenges for the regular jurors and one (1) peremptory challenge for the alternate juror). Section (c)(2) expands on prior practice by providing two (2) additional challenges to the defense collectively, and to the prosecuting attorney, for each co-defendant. Codefendants who cannot agree on the allocation of peremptory challenges will exercise them as directed by the court. (Effective July 1, 2017.)

## Rule 18.4. Procedure for selecting a jury.

(a) *Oath.* — The court shall give all members of the panel the following oath:

> You, and each of you, do solemnly swear (or affirm) that you will true answer give to all questions asked you by or under the direction of the court, touching your qualifications as Jurors. So help you God.

(b) *Inquiry by the court; brief opening statements.* — The court shall initiate the examination of jurors by identifying the parties and their counsel, briefly outlining the nature of the case, and explaining the purposes of the examination. The court shall ask any questions which it thinks necessary relating to the prospective jurors' qualifications to serve in the case on trial. The parties may, before *voir dire* and with the court's consent, present brief opening statements to the entire jury panel. On its own motion, the court may require counsel to do so.

(c) *Voir dire examination.* — The court shall permit the parties to conduct the examination of the prospective jurors and may itself conduct its own examination. The court may impose reasonable limitations with respect to questions allowed during a party's examination of the prospective jurors, giving due regard to the purpose of such examination.

(d) *Scope of examination.* — The examination of prospective jurors shall be limited to inquiries directed to bases for challenge for cause and information to enable the parties to exercise intelligently their peremptory challenges.

(e) *Exercise of peremptory challenges.* — Following examination of the jurors, the parties shall exercise their peremptory challenges, in the order in which the jurors have been seated, as follows:

(1) the court shall rule upon all challenges for cause before the parties are required to exercise peremptory challenges;

(2) next, the prosecuting attorney shall tender a full panel of accepted jurors to the defendant(s), after having exercised any peremptory challenges desired;

(3) next, the defendant(s) shall go down the juror list accepted by the prosecuting attorney and exercise any peremptory challenges to that panel;

(4) once the defendant(s) exercise peremptory challenges to the panel tendered, the prosecuting attorney shall then be required to tender sufficient additional jurors to constitute a full panel of accepted jurors;

(5) the above procedure shall be repeated until a full panel of jurors has been accepted by all parties; and

(6) once the jury panel is selected, alternate jurors shall be selected following the procedure set forth above for selecting the jury panel.

Constitutional challenges to the use of peremptory challenges shall be made at the time each panel is tendered. Peremptory challenges shall be made out of the hearing of the jurors, but shall be of record.

(f) *Alternate jurors.* — Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. An alternate juror who does not replace a regular juror shall be discharged at the time the jury retires to consider its verdict.

**HISTORY: Effective July 1, 2017.**

## COMMENT

Under Rule 18.4(c), parties are entitled "to probe the prejudices of prospective jurors and investigate their thoughts on matters directly related to the issues to be tried." *Ross v. State*, 954 So. 2d 968, 989 (Miss. 2007). But under sections (c) and (d), the judge may reasonably limit the length and content of the parties' *voir dire*. The court should instruct counsel that *voir dire* is permitted to enable counsel to propound questions seeking relevant information from and about the jurors, but not to ask "hypothetical questions or attemp[t] to elicit a pledge to vote a certain way. . . ." *Id.* The court should be particularly sensitive to the prejudice which can arise from *voir dire* by an unrepresented defendant.

Section (e) continues the practice of former Rule 4.05 of the Uniform Rules of Circuit and County Court. It contemplates that all jury panel members will participate in *voir dire* examination by the judge and counsel. Following disposition of the for-cause challenges, the parties shall exercise their peremptory challenges, as specified. All issues under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), must be raised each time a panel is tendered. Regarding constitutional challenges to the use of peremptory strikes, *see Johnson v. State*, 875 So. 2d 208 (Miss. 2004); *Berry v. State*, 802 So. 2d 1033 (Miss. 2001).

Section (f) is consistent with Mississippi Code Section 13-5-67. Whether to dismiss a juror for good cause and to replace that juror with an alternate is within the trial court's discretion; the decision will not be disturbed absent a showing of prejudice. *See Vaughn v. State*, 712 So. 2d 721 (Miss. 1998). But alternates must be discharged when the jury retires to deliberate. *See Folk v. State*, 576 So. 2d 1243 (Miss. 1991). (Effective July 1, 2017.)

### Rule 18.5. Oath and preliminary instructions.

(a) *Oath of jurors.* — The court shall, on the record of each trial, give the jurors the following oath or remind the jurors that they are still under the following oath:

> You, and each of you, do solemnly swear (or affirm) that you will well and truly try all issues and execute all writs of inquiry that may be submitted to you, or left to your decision by the court, or under its direction, during the present term, and true verdicts give according to the evidence. So help you God.

Additionally, in each capital case, the jurors shall be sworn to "well and truly try the issue between the state and the defendant, and a true verdict give according to the evidence and the law."

(b) *Oath of bailiffs.* — In capital cases, bailiffs may be specially sworn by the court, or under its direction, to attend on such jury and perform such duties as the court may prescribe for them.

(c) *Preliminary instructions.* — Immediately after the jury is sworn, the court, on the record, may instruct the jury concerning its duties, its conduct, the order of proceedings, and the elementary legal principles that will govern the proceeding.

**HISTORY: Effective July 1, 2017.**

#### COMMENT

Sections (a) and (b) are based upon Mississippi Code Sections 13-5-71 and 13-5-73. (Effective July 1, 2017.)

### Rule 18.6. Note taking by jurors.

(a) *Note taking permitted in the discretion of the court.* — The court may permit jurors to take written notes concerning testimony and other evidence. If the court permits jurors to take written notes, jurors shall have access to their notes during deliberations. Those notes shall be secured in the custody of the clerk when court is not in session. Immediately after the jury has rendered its verdict, all notes shall be collected by the bailiff or clerk and destroyed.

(b) *Instructions.* — The court shall instruct the jury as to whether note taking will be permitted. If the court permits jurors to take written notes, the trial judge shall give both a preliminary instruction and an instruction at the close of all the evidence on the appropriate use of juror notes. These instructions shall be given in the following manner:

(1) *Preliminary instruction: note taking forbidden.* —

> You may not take notes during the course of the trial. There are several reasons for this. It is difficult to take notes and, at the same time, pay attention to what a witness is saying. Further, in a group the size of yours, certain persons will take better notes than others will, and there is a risk

that jurors who do not take good notes will depend on jurors who do. The jury system depends upon all jurors paying close attention and arriving at a decision. I believe that the jury system works better when the jurors do not take notes.

You will notice that we do have an official court reporter making a record of the trial; however, we will not have typewritten transcripts of this record available for your use in reaching a decision in this case.

(2) *Preliminary instruction: note taking permitted.* —

If you would like to do so, you may take notes during the course of the trial. On the other hand, you are not required to take notes if you prefer not to do so. Each of you should make your own decision about this. If you decide to take notes, be careful not to get so involved in note taking that you become distracted from the ongoing proceedings.

Notes are only a memory aid and a juror's notes may be used only as an aid to refresh that particular juror's memory and assist that juror in recalling the actual testimony. Each of you must rely on your own independent recollection of the proceedings. Whether you take notes or not, each of you must form and express your own opinion as to the facts of this case. An individual juror's notes may be used by that juror only and may not be shown to or shared with other jurors. Immediately after the jury has rendered its verdict, all notes shall be collected by the bailiff or clerk and destroyed.

You will notice that we do have an official court reporter making a record of the trial; however, we will not have typewritten transcripts of this record available for your use in reaching a decision in this case.

(3) *Use of notes during deliberations.* —

**Jury Instruction #** Members of the Jury, shortly after you were selected I informed you that you could take notes and I instructed you as to the appropriate use of any notes that you might take. Most importantly, an individual juror's notes may be used by that juror only and may not be shown to or shared with other jurors. Notes are only a memory aid and a juror's notes may be used only as an aid to refresh that particular juror's memory and assist that juror in recalling the actual testimony. Each of you must rely on your own independent recollection of the proceedings. Whether you took notes or not, each of you must form and express your own opinion as to the facts of this case. Be aware that during the course of your deliberations there might be the temptation to allow notes to cause certain portions of the evidence to receive undue emphasis and receive attention out of proportion to the entire evidence. But a juror's memory or impression is entitled to no greater weight just because he or she took notes, and you should not be influenced by the notes of other jurors.

**HISTORY: Effective July 1, 2017.**

## COMMENT

Rule 18.6 is consistent with former Rule 3.14 of the Uniform Rules of Circuit and County Court. *See also Vardaman v. State*, 966 So. 2d 885, 893 (Miss. Ct. App. 2007). (Effective July 1, 2017.)

## Rule 18.7. Admonitions to jurors.

In all cases, the court, among other matters it deems proper, shall admonish the jurors that they are not to:

(1) discuss among themselves any subject connected with the trial until the case is submitted to them for deliberation;

(2) converse with anyone else on any subject connected with the trial, until they are discharged as jurors in the case;

(3) permit themselves to be exposed to outside comments or news accounts of the proceedings, until they are discharged as jurors in the case;

(4) conduct independent research about the case, legal issues, and/or the parties involved;

(5) view the place where the offense was allegedly committed; or

(6) form or express any opinion on the case until it is submitted to them for deliberation.

The jurors shall report to the court any communications or attempts to communicate with them on the case or any subject connected with the trial. When the jury is reconvened, the court, in its discretion, may poll the jury to determine if the jury has complied with the court's instructions.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 18.7 essentially incorporates former Rule 3.11 of the Uniform Rules of Circuit and County Court. The court is free to supplement the admonitions in any manner it deems proper. This Rule implicitly prohibits the use of cell phones and other electronic devices to engage in forbidden conduct. (Effective July 1, 2017.)

## Rule 18.8. Jury sequestration.

(a) *Death penalty case.* — In a death penalty case, the jury shall be sequestered during the entire trial.

(b) *Other cases.* — In all other cases, the jury may be sequestered on request of either the defendant or the prosecuting attorney made at least forty-eight (48) hours in advance of the trial. The court may grant or refuse the request to sequester the jury. The court may, on its own initiative or upon request of either party, sequester a jury at any stage of a trial.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 18.8 preserves practice under former Rule 10.02 of the Uniform Rules of Circuit and County Court. Sequestration is mandatory in death penalty cases, *see Simmons v. State*, 805 So. 2d 452 (Miss. 2001), and discretionary in other cases, *see Baldwin v. State*, 732 So. 2d 236 (Miss. 1999). (Effective July 1, 2017.)

## Rule 18.9. Prohibited disclosures.

Prior to the conclusion of the trial, no defense attorney, prosecuting attorney, clerk, deputy clerk, law enforcement official or other officer of the court, may release or authorize release of any statement for dissemination by any means of public communication on any matter concerning:

(1) The prior criminal record of the defendant or the defendant's character or reputation;

(2) The existence or contents of any confession, admission or statement given by the defendant; or the refusal or failure of the defendant to make any statement;

(3) The defendant's performance on any examinations or tests, or the defendant's refusal or failure to submit to an examination or test;

(4) The identity, testimony, or credibility of prospective witnesses;

(5) The possibility of a plea of guilty to the offense charged, or a lesser offense; and

(6) The defendant's guilt or innocence, or other matters relating to the merits of the case, or the evidence in the case.

**HISTORY: Effective July 1, 2018.**

### COMMENT

Rule 18.9 is based upon former Rule 9.01 of the Uniform Rules of Circuit and County Court. (Effective July 1, 2018.)

## RULE 19. TRIAL

### Rule 19.1. Proceedings at trial.

(a) *Order of proceedings.* — Following the impanelment of the jury, the trial shall proceed in the following order unless otherwise directed by the court:

(1) A summary of the charge and the plea of the defendant may be provided by the court. In summarizing the charge, all references to prior conviction(s) alleged as sentencing enhancers shall be omitted.

(2) The prosecuting attorney may make an opening statement to the jury, confining the statement to the facts the prosecutor expects to prove.

(3) The defendant (personally or by counsel) may make an opening statement to the jury at the conclusion of the State's opening statement or prior to the defendant's case-in-chief. The statement shall be confined to a statement of the defense and the facts, if any, the defendant expects to prove in support thereof.

(4) The prosecuting attorney shall offer the evidence in support of the charge.

(5) The defendant (personally or by counsel) may then make an opening statement, if it was deferred, and offer evidence in defense.

(6) The prosecuting attorney shall then be allowed to offer evidence in rebuttal.

(7) The court may allow surrebuttal for good cause.

(8) The judge shall then read the instructions to the jury. The court clerk may read the instructions to the jury when the judge is unable by reason of physical infirmity.

(9) The prosecuting attorney may then make a closing argument to the jury. Thereafter, the defendant may make a closing argument to the jury.

Failure of the prosecuting attorney to make a closing argument shall not deprive the defendant of the right to argue. The prosecuting attorney may then make a rebuttal argument, not to exceed one-half (½) of the prosecuting attorney's allotted time. If, after the prosecuting attorney's initial closing argument, a defendant declines to make a closing argument, the prosecuting attorney shall make no further argument.

(b) *Enhancement of punishment.* —

(1) *Sentencing enhancements based upon prior conviction(s).* — In cases involving enhanced punishment based upon prior conviction(s), the trial shall proceed as follows:

(A) Separate trials shall be held on the principal charge and on the charge of previous conviction(s). In the trial on the principal charge, the previous conviction(s) will not be mentioned by the state or the court except as provided by the Mississippi Rules of Evidence.

(B) If the defendant is convicted or enters a plea of guilty on the principal charge then, unless there is an agreement or ruling to the contrary, a hearing before the court without a jury will be conducted on the previous conviction(s).

(2) *Elevated crimes based upon facts required to be found by a jury.* —

(A) Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum shall be submitted to a jury and must be proved beyond a reasonable doubt.

(B) When a prior conviction is an element of the principal charge, the fact of a prior conviction shall be submitted to a jury and proved beyond a reasonable doubt. However, the defendant may stipulate to, or waive proof regarding, the prior conviction and the trial court shall accept such a stipulation. The stipulation then shall be submitted to the jury with a proper limiting instruction.

**HISTORY: Effective July 1, 2017.**

## COMMENT

Section (a) provides a presumptive method of proceeding at trial. Under section (a)(7), the court retains discretion to allow surrebuttal upon a showing of good cause. *See Moody v. State*, 841 So. 2d 1067, 1090 (Miss. 2003) (surrebuttal "is discretionary with the trial judge, who controls the manner and mode of examination of witnesses"). Pursuant to sections (a)(8) and (a)(9), the court will generally give final instructions to the jury before closing arguments of counsel in order to enhance jurors' ability to apply the applicable law to the facts; the court may wish, however, to withhold giving necessary procedural and housekeeping instructions until after closing arguments. *See* Rules 22(f), 23.1(a), and 23.3(a).

Section (b)(1) continues the practice under former Rule 11.03 of the Uniform Rules of Circuit and County Court in cases involving enhanced punishment based upon prior conviction(s). A jury resolves the principal charge, then the court determines whether the defendant satisfies the requirements for enhanced sentencing. *See, e.g., Nathan v. State*, 552 So. 2d 99, 106 (Miss. 1989); *Seely v. State*, 451 So. 2d 213, 214-15 (Miss. 1984).

Section (b)(2)(A) is consistent with *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), in that facts which increase the penalty beyond the statutory maximum, other than prior convictions, must be found by a jury. *See, e.g.*, Miss. Code Ann. § 41-29-142 (enhanced penalty based upon proximity to school, church, etc.); Miss. Code Ann. § 97-37-37(1) (general firearms enhancement); *Taylor v. State*, 137 So. 3d 283, 287

(Miss. 2014) ("*Apprendi* requires the jury to find not the sentence enhancement itself, but every fact required for the sentence enhancement to be imposed") (emphasis in original); *Brown v. State*, 995 So. 2d 698, 703 (Miss. 2008) ("The existence of a church within 1,500 feet of Brown's crime . . . is a fact that he was entitled to have determined by a jury").

Section (b)(2)(B) addresses instances in which a prior conviction is an element of the principal charge. *See, e.g.*, Miss. Code Ann. §§ 63-11-30(2)(c) (third and subsequent offense DUI), 97-37-5 (possession of firearm, etc., by a convicted felon), 97-37-37(2) (firearms enhancement applicable to "any convicted felon who uses or displays a firearm during the commission of any felony"). A criminal defendant is "indisputably entitle[d]" to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Apprendi*, 530 U.S. at 477 (quoting *United States v. Gaudin*, 515 U.S. 506, 510, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995)). *See also Smith v. State*, 950 So. 2d 1056, 1060 (Miss. Ct. App. 2007). Therefore, when a prior conviction is an element of the principal charge, that fact must be determined by a jury. *See Sallie v. State*, 155 So. 3d 760, 762 (Miss. 2015) ("the jury must find the elements of the firearm enhancement beyond a reasonable doubt under *Apprendi* before a trial court may apply the enhancement"); *Rogers v. State*, 130 So. 3d 544, 550 (Miss. Ct. App. 2013); *Rigby v. State*, 826 So. 2d 694, 700 (Miss. 2002) ("This Court has repeatedly held that prior DUI convictions are necessary elements of a felony DUI charge. Thus, they must be proven beyond a reasonable doubt to the jury"). That said, the defendant may stipulate to the prior conviction(s), and such a stipulation "should be submitted to the jury with a proper limiting instruction." *Rigby*, 826 So. 2d at 702. In *Rigby*, the limiting instruction was addressed as follows:

> [t]he instruction should explain to the jury that the prior DUI convictions should be considered for the sole purpose of determining whether the defendant is guilty of felony DUI and that such evidence should not be considered in determining whether the defendant acted in conformity with such convictions in the presently charged offense.

*Id.* Additionally:

> [w]here evidence of a prior conviction is a necessary element of the crime for which the defendant is on trial (i.e., possession of firearm by a convicted felon), but evidence of the *specific nature of the crime* for which the defendant was previously convicted . . ., is not an essential element of the crime for which the defendant is on trial, as it is in DUI cases, the trial court should accept a defendant's offer to stipulate and grant a limiting instruction.

*Williams v. State*, 991 So. 2d 593, 605-06 (Miss. 2008) (emphasis in original). *See also Herrington v. State*, 102 So. 3d 1241, 1248 (Miss. Ct. App. 2012) ("The jury did not need to know the details of Herrington's prior convictions to reach a verdict on the charge of felon in possession of a weapon; it needed only to know that there was one prior felony conviction. The type of prior conviction has no probative value regarding whether Herrington was a felon in possession of a weapon"). (Effective July 1, 2017.)

## Rule 19.2. Bifurcated trials.

(a) *Death penalty cases.* — In any case in which the State seeks to impose the death penalty, the trial shall be conducted in accordance with Mississippi Code Sections 99-19-101 and 99-19-103, as amended, and applicable court decisions.

(b) *Cases in which the jury may impose life sentence.* —

(1) In all cases not involving the death penalty, in which the jury may impose a life sentence, the court may conduct a bifurcated trial. If the defendant is found guilty of an offense for which life imprisonment may be imposed, a sentencing trial shall be held before the same jury, if possible, or before the court if jury waiver is allowed by the court.

(2) At the sentencing hearing:

(A) the prosecution may introduce evidence of aggravation of the offense of which the defendant has been adjudged guilty;

(B) the defendant may introduce any evidence of extenuation or mitigation;

(C) the prosecution may introduce evidence in rebuttal of the evidence of the defendant; and

(D) a record shall be made of the above proceeding and shall be maintained in the office of the clerk of the trial court as a part of the record.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 19.2 largely tracks the provisions in former Rules 10.04(A.) and (B.) of the Uniform Rules of Circuit and County Court. *See Taggart v. State*, 957 So. 2d 981, 991-95 (Miss. 2007) (discussing procedure in non-death penalty cases). (Effective July 1, 2017.)

## RULE 20. DUTIES OF COURT REPORTERS

### Rule 20. Duties of Court Reporters.

(a) *Felony cases.* — In all felony cases, the court reporter shall make a record of the *voir dire* and selection of the jury, opening statements, bench and in-chambers conferences, and closing arguments, whether or not such is ordered by the judge or requested by either party. In death-penalty cases, this duty may not be abrogated by the judge or waived by the defendant, and is in addition to all other duties.

(b) *Other cases.* —

(1) *Circuit and county court.* — In all other cases in circuit and county court, the court reporter shall make a record of the *voir dire* and selection of the jury, opening statements, bench and in-chambers conferences, and closing arguments, if directed to do so by the judge.

(2) *Municipal and justice court.* — In criminal proceedings in municipal and justice court, either party may engage the services of a court reporter to take down the proceedings, at the expense of the requesting party.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 20(a) places duties on court reporters which are in addition to all other duties imposed by law or the court. *See Davis v. State*, 684 So. 2d 643, 651 (Miss. 1996) (citation omitted) ("[t]he law obligates the court reporter to take notes of all proceedings at trial so that they will be available in the event of an appeal"). The duties of section (b)(1) apply only if the judge so orders. Section (b)(2) provides for either party to engage the services of a court reporter during criminal proceedings in municipal and justice court. While any such transcript will not constitute the official record, it may be used for other purposes (e.g., impeachment). (Effective July 1, 2017.)

## RULE 21. MOTIONS FOR DIRECTED VERDICT

### Rule 21. Motions for Directed Verdict.

(a) *After the prosecution's case-in-chief.* — After the prosecution rests, the court, on its own motion or upon motion by the defendant, may consider whether the evidence is sufficient to sustain a conviction. A motion for directed verdict must specify the manner in which the evidence is deficient. When, with respect to one (1) or more elements of the offense charged, the evidence is insufficient to support a conviction, the court shall order a directed verdict of "not guilty." The trial shall proceed with respect to the remaining count(s), if any.

(b) *At the close of the evidence.* — If the motion for directed verdict is denied, the defendant may rest or proceed to introduce evidence on his/her behalf. If the defendant chooses to go forward with his/her own case, the defendant may renew the motion for directed verdict after the close of all the evidence.

(c) *Waiver.* — The failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner prescribed will constitute a waiver of any argument on appeal pertaining to the sufficiency of the evidence to support the verdict.

(d) *Denial by operation of law.* — If, for any reason, a motion or a renewed motion for directed verdict is not ruled upon by the entry of judgment, it is deemed denied for purposes of appellate review.

**HISTORY: Effective July 1, 2017.**

#### COMMENT

Rule 21 follows common-law practice for a motion for directed verdict. A motion for directed verdict goes to the sufficiency of the evidence. *See McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993). All evidence introduced by the State, together with any reasonable inferences that may be drawn therefrom, is accepted as true. *See Davis v. State*, 530 So. 2d 694, 703 (Miss. 1988). The "critical inquiry" involves "whether the evidence shows 'beyond a reasonable doubt that [the] accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to support a conviction.' " *Bush v. State*, 895 So. 2d 836, 843 (Miss. 2005) (quoting *Carr v. State*, 208 So. 2d 886, 889 (Miss. 1968)). To preserve the issue for appeal, the defendant must move for directed verdict at the close of the prosecution's casein- chief. *See Page v. State*, 990 So. 2d 760, 762 (Miss. 2008). "If a motion for directed verdict is denied and the defendant introduces evidence on his own behalf, the defendant must renew his motion for directed verdict at the close of all evidence." *Id.* Failure to do so waives the issue on appeal. *See Seales v. State*, 90 So. 3d 37 (Miss. 2012). (Effective July 1, 2017.)

# RULE 22. JURY INSTRUCTIONS

## Rule 22. Jury instructions.

(a) *Procedural instructions.* — At the commencement of and during the course of a trial, the court may orally give the jury cautionary and other instructions of law relating to trial procedure and the duty and function of the jury, and may acquaint the jury generally with the nature of the case. Every oral instruction shall be recorded by the court reporter as it is delivered to the jury. All other instructions shall be in writing.

(b) *Substantive instructions.* —

(1) *By the parties.* — At least twenty-four (24) hours before trial, or at such other time during the trial as the court directs, each party must file with the clerk and deliver to all counsel jury instructions on the forms of verdict and the substantive law of the case. Except for good cause shown, the court shall not entertain a request for instructions which have not been pre-filed. At the conclusion of testimony, each party may present to the judge up to six (6) pre-filed substantive instructions. The court, for good cause shown, may allow more than six (6) instructions to be presented.

(2) *By the court.* — The court's instructions, if any, must be in writing and must be submitted to the parties who, in accordance with section (d), must make their specific objections on the record. The court shall not comment upon the evidence.

(c) *Identification.* —

(1) *Caption.* — All instructions shall be captioned at the top of the page "Jury Instruction No. ____" in order to allow the court to number the instructions given in such sequence as it deems proper.

(2) *Identifying submitted instructions.* — All instructions submitted shall be identified with letters and numerals placed in the bottom right corner of each page. The court's written instructions shall be numbered and prefixed with the letter *C*. The State's instructions shall be numbered and prefixed with the letter *S*. A defendant's instructions shall be numbered and prefixed with the letter *D*. In actions with multiple defendants, Roman numerals shall be used to identify the proposed instructions of each defendant; the Roman numerals shall be placed after the alphabetical designation *D*, and shall conform to the sequential listing of defendants as stated in the indictment. Instructions shall not otherwise be identified with a party.

(d) *Objections.* — A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court, on the record, of the specific objection and the grounds therefor before the instructions are presented to the jury. An opportunity must be given to object out of the jury's hearing.

(e) *Rulings on instructions.* — Prior to closing argument, the court shall rule on the requested instructions, marking each "given" or "refused," and all such instructions shall become part of the record.

(f) *When read.* — Instructions shall be read by the court to the jury before closing arguments. Instructions will not be given after closing arguments have begun, except when justice so requires. All given instructions shall be available to the parties for use during closing arguments, and will be carried into the jury room when the jury retires to consider its verdict.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 22(a)-(c) largely follows the practice established by former Rule 3.07 of the Uniform Rules of Circuit and County Court and Rule 51 of the Mississippi Rules of Civil Procedure.

Section (d) reflects Mississippi practice and tracks Rule 30(d) of the Federal Rules of Criminal Procedure.

Section (f) requires the court to instruct the jury before closing arguments in order to give the parties an opportunity to argue to the jury in light of the exact language used by the court. Section (f) does permit the court, when justice so requires, to instruct the jury both before and after closing arguments, which assures that the court retains power to remedy omissions in pre-argument instructions or to add instructions necessitated by the arguments. In this regard, section (f) gives the court more latitude than former Rule 3.07 of the Uniform Rules of Circuit and County Court, which permitted post-argument instructions only to correct "extreme" cases of injustice. (Effective July 1, 2017.)

## RULE 23. DELIBERATIONS

### Rule 23.1. Retirement of jurors.

(a) *Retirement.* — After closing arguments, the court may direct the jury to select one of its members as a foreperson to preside over the deliberations and to write and return any verdict. The court also may admonish the jurors that, until they are discharged as jurors in the cause, they may communicate upon subjects connected with the trial only while the jury is convened in the jury room for the purpose of reaching a verdict. The jurors shall then retire in the custody of the bailiff(s) and consider their verdict.

(b) *Permitting the jury to disperse.* — Except in cases in which the jury has been sequestered, the court may permit the jurors to disperse after their deliberations have commenced, instructing them when to reassemble, and giving the admonitions of Rule 18.7.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 23.1 is consistent with former Rule 3.10 of the Uniform Rules of Circuit and County Court. Jury sequestration is governed by Rule 18.8. (Effective July 1, 2017.)

### Rule 23.2. Materials used during deliberation.

Upon retiring for deliberation, the jurors shall take with them:

(a) forms of verdict approved by the court;
(b) a copy of the written instructions;
(c) their notes (if any); and
(d) such exhibits and equipment as the court shall direct.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 23.2 incorporates portions of Rule 3.10 of the Uniform Rules of Circuit and County Court. Section (a) is broad enough to permit the court to provide either a separate "form of verdict" document, an instruction on the form of the verdict, or both. Sections (a) through (c) are mandatory, and require that all verdict forms, written instructions, and any juror notes – as set out in Rule 18.6 – be taken to the jury room. Only section (d), regarding exhibits and equipment, is discretionary; discretion is vested in the court to determine whether to permit a jury to take back to the jury room exhibits which are, for example, contraband, dangerous, prone to destruction or theft, or excessively voluminous. *See Holloway v. State*, 809 So. 2d 598 (Miss. 2000); *Pettit v. State*, 569 So. 2d 678 (Miss. 1990). (Effective July 1, 2017.)

## Rule 23.3. Additional instructions; further review of evidence prohibited.

(a) *Additional instructions.* — If the jury, after they retire for deliberation, desires to be informed of any point of law, the court shall instruct the jury to reduce its question to writing and the court, after affording the parties an opportunity to state their objections or assent, may grant additional written instructions in response to the jury's request.

(b) *Further review of evidence prohibited.* — After the jurors have retired to consider their verdict, the court shall not recall the jurors to hear additional evidence.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 23.3 tracks former Rule 3.10 of the Uniform Rules of Circuit and County Court. The Rule covers the right of the jury to request (by way of a note to the judge) additional instructions after deliberations have begun. Additional instructions should not be given if the request concerns matters not in evidence or questions of law not pertinent to the case, or calls on the judge to express an opinion on a factual matter. (Effective July 1, 2017.)

## Rule 23.4. Assisting jurors at impasse.

If it appears to the court that the jury has reached an impasse in its deliberations, the court may, in the presence of counsel, make inquiry of the jury and require the jury to continue their deliberations, with an appropriate instruction.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 23.4 is consistent with former Rule 3.10 of the Uniform Rules of Circuit and County Court. The Court has approved the following instruction to address the jurors' report of impasse:

I know that it is possible for honest men and women to have honest different opinions about the facts of a case, but, if it is possible to reconcile your differences of opinion and decide this case, then you should do so.

Accordingly, I remind you that the court originally instructed you that the verdict of the jury must represent the considered judgment of each juror. It is your duty as jurors to consult with one another and to deliberate in view of reaching agreement if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if you are convinced it is erroneous, but do not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict. Please continue your deliberations.

*Sharplin v. State*, 330 So. 2d 591 (Miss. 1976) (rejecting the various forms of the so-called *Allen* charge, per *Allen v. United States*, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896)). (Effective July 1, 2017.)

### Rule 23.5. Mistrials.

Upon motion of any party, the court may declare a mistrial if there occurs during the trial, either inside or outside the courtroom, misconduct by a party, a party's attorney(s), or someone acting at the behest of a party or a party's attorney(s), resulting in substantial and irreparable prejudice to the movant's case.

Upon motion of a party or its own motion, the court may declare a mistrial if:

(a) The trial cannot proceed in conformity with the law; or

(b) It appears there is no reasonable probability of the jury's agreement upon a verdict.

**HISTORY: Effective July 1, 2017.**

#### COMMENT

Rule 23.5 tracks former Rules 3.10 and 3.12 of the Uniform Rules of Circuit and County Court. (Effective July 1, 2017.)

#### JUDICIAL DECISIONS

**Curative instructions.**

Circuit court properly denied defendant's motion for a mistrial because the court not err by failing to give the jury a curative instruction regarding the State's alleged prejudicial statements, referring to "crimes" instead of "alleged crimes," during voir dire where the jury was fully advised and instructed on the proper application of law through jury instructions, heard the State's curative statements and reiteration that defendant was innocent until proven guilty, and the prospective jurors indicated general appreciation of that proposition. Aday-Cazorla v. State, 309 So. 3d 1169, 2021 Miss. App. LEXIS 15 (Miss. Ct. App. 2021).

## RULE 24. VERDICT

### Rule 24.1. Time and form of verdict.

When the jurors have agreed upon a verdict they shall be returned to the courtroom by the bailiff(s). The court shall ask the foreperson or the jury panel whether an agreement has been reached on a verdict. If the foreperson or the jury panel answers in the affirmative, the judge shall call upon the foreperson or any member of the panel to deliver the verdict, in writing, to the clerk or the court. The verdict of the jury shall be unanimous, but need not be signed. The court shall examine the verdict and, if found to be in proper order, the clerk or the court then shall read the verdict in open court in the presence of the jury. If neither party nor the court desires to poll the jury, or when a poll of the jury reveals the verdict is unanimous, and if the verdict is in the form required by Rule 24.3, the court shall order the verdict filed and entered of record. The court then shall discharge the jurors, unless a bifurcated hearing is necessary.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 24.1 is based, in part, on former Rule 3.10 of the Uniform Rules of Circuit and County Court. *See also State v. Taylor*, 544 So. 2d 1387, 1389 (Miss. 1989). The provision that the verdict "need not be signed" is consistent with current practice. Polling the jury is governed by Rule 24.5. (Effective July 1, 2017.)

## Rule 24.2. Types of verdict.

(a) *General verdicts.* — Except as otherwise specified by this Rule, the jury shall in all cases render a verdict finding the defendant either guilty or not guilty.

(b) *Insanity or intellectual disability verdicts.* — When the jury determines that a defendant is not guilty by reason of insanity or intellectual disability, the verdict shall so state.

(c) *Different counts or offenses.* — If the jury is instructed on different counts, offenses, or degrees of offenses, the verdict shall specify each count, offense, or degree of offense of which the defendant has been found guilty or not guilty.

(d) *Lesser-included offense or attempt.* — The jury may be instructed that it can return a verdict on any of the following:

(1) an offense necessarily included in the offense charged; or

(2) an attempt to commit the offense charged or an offense necessarily included therein, if such attempt is an offense.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 24.2 specifies the type of verdicts the jury may return. Unless otherwise specified, general verdicts are required by Rule 24.2(a). The general verdict gives the jury discretion over the disposition of the case which it would not have if restricted to finding particular facts in special verdicts.

Section (b) provides for a verdict of not guilty by reason of insanity or intellectual disability, which are exceptions to the general verdict rule. See Miss. Code Ann. §§ 99-13-7, 99-13-9. An insanity verdict, which should include an additional jury determination of "whether the accused has since been restored to his sanity and whether he is dangerous to the community[,]" implicates the post-acquittal procedures outlined in Mississippi Code Section 99-13-7. Miss. Code Ann. § 99-13-7(1) (Rev. 2010). *See also* Miss. Code Ann. § 41-21-88 (2010).

Section (c) is consistent with former Rule 3.10 of the Uniform Rules of Circuit and County Court and requires the jury to specify the particular counts and degrees of the offense(s) of which it finds the defendant guilty or not guilty. These provisions ensure that the verdict will be clear and unambiguous.

Section (d) tracks Federal Rule of Criminal Procedure 31(c) and permits the jury to find the defendant guilty of any offense necessarily included in the offense charged, including an attempt to commit the offense, if such attempt is a crime. The rule places the responsibility for deciding what verdicts the jury may return on the court, restricting the jury to returning verdicts for which instructions have been given to it under Rule 24.3. Under Rule 14.1(e), the indictment gives notice to the defendant that the trial will concern all necessarily included offenses as well as the offense specified, without the need for an explicit statement to that effect. Rules 14.1(e) and 24.2(d) make clear that the prosecuting attorney, as well as the defendant, is entitled to an instruction on any offense set forth in section (d) for which there is evidentiary support and for which a verdict form is submitted to the jury.

Section (d) also substantively tracks former Rule 3.10 of the Uniform Rules of Circuit and County Court, with the exception that the current rule contains no provision for instruction on "lesser-related" offenses. Yet, pursuant to *Hye v. State*, 162 So. 3d 750 (Miss. 2015), "a criminal defendant no longer has the unilateral right under Mississippi law to insist upon an instruction for lesser-related offenses which are not necessarily included in the charged offense(s), i.e., so-called lesser-nonincluded-offense instructions." *Id.* at 751 (overruling *Griffin v. State*, 533 So. 2d 444 (Miss. 1988)). Therefore, (d) is consistent with existing Mississippi case law. (Effective July 1, 2017.)

## Rule 24.3. Necessity for forms of verdict.

Forms of verdicts shall be contained in the jury instructions for each offense charged and, where warranted by the evidence, the trial judge may instruct for any or all lesser-included or attempt offenses as provided in Rule 24.2(d). The defendant may not be found guilty of any offense for which no form of verdict has been submitted to the jury. If the verdict returned is not fully responsive, the court shall direct the jury to retire for further deliberations. The court may correct or complete the verdict, as to form only, in open court in the presence of the parties and the jury.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 24.3 permits the jury to find the defendant guilty of the offense charged, an offense necessarily included in each offense charged, or an attempt to commit the offense charged or an offense necessarily included therein, if the attempt is an offense. The Rule places on the court the responsibility of deciding what verdicts the jury may return, restricting the jury to returning verdicts for which verdict forms have been submitted to it. (Effective July 1, 2017.)

## Rule 24.4. Partial verdicts and mistrial.

(a) *Multiple defendants.* — If there are multiple defendants, the jury shall return a verdict as to any defendant about whom it has agreed.

(b) *Multiple counts.* — If the jury cannot agree on all counts as to any defendant, the jury shall return a verdict on those counts on which it has agreed.

(c) *Mistrial.* — If the jury cannot agree on a verdict on one (1) or more defendants or counts, the court may declare a mistrial as to those defendants or counts.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 24.4 is based on Federal Rule of Criminal Procedure 31(b). The Rule provides that a jury may return partial verdicts, as to multiple defendants, multiple counts, or both. Former Rule 3.10 of the Uniform Rules of Circuit and County Court permitted partial verdicts in cases of multiple defendants. (Effective July 1, 2017.)

## Rule 24.5. Jury poll.

After a verdict is returned, but before the jury is discharged, the court shall on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Under Rule 24.5, a jury poll is mandatory on the request of either party. Its purpose is to determine with certainty that "each of the jurors approves of the verdict as returned; that no one has been coerced or induced to sign a verdict to which he does not fully assent." *Humphries v. District of Columbia*, 174 U.S. 190, 194, 19 S. Ct. 637, 638-39, 43 L. Ed. 944 (1899). Failure to poll the jury at the request of the defendant is reversible error. *See McLarty v. State*, 842 So. 2d 590 (Miss. Ct. App. 2003); *State v. Taylor*, 544 So. 2d 1387, 1389 (Miss. 1989). This Rule discourages post-trial efforts to challenge the verdict on allegations of coercion on the part of some of the jurors. (Effective July 1, 2017.)

## Rule 24.6. Miscellaneous provisions.

(a) *Defective verdicts.* — If a verdict is so defective that the court cannot determine from it the intent of the jury, the court shall, with proper instructions, direct the jurors to reconsider the verdict. No verdict shall be accepted until it clearly reflects the intent of the jury. If the jury persists in rendering defective verdicts, the court shall declare a mistrial.

(b) *Comments by the court to jurors.* — While it is appropriate for the court to thank jurors at the conclusion of a trial for their public service, such comments should not include praise or criticism of their verdict.

(c) *Limits on impeaching the verdict.* — After the verdict has been received by the court and entered on the record, the testimony or affidavits of the jurors shall not be received to impeach the verdict, except as permitted by the Mississippi Rules of Evidence.

**HISTORY: Effective July 1, 2017.**

COMMENT

Rule 24.6 is taken directly from former Rule 3.10 of the Uniform Rules of Circuit and County Court. (Effective July 1, 2017.)

## RULE 25. POST-TRIAL MOTIONS

### Rule 25.1. Motion for a new trial.

(a) *Motion by defendant.* — The court, on written motion of the defendant, may vacate any judgment and grant a new trial for the grounds set forth in section (b).

(b) *Grounds.* — The court may grant a new trial for any of the following reasons:

(1) if required in the interests of justice;

(2) if the verdict is contrary to law or the weight of the evidence;

(3) if new and material evidence has recently been discovered which probably would produce a different result at a new trial and, by reasonable diligence, such evidence could not have been discovered sooner;

(4) if the jury has received any evidence, papers or documents, not authorized by the court, or the court has admitted illegal testimony, or excluded competent and legal testimony;

(5) if the jurors, after retiring to deliberate on the verdict, separated without leave of court;

(6) if the court has misdirected the jury in a material matter of law, or has failed to instruct the jury on all questions of law necessary for their guidance; or

(7) if, for any other reason, the defendant has not received a fair and impartial trial.

(c) *Timeliness.* — A motion for a new trial shall be made within ten (10) days after entry of judgment (which, for purposes of this Rule, includes both adjudication of guilt and sentence). Upon good cause shown, the court may grant a reasonable extension thereof.

(d) *Court's own motion.* — The court may, on its own motion and with the consent of the defendant and notice to the prosecuting attorney, order a new trial before the entry of judgment.

**HISTORY: Effective July 1, 2017.**

COMMENT

Rule 25.1 preserves practice under former Rule 10.05 of the Uniform Rules of Circuit and County Court, with a few modifications and additions. Section (b)(7) modifies the former rule by explicitly adding that a new trial may be granted for any reason if the defendant has not received a fair and impartial trial. Section (c) clarifies that the time to make a motion for a new trial begins to run after entry of judgment, which includes adjudication of guilt and sentence. Under section (d), the court may order a new trial before the entry of judgment only with the consent of the defendant and notice to the prosecuting attorney. Problems of double jeopardy may arise when the court acts on its own motion without the consent of the defendant. *See United States v. Smith*, 331 U.S. 469, 67 S. Ct. 1330, 91 L. Ed. 1610 (1947). Under Rule 4(e) of the Mississippi Rules of Appellate Procedure, a defendant must file a notice of appeal within thirty (30) days after the date of the denial of any motion for a new trial or the date of imposition of sentence, whichever is later. (Effective July 1, 2017.)

## JUDICIAL DECISIONS

**Preservation for review.**

Although defendant's trial attorney made an ore tenus motion for judgment notwithstanding the verdict (JNOV) during the sentencing hearing, defendant did not preserve a weight-of-the-evidence issue for appeal because defendant's attorney did not file a motion for new trial. The motion for JNOV could not be construed as a motion for a new trial, and the trial court was not tendered a proper written motion for a new trial. Ivory v. State, 283 So. 3d 108, 2019 Miss. LEXIS 336 (Miss. 2019).

## Rule 25.2. Motion to vacate judgment.

(a) *Power of the court.* — The court, on motion of a defendant or on its own motion, may vacate judgment and dismiss the case without prejudice if the indictment or charging affidavit did not charge an offense, or if the court was without jurisdiction.

(b) *Timeliness.* — A motion to vacate judgment shall be filed within ten (10) days after entry of judgment. The court may act on its own motion in vacating judgment only during the period in which a motion to vacate judgment would be timely.

**HISTORY: Effective July 1, 2017.**

## COMMENT

Rule 25.2 essentially continues practice under former Rule 10.05 of the Uniform Rules of Circuit and County Court. *See also Jefferson v. State*, 556 So. 2d 1016 (Miss. 1989).

The deadline established by section (b) tracks the deadline for a motion for a new trial under Rule 25.1. However, a motion to vacate judgment (unlike a motion for new trial) does not toll the time for filing a notice of appeal under Mississippi Rule of Appellate Procedure 4(e). Therefore, when a motion under Rule 25.2 has been filed but not decided at the time an appeal has been perfected, both trial and appellate courts will have jurisdiction of the case; if the trial court then grants the Rule 25.2 motion, the appeal may be mooted. *See Gardner v. State*, 547 So. 2d 806 (Miss. 1989); *Wilson v. State*, 461 So. 2d 728 (Miss. 1984). (Effective July 1, 2017.)

## Rule 25.3. Denial by operation of law.

A motion for a new trial or a motion to vacate judgment pending thirty (30) days after entry of judgment shall be deemed denied as of the thirtieth (30$^{t}$/fh) day after the motion was filed. However, the parties may agree in writing, or the court may order, that the motion be continued past the thirtieth (30$^{t}$/fh) day to a date certain within ninety (90) days after the motion was filed; any motion still pending after the date to which it is continued shall be deemed denied as of that date. The motion may be continued from time to time as provided in this Rule.

**HISTORY: Effective July 1, 2017; amended effective July 1, 2018.**

### COMMENT

Rule 25.3 is new to Mississippi practice. The Rule promotes finality by providing that a after the motion was filed motion for a new trial or a motion to vacate judgment shall not remain pending in the trial court for more than thirty (30) days after the motion was filed. This Rule thereby addresses the problem of when a timely post-trial motion is filed but is not decided or even noticed for a hearing. Such a case is then essentially in limbo, as the pending post-trial motion indefinitely postpones the running of the period for filing a notice of appeal and indefinitely delays finality in the case. This deadline may be extended by written agreement of the parties or court order to a date certain within ninety (90) days after the motion was filed. Multiple extensions of the deadline, which should be rare, are nonetheless permitted by Rule 25.3. (Effective July 1, 2017; amended effective July 1, 2018.)

### Rule 25.4. Clerical and technical errors.

After giving notice to the State and the defendant, the court may correct a clerical error in a judgment or order, correct an error in the record arising from oversight or omission, or correct a sentence that resulted from arithmetical, technical, or other clear error.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 25.4 is similar to Mississippi Rule of Civil Procedure 60(a). It provides an efficient method for correcting clerical and technical errors appearing in judgments, orders, or other parts of the record. *See Shinn v. State*, 74 So. 3d 901 (Miss. Ct. App. 2011) (recognizing authority for correction of scrivener's or clerical error at any time). A motion to correct simple clerical mistakes may be made at any time. (Effective July 1, 2017.)

## RULE 26. JUDGMENT

### Rule 26.1. Definitions; scope.

(a) *Determination of guilt.* — The term "determination of guilt" means a verdict of guilty by a jury, a finding of guilt by a court following a non-jury trial, or the acceptance by the court of a plea of guilty or *nolo contendere*.

(b) *Judgment.* — The term "judgment" means the adjudication of the court based on the verdict of the jury, the plea of the defendant of guilty or *nolo contendere*, or on its own finding following a non-jury trial, that the defendant is guilty or not guilty. The term "judgment" may include both determination of guilt and sentence.

(c) *Sentence.* — The term "sentence" means the pronouncement by the court of the penalty imposed upon the defendant after an adjudication of guilt.

(d) *Scope.* — Rule 26 shall apply to death penalty cases only to the extent that a procedure is not otherwise provided.

**HISTORY: Effective July 1, 2017.**

## Rule 26.2. Judgment; time.

(a) *On acquittal.* — When a defendant is acquitted of any charge, judgment pertaining to that charge shall be pronounced and entered immediately.

(b) *On conviction.* —

(1) On a determination of guilt on any charge, judgment pertaining to that charge shall be pronounced and entered together with the sentence

(2) Sentence shall be imposed without unreasonable delay.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 26.2 replaces portions of former Rule 11.01 of the Uniform Rules of Circuit and County Court.

When the defendant has been convicted, section (b) follows common practice of pronouncing judgment at sentencing. Because often there will be a period of delay between adjudication of guilt and determination of sentence, pronouncement of judgment of conviction and sentence will be delayed until sentencing has been completed. As under former Rule 11.01 of the Uniform Rules of Circuit and County Court, section (b)(3) requires the sentence be imposed "without unreasonable delay." (Effective July 1, 2017.)

## Rule 26.3. Presentence report.

(a) *In general.* — A presentence investigation may be conducted and a report thereof shall be made as required for cases where the court has discretion in imposition of sentence. Contents of this report shall be disclosed only to the parties. A copy of said report shall be delivered to both the prosecutor and the defendant or the defense attorney within a reasonable time prior to sentencing so as to afford a reasonable opportunity for verification of the material. Prior to the sentencing proceeding, each party is required to notify the opposing party and the court of any part of the presentence report which the party intends to controvert by the production of evidence.

(b) *Content.* — The presentence report may contain, but is not limited to, the following information:

(1) a description of the offense and the circumstances surrounding it, not limited to aspects developed for the record as part of the determination of guilt;

(2) any prior criminal convictions of the defendant, or juvenile adjudications of delinquency;

(3) a statement considering the economic, physical, and psychological impact of the offense on the victim and the victim's immediate family;

(4) the defendant's financial condition;

(5) the defendant's educational background;

(6) a description of the defendant's employment background, including any military record and present employment status and capabilities;

(7) the social history of the defendant, including family relationships, marital status, residence history, and alcohol or drug use;

(8) information about environments to which the defendant might return or to which the defendant could be sent should probation be granted;

(9) information about special resources which might be available to assist the defendant, such as treatment centers, rehabilitative programs, or vocational training centers;

(10) a physical and mental examination of the defendant, if ordered by the court; and

(11) any other information required by the court.

(c) *Excluded Content.* — The report shall not include:

(1) sources of information obtained on a promise of confidentiality; or

(2) information which would disrupt an existing police investigation.

(d) *Special duty of the prosecuting attorney.* — The prosecuting attorney shall disclose to the defendant any information within the prosecuting attorney's possession or control, not already disclosed, which would tend to reduce the punishment to be imposed.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Section (b) embraces former Rule 11.02 of the Uniform Rules of Circuit and County Court, with two (2) additions. Section (b)(3) now provides for a statement about the impact of the offense on the victim and the victim's immediate family. Section (b)(7) now provides for the report to include information about the defendant's alcohol or drug use. (Effective July 1, 2017.)

## Rule 26.4. Sentencing hearings.

(a) *Generally.* — If the court has either discretion as to the penalty to be imposed or power to suspend execution of the sentence, the court shall conduct a sentencing hearing in all felony cases, unless waived by the parties with consent of the court. The sentencing hearing may commence immediately after a determination of guilt or may be continued to a later date. If a presentence report is required, the sentencing hearing shall not be conducted until copies thereof have been furnished or made available to the court and the parties.

(b) *Enhanced punishment based on prior conviction(s).* — Absent stipulation, the court shall hold a hearing in order to establish the alleged prior conviction(s) to determine the defendant's status as a habitual or enhanced offender. The prosecution must establish the defendant's prior conviction(s) beyond a reasonable doubt. If the defendant disputes any conviction presented by the prosecution, the court may allow the prosecution to present additional evidence of the disputed conviction.

(c) *Evidence.* — Evidence may be presented by both the prosecuting attorney and the defendant as to any matter that the court deems probative on the issue of sentencing.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Under Rule 10.1, the defendant has the right to be present at the sentencing hearing under Rule 26.4 and at the pronouncement of sentence under Rule 26.5.

Under Rule 26.4(b), the court determines the defendant's status as a habitual or enhanced offender. Rule 26.4(b) does not contemplate those facts and elements necessary to enhance a sentence that are required to be found by a jury, which is addressed in Rule 19.1(b). *See also Apprendi v. United States*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). (Effective July 1, 2017.)

## Rule 26.5. Pronouncement of judgment and sentence.

(a) *Pronouncement of judgment.* — The judgment shall be pronounced in open court at any time after conviction, in the presence of the defendant (unless waived pursuant to Rule 10.1(b)), and recorded in the minutes of the court. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly.

(b) *Pronouncement of sentence.* — In pronouncing sentence, the court shall:

(1) afford the defendant an opportunity, personally and/or through the defendant's attorney, to make a statement on the defendant's behalf before imposing sentence;

(2) state that a credit will be allowed on the sentence, as provided by law, for time during which the defendant has been incarcerated on the present offense; and

(3) explain to the defendant the terms of the sentence.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Section (a) continues provisions in former Rule 11.01 of the Uniform Rules of Circuit and County Court (sentence pronounced in open court in the presence of the defendant). Subsection (b)(1) preserves the defendant's right to be present at sentencing, also recognized by Rule 10.1, unless waived under Rule 10.1(b). Subsection (b)(2) requires the court, at the time of sentencing, to make sure the record accurately reflects the time already spent in custody. *See* Miss. Code Ann. § 99-19-23. The explanation of the sentence under subsection (b)(3) should include the terms of probation, the length and order of sentences if there are more than one (1), and whether the new sentence is to be served concurrently with, or consecutively to, a sentence that the defendant is then serving. (Effective July 1, 2017.)

## Rule 26.6. Fine, restitution, and/or court costs following adjudication of guilt.

(a) *Scope.* — Rule 26.6 applies only following a determination of guilt and, therefore has no applicability to pretrial diversion, non-adjudication, and the like.

(b) *Method of payment; installments.* — When the defendant is sentenced to pay a fine, restitution, and/or court costs, the court may permit payment to be made within a specified period of time or in specified installments. Restitution shall be payable as promptly as possible, taking into account the defendant's indigency or economic ability to pay.

(c) *Method of payment; to whom.* — Unless the court expressly directs otherwise:

(1) the payment of a fine, restitution, and/or court costs shall be made to the clerk of court; and

(2) monies received from the defendant shall be applied as follows:

(A) first, to pay any and all court costs (as designated by statute) assessed against the defendant;

(B) second, to pay any restitution the defendant has been ordered to make; and

(C) third, to pay any fines imposed against the defendant.

The clerk shall, as promptly as practicable, forward restitution payments to the victim.

(d) *Court action upon failure of defendant to pay fine, restitution, and/or court costs.* — Upon the defendant's failure to pay a fine, restitution, and/or court costs, the court first must require the defendant to appear and show cause why said defendant should not be held in contempt of court. A summons requiring the defendant's appearance shall be personally served on the defendant and shall set forth the time and location of the hearing. If the defendant fails to appear, the court may issue a warrant for the defendant's arrest. During the hearing, the court shall inquire and cause an investigation to be made into the reasons for nonpayment, including whether nonpayment was willful or due to indigency or economic inability to pay. In that review:

(1) If it appears to the satisfaction of the court that nonpayment is not willful, the court shall enter an order allowing the defendant additional time for payment, reducing the amount thereof or of each installment, or revoking the fine or order of restitution or the unpaid portion thereof in whole or in part. However, the court shall not suspend or reduce an assessment imposed pursuant to Mississippi Code Section 99-19-73.

(2) If the court finds nonpayment is willful and finds the defendant in contempt of court, the court may direct that the defendant be incarcerated until the unpaid obligation is paid, subject, however, to section (e).

(e) *Incarceration for nonpayment of fine, restitution, and/or court costs.* —

(1) Incarceration shall not automatically follow the nonpayment of a fine, restitution, and/or court costs. Incarceration may be employed only after the court has conducted a hearing and examined the reasons for nonpayment and finds, on the record, that the defendant could have made payment but refused to do so. In justice and municipal court, such finding shall be included in the court's order.

(2) After consideration of the defendant's situation, means, and conduct with regard to the nonpayment, the court shall determine the period of any incarceration, subject to the limitations set by statute.

(3) If, at the time the fine, restitution and/or court costs was ordered, a sentence of incarceration was also imposed, the aggregate of the period of incarceration imposed pursuant to this Rule and the term of the sentence originally imposed may not exceed the maximum term of imprisonment authorized for the offense.

**HISTORY: Effective July 1, 2017; amended effective July 1, 2018.**

## COMMENT

Rule 26.6 replaces former Rule 11.04 of the Uniform Rules of Circuit and County Court.

Section (b) mirrors practice under Mississippi Code Section 99-19-20(1) and recognizes that not everyone assessed a fine or restitution will be able to make full payment on the day of assessment. In addition to allowing payment in installments, the court may require the defendant to work on public property; the rate earned will be applied to the payment. *See* Miss. Code § 99-19-20(1), (2)(c).

Section (c) provides that, unless the court expressly orders otherwise, payments shall be made to the clerk and allocated as provided in section (c)(2). "The term 'fine' means, in addition to the pecuniary punishment, all fees, costs, assessments and other charges required by law to be imposed in such cases." Miss. Code Ann. § 99-19-3. Court costs include those designated by statute. *See, e.g.*, Miss. Code Ann. §§ 25-7-13 (circuit court clerk fees), 25-7-25 (justice court fees), 25-7-27 (marshals and constables' fees). Fees owed to private collection and/or probation companies are not included in court costs. Section (c) also requires restitution payments be forwarded to the victim as promptly as practicable, as opposed to accumulating payments before remitting them to the victim.

Section (d) outlines the court's authority to inquire into and address non-payment or non-compliance, through contempt and other means, and provides reasonable alternatives to automatic incarceration. Section (d)(1) generally follows Mississippi Code Section 99-37-11, while section (d)(2) follows Mississippi Code Section 99-19-20(2). The court may address contempt by any other means provided by statute. *See, e.g.*, Miss. Code §n 99-19-65 (clerk's issuance of execution of any portion remaining unpaid). Nothing in Rule 26.6 precludes, in an appropriate case, proceeding pursuant to Rule 27.

Section (e) governs incarceration for non-payment and limits incarceration to instances in which the defendant could have satisfied payment but refused to do so. A defendant should not be imprisoned automatically when alternative methods are available. *See Bearden v. Georgia*, 461 U.S. 660, 672, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983); *Tate v. Short*, 401 U.S. 395, 91 S. Ct. 668, 28 L. Ed. 2d 130 (1971) (denial of equal protection to limit punishment to payment of a fine for those who are able to pay, but to convert the fine to imprisonment for those who are unable to pay). Further, the period of incarceration, if any, is subject to Mississippi Code Sections 99-19-20 and 99-37-9. Section (e)(3) follows Mississippi Code Section 99-19-20(2)(b) and *Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970), which forbid imprisonment of an indigent defendant for non-payment beyond the maximum sentence authorized for the offense. (Effective July 1, 2017.)

## Rule 26.7. Consecutive or concurrent sentences.

Unless otherwise provided by law, the court may direct that the sentence being imposed will be served concurrently with, or consecutively to, any other sentence previously or simultaneously imposed upon the defendant by any court. When sentencing orders are silent, sentences shall run concurrently.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 26.7 is based generally on Mississippi Code Section 99-19-21. The Rule is intended to encompass multiple charges arising from the same criminal episode, unrelated offenses for which sentence is imposed at one time, and a sentence imposed while the defendant is serving a sentence in Mississippi or elsewhere for another offense. Unless the sentencing order specifies otherwise, sentences shall run concurrently. *See Shinn v. State*, 74 So. 3d 901 (Miss. 2011) (citing *Anderson v. State*, 288 So. 2d 852 (Miss. 1974)). (Effective July 1, 2017.)

## Rule 26.8. Entry of judgment of conviction and sentence.

(a) *Entry of judgment and sentence.* — The judgment is complete and valid upon its entry in the minutes.

(b) *Entry of order and duty of clerk.* — Immediately upon entry of an order or judgment of the court, the clerk of the court shall make a diligent effort to assure that all attorneys of record have received notice of the entry of the order or judgment.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 26.8 applies only to a judgment of conviction; Rule 26.2(a) governs judgment of acquittal.

Pursuant to former Rule 11.01 of the Uniform Rules of Circuit and County Court, section (a) provides that a judgment of conviction and sentence are complete upon entry in the minutes. Rule 26.1(c) defines sentence as "pronouncement by the court of the penalty imposed" following "an adjudication of guilt." Rule 26.5 requires pronouncement of judgment and sentence both be made in open court, and Rule 26.2(b) provides that a judgment of conviction shall be "pronounced and entered together with the sentence . . . ."

Section (b) tracks former Rule 11.05 of the Uniform Rules of Circuit and County Court. (Effective July 1, 2017.)

# RULE 27. PROBATION

## Rule 27.1. Initiation of revocation proceedings; securing the probationer's presence.

(a) *Initiation of revocation proceedings.* — If a probationer has violated a condition of probation or has acted contrary to a lawful instruction issued by the supervising officer, the supervising officer or the prosecuting attorney may petition the sentencing court to revoke or modify probation.

(b) *Securing the probationer's presence.* — Pursuant to a petition to revoke or modify, the sentencing court may, when appropriate, issue a warrant for the probationer's arrest or issue a summons directing the probationer to appear on a specified date for a revocation hearing.

(c) *Arrest by supervising officer.* — The probationer may be arrested without a warrant by the supervising officer responsible for the probationer's supervision or by the officer's agent, pursuant to statute, for violation of a condition of probation imposed or an instruction issued.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Section (a) provides a mechanism for probation revocation that permits initiation of the proceeding by the supervising officer or the prosecuting attorney. The court may issue an arrest warrant or a summons to compel the probationer's appearance or, if necessary, the supervising officer (or the officer's agent) may take the probationer into custody without a warrant. See Miss. Code Ann. § 47-7-37(2). (Effective July 1, 2017.)

## Rule 27.2. Preliminary hearing after arrest.

Whenever a probationer is arrested for an alleged violation of probation, an informal preliminary hearing shall be conducted as prescribed by statute.

**HISTORY: Effective July 1, 2017.**

COMMENT

Rule 27.2 refers to the applicable statute(s) on preliminary hearings in the context of probation-revocation proceedings. *See, e.g.,* Miss. Code Ann. § 47-7- 37(3). *See also Gagnon v. Scarpelli,* 411 U.S. 778, 786, 93 S. Ct. 1756, 1761, 36 L. Ed. 656 (1973) (citing *Morrissey v. Brewer,* 408 U.S. 471, 487, 92 S. Ct. 2593, 2603, 33 L. Ed. 2d 484 (1972)) ("[a]t the preliminary hearing, a probationer or parolee is entitled to notice of the alleged violations of probation or parole, an opportunity to appear and present evidence in his own behalf, a conditional right to confront adverse witnesses, an independent decisionmaker, and a written report of the hearing"). (Effective July 1, 2017.)

## Rule 27.3. Revocation of probation.

(a) *Hearing.* — A hearing to determine whether probation should be revoked shall be held before the sentencing court, as prescribed by statute.

(b) *Summary disposition.* — The probationer may waive the hearing prescribed by Rule 27.3(a) and the sentencing court may make a final disposition of the issue, if:

(1) the probationer has been given sufficient notice of the charges and sufficient notice of the evidence to be relied upon; and

(2) the probationer admits, under the requirements of Rule 27.3(e), commission of the alleged violation.

(c) *Presence.* — The probationer is entitled to be present at the hearing.

(d) *Counsel.* —

(1) The probationer may be represented by retained counsel.

(2) Counsel shall be appointed to represent an indigent probationer if the probationer makes a colorable claim that:

(A) the probationer has not committed the alleged violation of the conditions of probation or the instructions issued by the supervising officer; or

(B) even when the violation is a matter of public record or is uncontested, there are substantial reasons that justify or mitigate the violation and make revocation inappropriate, and those reasons are complex or otherwise difficult to develop or present.

(e) *Admission by the probationer.* — Before accepting an admission by a probationer that the probationer has violated a condition of probation or a lawful instruction issued by the supervising officer, the court shall determine that the probationer understands the following:

(1) the nature of the violation to which an admission is offered;

(2) the right to be represented by counsel as provided by Rule 27.3(d);

(3) the right to testify and to present witnesses and other evidence on the probationer's own behalf and to cross-examine adverse witnesses under subsection (f)(1); and

(4) that, if the alleged violation involves a criminal offense for which the probationer has not yet been tried, the probationer may still be tried for that offense and, although the probationer may not be required to testify, that any statement made by the probationer at the present proceeding may be used against the probationer at a subsequent proceeding or trial.

The court shall also determine that the probationer waives these rights, that the admission is voluntary and not the result of force, threats, coercion, or promises, and that there is a factual basis for the admission.

(f) *Nature of the hearing.* —

(1) The judge must find by a preponderance of the evidence that a violation of the conditions of probation or the instructions occurred. Each party shall have the right to present evidence and the right to confront and cross-examine adverse witnesses who appear and testify in person. The court may receive any reliable, relevant evidence not legally privileged, including hearsay.

(2) If the alleged violation involves a criminal offense for which the probationer has not yet been tried, the probationer shall be advised at the beginning of the revocation hearing that, regardless of the outcome of the revocation hearing, the probationer may still be held for that offense and that any statement made by the probationer at the hearing may be used against the probationer at a subsequent proceeding or trial.

(3) In cases involving breach of a condition of probation because of nonpayment of a fine, restitution, or court costs, incarceration shall not automatically follow nonpayment. Incarceration may be employed only after the court has examined the reasons for nonpayment and finds, on the record, that the probationer could have satisfied payment but refused to do so.

(g) *Disposition.* — If the judge finds that a violation of the conditions of probation or lawful instructions occurred, it may revoke, modify, or continue probation.

(h) *Record.* — The judge shall make a written statement or state for the record the evidence relied upon, and the reasons for, revoking probation.

**HISTORY: Effective July 1, 2017.**

## COMMENT

Rule 27.3 is drafted to comply with the constitutional requirements articulated in *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 656 (1973). Rules 27.2 and 27.3 together set up a two-hearing process specifically required by *Gagnon*. Rule 27.2 provides for an informal preliminary hearing as prescribed by statute. Rule 27.3(a) then provides for the revocation hearing itself, as prescribed by statute. *See, e.g.*, Miss. Code Ann. § 47-7-37. *But see* Miss. Code Ann. §§ 47-7-38 (authorizes the Mississippi Department of Corrections "to impose graduated sanctions as an alternative to judicial modification or revocation" in certain instances), 47-7-38.1 (directs the Mississippi Department of Corrections to establish "technical violation centers" to detain probation violators for "technical violations").

Section (b) allows the probationer to waive a revocation hearing within carefully defined limits. Two hearings are not necessary if, at the first hearing, the probationer has received sufficient notice of the charges and of the evidence of the probation violation, and the probationer admits commission of the alleged violation consistent with section (e).

Section (d)(1) provides a probationer may be represented by retained counsel. Section (d)(2) states the right to appointed counsel for indigent probationers is determined on a case-by-case basis, through a due-process analysis. *See Riely v. State*, 562 So. 2d 1206 (Miss. 1990); *Gagnon*, 411 U.S. at 790-91.

The procedure for accepting an admission under section (e) applies at either the informal preliminary hearing or the revocation hearing. If there is no admission, the hearing is conducted pursuant to section (f).

Section (f)(3) recognizes the constitutional limits on revocation of probation for non-payment. As the United States Supreme Court explained in *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983):

[I]n revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation . . . . If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment.

*Id.* at 672.

Section (h) is included to give a reviewing court a basis for evaluating the revocation hearing and decision. *Gagnon* requires that a written statement be made as to the evidence relied upon, and the reasons for, revoking probation. *See Gagnon*, 411 U.S. at 786. A written judgment entry would constitute a sufficient written statement. (Effective July 1, 2017.)

### Rule 27.4. Other proceedings.

Proceedings to revoke or modify any other suspended sentence or period of post-release supervision shall be conducted in accordance with Rule 27.

**HISTORY: Effective July 1, 2017.**

#### COMMENT

Rule 27.4 is consistent with existing statutes and case law. *See* Miss. Code Ann. §§ 47-7-34, 47-7-35, and 47-7-37 (post-release supervision); *Johnson v. State*, 925 So. 2d 86 (Miss. 2006) (discussing imposition of suspended sentences). (Effective July 1, 2017.)

## RULE 28. RETENTION OF RECORDS AND EVIDENCE

### Rule 28. Retention of Records and Evidence.

The clerk of the court shall receive and maintain all papers, documents, and records filed, and all evidence admitted, in criminal cases. All records and evidence of the proceedings shall be retained according to law. (Effective July 1, 2017.)

#### COMMENT

Rule 28 defines the basic duties of the clerk of court in criminal cases. On the retention of records as required by law, see Miss. Code Ann. § 9-7-128. (Effective July 1, 2017.)

## RULE 29. APPEALS FROM JUSTICE OR MUNICIPAL COURT

### Rule 29.1. Notice of appeal; contents; defects; dismissal.

(a) *Notice of appeal.* — Any person adjudged guilty of a criminal offense by a justice or municipal court may appeal to county court or, if there is no county court, to circuit court, by filing simultaneously a written notice of appeal, and both a cost bond and an appearance bond (or cash deposit), as provided in Rules 29.3(a) and 29.4(a), with the clerk of the circuit court having jurisdiction within thirty (30) days of such judgment. This written notice of appeal and posting of the cost bond and the appearance bond (or cash deposit) perfects the appeal. After the filing of the written notice of appeal, cost bond, and appearance bond (or cash deposit), all further correspondence concerning the case shall be mailed directly to the circuit clerk for inclusion in the file.

(b) *Contents.* — The written notice of appeal shall specify the party or parties taking the appeal; specify the current residence address and the current mailing address, if different, of each party taking the appeal; designate the judgment or order from which the appeal is taken; be addressed to county or circuit court, whichever appropriate; and state that the appeal is taken for a trial *de novo*.

(c) *Defects in the notice of appeal; dismissal.* — Upon a failure of a party to comply with the requirements of this rule as to content of the written notice of appeal, the court, on its own motion or on motion of a party, shall direct the clerk of the court to give written notice to the party in default, apprising the party of the nature of the deficiency. If the party in default fails to correct the deficiency within fourteen (14) days after notification, the appeal shall be dismissed by the clerk of the court. The county or circuit court shall promptly notify the lower court of any such dismissal.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 29.1 incorporates provisions from former Rule 12.02(A.) of the Uniform Rules of Circuit and County Court.

Section (a) requires the notice of appeal to be filed with the clerk of the circuit court within thirty (30) days of entry of the judgment appealed from. *See Murray v. State*, 870 So. 2d 1182, 1184 (Miss. 2004) (holding the thirty (30) day deadline in procedural rule governs over conflicting statute). Under section (a), and unlike Rule 4(e) of the Mississippi Rules of Appellate Procedure, pending post-trial motions do not extend the time for taking an appeal; nor is the time for filing a notice of appeal extended if the lower court judge stays execution of the judgment. Section (c) requires that the lower court be promptly notified of any dismissal, so that execution of its judgment may proceed. (Effective July 1, 2017.)

## Rule 29.2. Record.

Upon receiving written notice of appeal, and upon the defendant's compliance with Rules 29.3(a) and 29.4(a), the circuit clerk shall promptly notify the lower court and the appropriate prosecuting attorney. Within ten (10) days after receipt of such notice, the judge or clerk of the lower court shall deliver to the clerk of the circuit court a certified copy of the record and all original papers in the case.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 29.2 is consistent with former Rule 12.02(A.)(3.) of the Uniform Rules of Circuit and County Court. (Effective July 1, 2017.)

## Rule 29.3. Cost bonds.

(a) *Cost bonds.* — Unless excused by the county or circuit court by the making of an affidavit of poverty like that specified in Mississippi Code Section 99-35- 7, every defendant who appeals under this rule shall post a cash deposit, or bond with sufficient resident sureties (or licensed guaranty companies) to be approved by the circuit clerk, for all estimated court costs incurred both in the appellate and lower courts (including, but not limited to, fees, court costs, and amounts imposed pursuant to statute). The amount of such cash deposit or bond shall be determined by the judge of the lower court, payable to the State in an amount of not less than One Hundred Dollars ($100.00) nor more than Twenty-Five Hundred Dollars ($2,500.00). Upon a bond forfeiture, the costs of the lower court shall be recovered after the costs of the appellate court.

(b) *Dismissal for noncompliance.* — A defendant's failure to comply with Rule 29.3(a) shall be grounds for the court, on its own motion or on motion of a party, to dismiss the appeal, with costs. The county or circuit court shall promptly notify the lower court of any such dismissal.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 29.3(a) is derived from former Rule 12.02(B.)(2.) of the Uniform Rules of Circuit and County Court. *See also* Miss. Code Ann. § 99-35-1 ("Any person appealing a judgment of a justice court or a municipal court under this section shall post bond for court costs relating to such appeal"). The purpose of the cost bond is to cover all estimated court costs, broadly defined, in both the trial and appellate court. Posting the cash deposit or bond stays execution of the judgment imposed by the lower court as it relates to fees, court costs, and amounts imposed pursuant to statute. Section (b) is taken directly from former Rule 12.02(A.)(1.) of the Uniform Rules of Circuit and County Court. Section (b) further provides that the lower court be promptly notified of the dismissal, so that execution of its judgment may proceed. (Effective July 1, 2017.)

## Rule 29.4. Appearance bonds.

(a) *Appearance bond.* — Unless excused by the county or circuit court by the making of an affidavit as specified in Mississippi Code Section 99-35-7, a cash deposit, or bond with sufficient resident sureties (or licensed guaranty companies) to be approved by the circuit clerk, shall be given and conditioned on appearance before the county or circuit court from day to day and term to term until the appeal is finally determined or dismissed. The amount of such cash deposit or appearance bond shall be determined by the judge of the lower court.

(b) *Failure to appear.* — If the defendant fails to appear at the time and place set by the court, the court may dismiss the appeal with prejudice and with costs, and order forfeiture of the appearance bond or cash deposit. The county or circuit court shall promptly notify the lower court of any such dismissal.

(c) *Time in custody credited.* — All time the defendant is in custody on the present charge shall be credited against any sentence imposed by the court.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 29.4 continues the practice from former Rule 12.02(B.)(1.) and (3.) of the Uniform Rules of Circuit and County Court. The filing and approval of an appearance bond stays imposition of the sentence of incarceration. See Miss. Code Ann. § 99-35-3 (providing for appearance bonds).

Under section (c), a defendant's sentence includes credit for time already spent in custody on the present charge. (Effective July 1, 2017.)

### Rule 29.5. Proceedings.

Upon the filing with the circuit clerk of the written notice of appeal and bonds or cash deposits required by this Rule, unless excused therefrom, the prior judgment of conviction shall be stayed. The appeal shall proceed as a trial *de novo*. In appeals from justice or municipal court, when the maximum possible sentence is six (6) months or less, the case may be tried without a jury.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 29.5 continues the practice from former Rule 12.02(C.) of the Uniform Rules of Circuit and County Court. *See also* Miss. Code Ann. § 99-35-1. As under Rule 18.1(a)(3), a jury trial is discretionary if a defendant's maximum possible sentence is six (6) months or less. *See Hinton v. State*, 222 So. 2d 690, 692 (Miss. 1969). (Effective July 1, 2017.)

## RULE 30. APPEALS FROM COUNTY COURT

### Rule 30.1. Notice of appeal; contents; proceedings.

(a) *Notice of appeal.* — Any person adjudged guilty of a criminal offense by a county court, where the case was not a felony action transferred to that court from circuit court, may appeal to the circuit court having jurisdiction by filing written notice with the clerk of the circuit court within thirty (30) days of the entry of the final judgment. Extensions may be granted as provided in Mississippi Rule of Appellate Procedure 4(g).

(b) *Contents.* — The notice of appeal shall specify the party or parties taking the appeal; designate the judgment or order from which the appeal is taken; state that the appeal is to circuit court; and state that the appeal is taken on the record. The clerk, upon receiving written notice of appeal, shall immediately send notice to the prosecuting attorney. Thereafter, appeals shall proceed as if in the Supreme Court and in accordance with the Mississippi Rules of Appellate Procedure.

(c) *Proceedings.* — On appeal, legal arguments may be heard in any county within the jurisdiction of the circuit court and shall be considered solely on the record made in county court. If no prejudicial error be found, the circuit court shall affirm and enter judgment in like manner as affirmances in the Supreme Court. If prejudicial error be found, the circuit court shall reverse as is provided for reversals in the Supreme Court. If a new trial is granted, the cause shall be placed on the docket of the circuit court and a new trial held therein *de novo*.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 30.1 largely continues practice under former Rules 12.03(A.), (C.), (D.), and (F.) of the Uniform Rules of Circuit and County Court. Essentially, a defendant may appeal a conviction in county court to the circuit court that has jurisdiction by filing a written notice of appeal with the clerk of the circuit court within thirty (30) days after entry of the final judgment (under former Rule 12.03(A.) of the Uniform Rules of Circuit and County Court, such written notice of appeal was filed with the clerk of the county court). See Miss. Code Ann. § 11-51-79. This includes cases that originated in county court and cases appealed to county court from justice or municipal court under Rule 29.1. Once the notice of appeal is filed, the case proceeds according to the Mississippi Rules of Appellate Procedure. Appeal of a conviction in circuit court is to the Mississippi Supreme Court, whether the case originated in county court, or in justice or municipal court. *See Jones v. City of Ridgeland*, 48 So. 3d 530 (Miss. 2009) (interpreting Miss. Code Ann. § 11-51-81).

As provided in Rule 30.3, Rule 30.1 does not apply to felony cases transferred by a circuit court to a county court for disposition. Nor does Rule 30.1 apply to a case assigned to a county court judge pursuant to Mississippi Code Section § 9-9-35, which remains throughout a circuit court case. (Effective July 1, 2017.)

## Rule 30.2. Bond.

Defendants who appeal a conviction in county court to circuit court shall be entitled to release pursuant to Rule 8.3. All time that the defendant has been in custody on the present charge shall be credited against any sentence imposed.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 30.2 directs that Rule 8.3 governs release of defendants who appeal a conviction in county court to circuit court. As under prior Rule 12.03(B.) of the Uniform Rules of Circuit and County Court, a defendant is entitled to credit for time in custody on the present charge against any sentence imposed. (Effective July 1, 2017.)

## Rule 30.3. Felony transfers.

Final judgments in felony cases transferred from circuit court to county court shall be appealed to the Supreme Court in the same manner as if the judgment were rendered in the circuit court.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 30.3 follows practice under former Rule 12.03(E.) of the Uniform Rules of Circuit and County Court. See also Miss. Code Ann. §§ 9-9-27, 11-51-79. (Effective July 1, 2017.)

# RULE 31. POST-CONVICTION COLLATERAL RELIEF

## Rule 31. Post-Conviction Collateral Relief.

Applications for post-conviction collateral relief in criminal cases are governed by statute, as supplemented and modified by Rule 22 of the Mississippi Rules of Appellate Procedure. (Effective July 1, 2017.)

### COMMENT

Rule 31 confirms that applications for post-conviction collateral relief are governed by a comprehensive statutory process. *See* Miss. Code Ann. § 99-39-3(1). (Effective July 1, 2017.)

# RULE 32. CONTEMPT

## Rule 32.1. Applicability; indirect and direct contempt defined; criminal and civil contempt defined.

(a) *Applicability.* — Rule 32 applies to both civil and criminal contempt arising in a criminal action.

(b) *Indirect contempt.* — "Indirect contempt," also known as "constructive contempt," means any contempt other than a direct contempt.

(c) *Direct contempt.* — "Direct contempt" means contempt committed:

(1) in the presence of the judge presiding in court; or

(2) so near to the judge as to interrupt the court's proceedings.

(d) *Criminal contempt.* — "Criminal contempt" means either:

(1) misconduct of a person that obstructs the administration of justice and that is committed either in the presence of the judge presiding in court or so near thereto as to interrupt its proceedings;

(2) willful disobedience or resistance of any person to a court's lawful writ, subpoena, process, order, rule, or command, where the primary purpose of the finding of contempt is to punish the contemnor; or

(3) any other willfully contumacious conduct which obstructs the administration of justice, or which lessens the dignity and authority of the court.

(e) *Civil contempt.* — "Civil contempt" means willful, continuing failure or refusal of any person to comply with a court's lawful writ, subpoena, process, order, rule or command that by its nature is still capable of being complied therewith.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Section (a) provides that Rule 32 applies both to civil and criminal contempt proceedings, so long as they arise out of a criminal case. *See* Rule 1.1.

The distinction between indirect (or constructive) contempt, defined by section (b), and direct contempt, defined by section (c), is drawn as a basis for procedural differences in applying a remedy. In those limited cases of direct contempt, where the contempt is within the judge's actual sight or hearing so that further or extrinsic evidence is not needed to show the judge what in fact occurred, the judge may dispose of the matter summarily under Rule 32.2. In all other instances the contempt is "indirect," which implicates additional procedural due process safeguards, such as specification of charges, notice, and a hearing. *See* Rules 32.3 through 32.5. *See In re Smith*, 926 So. 2d 878, 888 (Miss. 2006); *Cooper Tire & Rubber Co. v. McGill*, 890 So. 2d 859, 868-69 (Miss. 2004) (addressing "procedural safeguards" in cases of "constructive criminal contempt"); *Purvis v. Purvis*, 657 So. 2d 794, 798 (Miss. 1994).

The general distinction between criminal contempt, defined by section (d), and civil contempt, defined by section (e), is the purpose for which the sanctions are imposed, although the ultimate sanction in either case is incarceration. *See McGill*, 890 So. 2d at 867-68 ("[i]n classifying a finding of contempt as civil or criminal, this Court focuses on the *purpose* for which the power was exercised. . . . [T]he determination should focus on the character of the sanction itself and not the intent of the court imposing the sanction"). Where the sanction operates prospectively to ensure compliance with a lawful order of the court, the contempt is civil. *See Gutierrez v. Gutierrez*, 153 So. 3d 703, 712 (Miss. 2014) (citing *Jones v. Hargrove*, 516 So. 2d 1354, 1357 (Miss. 1987)) ("[t]he purpose of civil contempt is to compel parties to obey the orders of the court"); *Gaiennie v. McMillin*, 138 So. 3d 131, 136 (Miss. 2014) (quoting *Lahmann v. Hallmon*, 722 So. 2d 614, 620 (Miss. 1998)) ("The purpose of civil contempt is to enforce or coerce obedience to the orders of the court"); *Mingo v. State*, 944 So. 2d 18, 32 (Miss. 2006) (quoting *In re Williamson*, 838 So. 2d 226, 237 (Miss. 2002)) ("If the primary purpose of the contempt order is to enforce the rights of private party litigants or enforce compliance with a court order, then the contempt is civil"); *In re Smith*, 926 So. 2d at 887. The person being punished holds the keys to the jail and can purge himself/herself of contempt and gain release at any time by complying with the order. *See In re Smith*, 926 So. 2d at 887 (quoting *McGill*, 890 So. 2d at 868) ("The contemnor may be jailed or fined for civil contempt; however, the contemnor must be relieved of the penalty when he performs the required act"); *Jones* , 516 So. 2d at 1357; *Shillitani v. United States*, 384 U.S. 364, 86 S. Ct. 1531, 16 L. Ed. 2d 622 (1966); *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 31 S. Ct. 492, 55 L. Ed. 797 (1911). On the other hand, a criminal contempt proceeding is intended to punish for past, not contemplated or ongoing, conduct. *See Mingo*, 944 So. 2d at 32 (quoting *In re Williamson*, 838 So. 2d at 237) ("Criminal contempt penalties . . . are designed to punish the contemnor for disobedience of a court order; punishment is for past offenses and does not terminate upon compliance with the court order"); *In re Smith*, 926 So. 2d at 887-88. Its purpose is to vindicate the dignity of the court. Criminal contempt is a criminal offense for which a specific punishment is meted out, over which the defendant has no control. *See In re Smith*, 926 So. 2d at 887; *McGill*, 890 So. 2d at 868; *United States v. Barnett*, 376 U.S. 681, 84 S. Ct. 984, 12 L. Ed. 2d 23 (1964). If the conduct is extreme, contempt can be a serious crime entitling a defendant to certain constitutional safeguards (e.g., jury trial). *See* Miss. Code Ann. § 11-51-11(4); *Bloom v. Illinois*, 391 U.S. 194, 88 S. Ct. 1477, 20 L. Ed. 2d 522 (1968). (Effective July 1, 2017.)

## Rule 32.2. Direct contempt.

(a) *Summary imposition of sanctions.* — The court against which a direct civil or criminal contempt has been committed may summarily impose sanctions on the person who committed it if:

(1) the presiding judge has personally perceived the conduct constituting the contempt and has personal knowledge of the identity of the person committing it;

(2) the contempt has interrupted the order of the court or interfered with the dignified conduct of the court's business; and

(3) the punishment imposed does not exceed thirty (30) days incarceration or a fine of One-Hundred Dollars ($100.00).

The court shall afford the alleged contemnor an opportunity, consistent with the circumstances then existing, to present exculpatory or mitigating evidence. If the court summarily finds and announces on the record that direct contempt has been committed, the court may defer imposition or execution of sanctions until the conclusion of the proceeding during which the contempt was committed.

(b) *Order of contempt.* — Either before sanctions are imposed, or promptly thereafter, the court shall issue a written order stating, or shall state on the record, that a direct contempt has been committed and specifying:

(1) whether the contempt is civil or criminal;

(2) the evidentiary facts known to the court from the judge's own personal knowledge concerning the conduct constituting the contempt and, regarding any relevant evidentiary facts not so known, the basis of the court's findings;

(3) the sanction imposed for the contempt;

(4) in the case of civil contempt, how the contempt may be purged; and

(5) in the case of criminal contempt, if the sanction is incarceration, a determinate term.

(c) *Review and record.* —

(1) *Review.* — The contemnor may seek review by appeal or by writ of habeas corpus, if appropriate.

(2) *Record.* — The appellate record in cases of direct contempt in which sanctions have been summarily imposed shall consist of:

(1) the order of contempt; and, if the proceeding during which the contempt occurred was recorded, a transcript of that part of the proceeding; and

(2) any evidence admitted in the proceeding.

(d) *No summary imposition of sanctions.* — In any proceeding involving a direct contempt for which the court determines not to impose sanctions summarily, the judge shall issue a written order specifying the evidentiary facts within the personal knowledge of the judge respecting the conduct constituting the contempt and the identity of the contemnor. Thereafter, the proceeding shall be conducted pursuant to Rule 32.3 or Rule 32.4, whichever is applicable, and Rule 32.5 in the same manner as an indirect contempt.

**HISTORY: Effective July 1, 2017.**

## COMMENT

Under section (a), sanctions may be imposed immediately upon a finding of direct contempt or deferred to the conclusion of the proceeding. A delay between citation for contempt and the imposition of sanctions can provide a cooling-off period in the relations between the judge and the contemnor, and is particularly relevant in those circumstances when the contemnor is a lawyer representing a client on trial. Delay gives all parties a chance to reacquire their objectivity, and also allows the contemnor time to discuss the matter with an attorney and prepare a statement. Deferral of a sanction does not, however, affect its summary nature. The sanction remains summary in nature in that no hearing is required; the court simply announces and imposes the sanction at the conclusion of the proceeding. By limiting the use of summary disposition to those cases where the alleged contemptuous conduct was committed in the presence of the judge, subsection (a)(1) recognizes that the judge can determine the facts surrounding an allegation of contempt without a hearing only when the judge personally witnesses the contemptuous conduct. As to possible constitutional limitations on the summary imposition of sanctions, including the right to jury trial and the right to counsel, *see, e.g., Taylor v. Hayes*, 418 U.S. 488, 94 S. Ct. 2697, 41 L. Ed. 2d 897 (1974); *Codispoti v. Pennsylvania*, 418 U.S. 506, 94 S. Ct. 2687, 41 L. Ed. 2d 912 (1974); and *Bloom v. Illinois*, 391 U.S. 194, 88 S. Ct. 1477, 20 L. Ed. 2d 522 (1968). Because of these limitations, summary procedures are available only when necessary to preserve order (subsection (a)(2)), and when the potential punishment does not exceed thirty (30) days incarceration or a One-Hundred Dollar ($100.00) fine (subsection (a)(3)). *See* Miss. Code Ann. § 9-1-17.

Section (a) does provide the contemnor with significant procedural rights, by requiring the court to "fin[d] and announc[e] on the record that direct contempt has been committed," and permitting the contemnor, "consistent with the circumstances then existing, to present exculpatory or mitigating evidence." Thus, the contemnor must be given notice of the charges and an opportunity to present information in mitigation of punishment. It should be recognized that the power to punish summarily for contempt is to be used cautiously, and is not an appropriate device to control every act of courtroom disrespect.

Section (c) establishes methods of review for direct contempts when sanctions are imposed summarily. *See, e.g.,* M.R.A.P. 21; Miss. Code Ann. §§ 11-51-11 (criminal contempt judgments), 11-51-12 (civil contempt judgments).

Section (d) limits the applicability of Rule 32.2 to direct contempts where sanctions are summarily imposed. Otherwise, the judge is required to issue a written order specifying the facts known to the judge to constitute the contempt, and the matter proceeds in the manner provided for indirect contempts under Rules 32.3 through 32.5. (Effective July 1, 2017.)

## Rule 32.3. Indirect criminal contempt; commencement; prosecution.

(a) *Nature of the proceedings.* — All criminal contempts not adjudicated pursuant to Rule 32.2 shall be prosecuted by means of a written motion or on the court's own initiative.

(b) *Disqualification of the judge.* — Indirect criminal contempt charges shall be heard by a judge other than the trial judge.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Section (a) provides that criminal contempts that are not, or cannot be, tried summarily in accordance with Rule 32.2 must be tried pursuant to the provisions of Rule 32.3, i.e., under the procedures established by these Rules for the trial of other criminal offenses. *See Dennis v. Dennis*, 824 So. 2d 604, 609 (Miss. 2002) ("A defendant in [indirect] contempt proceedings is entitled to notice and is entitled to be informed of the nature and cause of the accusation, of his rights to be heard, to counsel, to call witnesses, to an unbiased judge, to a jury trial, and against self-incrimination, and that he is presumed innocent until proven guilty beyond reasonable doubt."). Section (a) requires contempt proceedings to be prosecuted by written motion or on the court's own initiative.

Section (b) requires that a new judge hold a hearing to determine the guilt of the contemnor, as well as to impose punishment, whenever the nature of the contemptuous conduct involves indirect criminal contempt. *See Mississippi Comm'n on Jud. Performance v. Harris,* 131 So. 3d 1137, 1142 n.6 (Miss. 2013); *Corr v. State*, 97 So. 3d 1211, 1216 (Miss. 2012). *But see Purvis v. Purvis*, 657 So. 2d 794, 798 (Miss. 1994) (citing *Mayberry v. Pennsylvania*, 400 U.S. 455, 463-64, 91 S. Ct. 499, 504, 27 L. Ed. 2d 532 (1971)) ("[d]irect contempt may be handled by the sitting judge instantly, although it is wise for a judge faced with personal attacks who waits till the end of the proceedings to have another judge take his place"). (Effective July 1, 2017.)

### Rule 32.4. Indirect civil contempt.

(a) *Commencement.* — A civil contempt proceeding may be commenced by the filing of a motion for contempt with the clerk of the court whose order or judgment is claimed to have been violated. No filing fee shall be required in connection with the filing of the motion for civil contempt. The proceeding shall be considered part of the action out of which the contempt arose.

(b) *Contents of the motion.* — The motion for civil contempt shall contain:

(1) a statement of the order or judgment involved, or a copy thereof, if available, and the name of the issuing judge where appropriate;

(2) the case caption and the docket number of the case;

(3) a short, concise statement of the facts on which the asserted contempt is based; and

(4) a request for the issuance of a summons as specified below.

The motion for civil contempt shall be verified or supported by affidavits.

(c) *Summons.* — The summons shall issue only on a judge's order and shall direct the parties to appear before the court at a date and time certain for the purpose(s) specifically stated therein of:

(1) scheduling a trial;

(2) considering whether and when the filing of an answer is necessary;

(3) considering whether discovery is necessary;

(4) holding a hearing on the merits of the motion; or

(5) considering such other matters or performing such other acts as the court may deem appropriate.

A hearing on the merits of the motion shall be held not less than seven (7) days after service of the summons.

(d) *Service of the summons and motion.* — The following shall be served upon the alleged contemnor:

(1) a copy of the summons;

(2) a copy of the motion for civil contempt;

(3) a copy of the accompanying affidavits; and

(4) if incarceration to compel compliance is sought, notice to the alleged contemnor in the following form:

> TO THE PERSON ALLEGED TO BE IN CONTEMPT OF COURT:
>
> 1. It is alleged that you have disobeyed a court order, are in contempt of court, and should go to jail until you obey the court's order.
>
> 2. You have the right to have a lawyer. If you already have a lawyer, you should consult the lawyer at once. If you do not now have a lawyer, please note:
>
> (a) A lawyer can be helpful to you by:
>
> (1) explaining the allegations against you;
>
> (2) helping you determine and present any defense to those allegations;
>
> (3) explaining to you the possible outcomes; and
>
> (4) helping you at the hearing.

(b) Even if you do not plan to contest that you are in contempt of court, a lawyer can be helpful.

(c) If you want a lawyer but do not have the money to hire one, you may ask the court to appoint one for you.

3. IF YOU DO NOT APPEAR FOR A SCHEDULED COURT HEARING BEFORE THE JUDGE, YOU WILL BE SUBJECT TO ARREST.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 32.4 applies to all proceedings to enforce compliance with orders or judgments formalized by court order, for the violation of which civil contempt is an appropriate remedy. Section (a) provides that indirect civil contempt proceedings are initiated by motion and clarifies that they are treated as part of the action out of which the contempt arose. Consequently, no filing fee is required.

Section (b) prescribes what must be included in an indirect civil contempt motion and, because of the serious nature of an allegation of civil contempt, requires verification or accompanying appropriate affidavits.

Section (c) endows the summons with unusual significance. Because of the expedited and grave nature of a civil contempt proceeding, the summons: "issue[s] only on a judge's order"; must "direct the parties to appear before the court at a date and time certain" after service of the order; and must specifically state what will happen when the parties appear. Section (c) seeks to permit flexibility with respect to what occurs when the parties first appear in answer to the summons. Depending on the nature of the alleged contempt, a case may or may not benefit from the filing of an answer, expedited discovery, or an immediate hearing. Consequently, the rule gives wide discretion to the judge to determine what should happen when the parties appear: a "hearing on the merits," if it makes sense to have that quickly; scheduling a trial; considering dispensing with an answer; expediting discovery, if discovery is necessary; requiring initial compliance by the defendant pending a hearing; or considering other appropriate matters or requiring other appropriate acts to be performed. Under section (c)(3), a party must seek an order permitting discovery, unlike normal discovery provisions which permit parties, on their own, to initiate discovery. (Effective July 1, 2017.)

## Rule 32.5. Further proceedings.

(a) *Consolidation of criminal and civil contempts.* — If a person has been charged with more than one (1) contempt pursuant to Rule 32.3, Rule 32.4, or both, the court may consolidate the proceedings for hearing and disposition.

(b) *When judge disqualified.* — A judge who enters an order pursuant to Rule 32.2(d), institutes an indirect contempt proceeding on the court's own initiative pursuant to Rule 32.3 or Rule 32.4, or reasonably expects to be called as a witness at any hearing on the matter, is disqualified from sitting at the hearing.

(c) *Failure to appear at hearing.* —

(1) *Generally.* — If, after proper notice, the alleged contemnor fails to appear personally at the time and place set by the court, the court may enter an order directing the alleged contemnor be taken into custody and brought before the court or judge designated in the order.

(2) *Civil contempt.* — If, after proper notice, the alleged contemnor in a civil contempt proceeding fails to appear in person or by counsel at the time

and place set by the court, the court may proceed in the alleged contemnor's absence.

(d) *Disposition.* — When a court makes a finding of contempt, the court shall issue a written order that specifies the sanction imposed for the contempt. In the case of a civil contempt, the order shall specify how the contempt may be purged. In the case of a criminal contempt, if the sanction is incarceration, the order shall specify a determinate term.

**HISTORY: Effective July 1, 2017.**

### Rule 32.6. Bail.

A contemnor incarcerated for contempt is entitled to the same consideration with respect to bail pending appeal as a defendant convicted in a criminal proceeding, as provided by law.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 8.3 generally provides that "[a] convicted defendant shall be entitled to bail pending appeal as prescribed by Mississippi Code Section 99-35-115." But Mississippi Code Sections 11-51-11 and 11-51-12 specifically address bond in appeals from criminal and civil contempt judgments. *See* Miss. Code Ann. §§ 11-51-11, 11-51-12. (Effective July 1, 2017.)

## RULE 33. SUBPOENAS

### Rule 33. Subpoenas.

(a) *Generally.* — Except as set forth below, the procedures for subpoenas shall conform to Rule 45 of the Mississippi Rules of Civil Procedure. This Rule shall not apply to proceedings before a grand jury.

(b) *Subpoenas duces tecum for production at trial or hearing.* — A subpoena may, without a motion or hearing, require the production of books, papers, documents or other objects at the date, time and place at which the trial, hearing or proceeding at which these items are to be offered in evidence is scheduled to take place.

(c) *Subpoenas duces tecum for production other than at trial or hearing.* —

(1) *Generally.* — No subpoena may require the production of books, papers, documents or other objects at a date and time or place other than the date, time and place at which the trial, hearing or proceeding at which these items are to be offered in evidence is scheduled to take place, unless the court has entered an order pursuant to this Rule authorizing the issuance of such subpoena.

(2) *Motions; service; opposition.* — A hearing on a motion for the issuance of a subpoena *duces tecum* shall be set at the time the motion is filed and served. The hearing shall be set no earlier than ten (10) days after filing and service of the motion. Except for good cause shown, all motions for subpoenas *duces tecum* shall be served on:

(A) the custodian of the books, papers, documents or other objects which would be subject to the subpoena;

(B) all parties;

(C) all persons whose books, papers, documents or other objects would be subject to the subpoena; and

(D) all persons who may have a claim that privileged material would be subject to the subpoena.

Any party to the action or other interested person may file an opposition or response.

(3) *Supporting affidavit or declaration.* — Motions seeking subpoenas *duces tecum* shall be supported by an affidavit or declaration stating facts which establish:

(A) the documents or objects sought are evidentiary and relevant;

(B) the documents or objects sought are not otherwise reasonably procurable in advance of the trial, hearing or proceeding by exercise of due diligence;

(C) the moving party cannot properly prepare for trial without such production and inspection in advance of trial and the failure to obtain such inspection may tend unreasonably to delay the trial; and

(D) the application is made in good faith and is not intended for the purpose of general discovery.

(4) *Immediate lodging with court.* — Any subpoena *duces tecum* under section (c) shall be returnable to, and the items sought thereunder produced before, the court. In the event that materials subject to a subpoena are received by a party, an attorney, or an attorney's agent or investigator directly from the subpoenaed person, any person receiving such materials shall immediately notify the court and shall immediately lodge such materials with the court. The materials shall not be opened, reviewed or copied by a recipient without a prior court order.

(d) *Sanctions.* — Violation of this Rule may provide a basis for sanctions.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 33 is derived from former Rule 2.01 of the Uniform Rules of Circuit and County Court. (Effective July 1, 2017.)

## RULE 34. MOTIONS

### Rule 34.1. Motions; form, content, rights of reply.

(a) *General.* — A party applying to the court for an order must do so by motion.

(b) *Form and content of a motion.* — A motion – except when made during a trial or hearing – must be in writing, unless the court permits the party to make the motion by other means. A motion shall contain a concise statement of the precise relief requested and shall state the specific factual grounds and specific legal authority in support thereof. A motion may be supported by affidavit. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion or if the matter is presented in an agreed order.

(c) *Rights of reply.* — Unless otherwise ordered by the court, each party may file and serve a response within ten (10) days after service of the motion, and the moving party may file and serve a reply, which shall be directed only to matters raised in a response, within five (5) days after service of the response. Responses and replies shall be in the form required for motions.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 34 is consistent with common practice as embodied in Rule 47 of the Federal Rules of Criminal Procedure, Rule 7(b) of the Mississippi Rules of Civil Procedure, and former Rule 6.07 of the Uniform Rules of Circuit and County Court. Rule 34.1 is intended to provide general standards governing the details of motion practice in criminal cases; the general standards will, of course, be inapplicable when a Rule specifies a different procedure. Sections (a) and (b) are intended to produce concise, but precise pleadings. To this end, section (b) requires a statement of the "specific factual grounds" for the relief requested.

Section (b) eliminates the requirement of writing for motions made during a trial or hearing. The language "other means" in section (b) broadly permits the court to entertain motions through electronic or other reliable methods. The sentence in section (b) permitting a motion to be "supported by affidavit" is not intended to permit "speaking motions," but to authorize the use of affidavits when they are appropriate to establish a fact.

Unless otherwise ordered by the court, section (c) provides a right (but not a duty) to respond to all motions. Permitting a reply by the moving party to the response to the motion allows the moving party an opportunity to address new issues that the opposing party may have raised in the response. (Effective July 1, 2017.)

## Rule 34.2. Hearing; oral argument.

Upon request of any party, or on its own initiative, the court may set any motion for hearing. The court may limit or deny oral argument on any motion. It is the duty of the movant, when a motion or other pleading is filed (including a motion for a new trial), to pursue the motion to hearing and decision. Failure to pursue a pretrial motion to hearing and decision before trial is deemed an abandonment of that motion; however, the motion may be heard after the commencement of trial.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 34.2 is based on former Rule 2.04 of the Uniform Rules of Circuit and County Court. The hearing and oral argument provisions are intended to give the court maximum discretion in deciding what procedures, in addition to the written motion and memoranda, will be most helpful to it in reaching a reasoned and expeditious decision on each issue. No party has an absolute right to oral argument on a motion. (Effective July 1, 2017.)

## Rule 34.3. Waiver of former requirements.

Upon request of any party, or on its own initiative, the court may waive a requirement specified in this Rule or overlook a formal defect in a motion or request.

**HISTORY: Effective July 1, 2017.**

### COMMENT

This inherent power of the court is specifically included for purposes of clarity, and to allow its exercise informally. Rule 34.3 should be used primarily to allow handwritten documents to be submitted by indigent defendants or persons without counsel; it should not be used to sanction deviations which affect an opposing party's substantial rights. (Effective July 1, 2017.)

### Rule 34.4. Service and filing.

Unless otherwise specified in these Rules, the manner and sufficiency of service and filing of motions, requests, petitions, applications, and all other pleadings and documents shall be governed by Rule 1.7.

**HISTORY: Effective July 1, 2017.**

### Rule 34.5. Entry of order and duty of clerk.

Immediately upon entry of an order or judgment of the court, the clerk of court shall make a diligent effort to ensure that all attorneys of record have received notice of the entry of the order.

**HISTORY: Effective July 1, 2017.**

### COMMENT

Rule 34.5 continues practice under former Rule 11.05 of the Uniform Rules of Circuit and County Court. (Effective July 1, 2017.)

## ORDER ADOPTING THE MISSISSIPPI RULES OF CRIMINAL PROCEDURE SUPREME COURT OF MISSISSIPPI

The Mississippi Constitution mandates certain procedural requirements in the criminal law of this State. And the Mississippi Legislature and this Court, acting on the respective authority vested in them by the Mississippi Constitution, have articulated additional procedural requirements. In order to promote justice, uniformity, and efficiency in our courts, we find it necessary and reasonable now to combine all of the requirements governing criminal procedure in the courts of this State into a singular set of rules. Therefore, pursuant to the inherent authority vested in this Court by the Constitution of the State of Mississippi, as discussed in *Newell v. State*, 308 So. 2d 71 (Miss. 1975), we adopt the rules attached hereto as the Mississippi Rules of Criminal Procedure, which shall govern the procedure in all criminal proceedings in the Circuit, County, Justice and Municipal Courts of this State. These rules shall take effect on July 1, 2017.

The Clerk of this Court is authorized and directed to spread this order and the rules attached hereto at large on the minutes of the Court, and the Clerk is further authorized and directed to forward a certified copy thereof to West Publishing Company for publication in a forthcoming edition of Southern Reporter, Mississippi Cases, the official publication of decisions of this Court.

SO ORDERED, this the 13th day of December, 2016.

____________________
ANN H. LAMAR
JUSTICE, FOR THE COURT

ALL JUSTICES AGREE.

## APPENDIX
## Rule 1. Sample charge to grand jury.

### Sample charge to grand jury

You have been summoned and sworn as a grand juror of the Circuit Court for ____________ County (________ Judicial District) of the ____________ Judicial Circuit of the State of Mississippi. As members of the Grand Jury, you are a part of the judicial branch of state government, an arm of this circuit court. The law of this state provides that grand juries are empaneled and charged concerning their duties only by the circuit judge. In compliance with this law, the court, before you begin your work, instructs you concerning your duties as members of the grand jury. It is mandatory that you follow these instructions and should you deem, during your service, need of additional instructions, you should present this request to the court. The law of this state specifies the express powers of grand juries. The grand jury has the power of indictment or presentment in a crime and the additional authority to issue reports.

The Grand Jury is an ancient and honored institution. Its existence is firmly imbedded in the system of Anglo-Saxon justice which we inherited from England. It is guaranteed in the constitution, which provides that no person may be placed on trial for a felony unless he or she has been indicted by a grand jury. This provision stands as a barrier against unjust prosecution by persons in authority. The grand jury is the means, not only of bringing to trial persons accused of crime, but also to protect persons from unfounded accusations whether presented by legal officers or by others who may be motivated by public clamor or private malice. Your duty is to allow or to deny issuance of an indictment. There are from 15 to 25 members of a grand jury and 12 members must agree before you can approve an indictment. The words “true bill” are used to indicate an indictment that you have approved. Each indictment must be signed by the foreman and may be signed by one of the prosecuting attorneys.

You will hear only one side of a case. It is not your duty to decide the guilt or innocence of the accused. It is your duty to determine whether there is sufficient evidence or probable cause to require an accused to stand trial. If the evidence establishes a probability that a crime was committed and that the defendant committed the crime, then you should return a “true bill.” If you do not have an indictment before the grand jury, you may return a presentment, which is an instruction for an indictment to be drawn. If the evidence fails to establish a probability that a crime was committed and that the defendant is guilty of that crime, then you must refuse to return a “true bill.” You should prepare a list of the cases upon which you have refused to return a "true bill" and return that list to the court.

No public purpose would be served by indicting a person when it appears to you that the evidence is not sufficient to sustain a conviction. Unjust or unfounded indictments should not be returned against anyone. On the other hand, it is equally important that indictments be returned against those who, upon the evidence, appear to be probably guilty of the commission of a crime. Anyone you indict shall receive a speedy public trial to determine their guilt or innocence.

You must be fair and just in your deliberations to the best of your ability and understanding. Your oath requires that you do not indict any person through malice, hatred or ill will; nor will you fail to indict any person through fear, favor, regard, reward, or hope of reward. You must be guided by an impartial spirit free from personal, social, racial, religious or political bias or feeling.

You are cautioned that rumor and hearsay testimony are unreliable. Also, that no person may be compelled to be a witness against himself/herself. A witness who testifies about his/her own participation in a crime must first be advised in your presence of his/her constitutional rights by the prosecuting attorney(s) before you may accept such evidence. You determine what witnesses you will permit to appear and testify before you.

The district attorney, county attorney and attorney general are by law the representatives of the State of Mississippi in all criminal prosecutions. It is the duty of the district attorney and county attorney to be present with the grand jury in the room to present the evidence, to examine the witnesses and to give advice on any matter of law which may be raised. You are entitled to the legal advice of the prosecuting attorney(s) on matters of law unless you are instructed to the contrary by the court. You are, however, the sole judges of the facts and the prosecuting attorney(s) may not influence you as to whether an indictment will be approved. After the testimony is taken and you are discussing what action you will take, the prosecuting attorney(s) will withdraw from your jury room. They are not permitted to be present during your deliberations nor when a ballot is taken and they may not influence your decision on any question of fact. You may request the advice and assistance of the attorney general of the state. You are also at liberty at any time to call for further instructions from the court, although the instruction which the prosecuting attorney(s) give you will usually be sufficient.

You are an independent body. You, as well as the prosecuting attorney(s), have the right to require the clerk of this court to issue subpoenas for witnesses to be brought before you to testify. Your foreman shall keep a record of the names of all witnesses sworn before the grand jury. This list of witnesses, certified and signed by the foreman, shall be returned to the court.

The grand jury has the important duty of making certain mandatory investigations and inspections. The grand jury must:

1. You must make a personal inspection of the county jail, its condition, sufficiency for the safekeeping of prisoners, and their accommodation and health, and make a report on the same to the court.
2. You must examine the tax collector's books and his/her reports and settlements, and make a report on the same to the court.
3. You must examine the status of forest protection in the county, and in doing so, you are charged in particular of the crimes of setting fires as set forth in § 95-5-25 and § 97-17-13 of the Mississippi Code of 1972.

In addition, you, the grand jury, may make additional investigations and make reports on the same on your own initiative. Thus, you may investigate how officials are conducting their public trust, and make investigations as to the proper conduct of public institutions. This gives you the power to inspect such institutions, and if you decide, to call before you those in charge of their operations, and such other persons who can testify in that regard. If, as a result of such an investigation, it is determined that an improper condition exists, you may recommend a remedy. You shall have free access at all proper hours to papers, records, accounts and books of all county officers, including written reports of prior grand juries, for all examinations which in your discretion you may see fit to make, and may report to the court in relation thereto. While you may indict any person, you should not accuse any person by name of an offense, malfeasance, or misfeasance unless an indictment is returned. It is not your duty or responsibility to make reports praising performance of public duty by certain or all public officials. This is their duty under the law and their oath of office requires their diligent performance of lawful duties, and any such report by you could serve no purpose other than that of partisan politics.

The law requires that the circuit court shall charge you particularly concerning enforcement of the following laws:

1. Those against unlawful gambling and handling of intoxicating liquors;
2. Those relating to gambling with minors and the giving or selling to them tobacco, narcotics, or liquors;
3. Those providing for the assessment, collection and disbursement of the public revenues, state and county;
4. Those defining the duties of public officers;
5. Those relating to the collection and paying over of fines and forfeitures;
6. Those relating to providing fire escapes in hotels, theaters and other buildings;
7. Those relating to the management of 16th section school trust lands;
8. The law in relation to the illegal possession and sale of barbiturate acid and narcotics, and all other substances under the Controlled Substances Act, § 49-29-101 and following sections;
9. Section 47-1-31, prisoners, records, treatment and condition;
10. Section 47-1-27, responsibility of custodian of county prisoners;
11, Section 45-11-1, fire protection and safety;
12. Schools;
13. Motels, hotels, lodging houses, public buildings;
14. Handling of juveniles (In Harrison County only – The purposes and provisions of Chapter 23 of Title 43, "Family Court.");
15. Ambulance service;
16. Pollution of streams;
17. Hospitals;
18. Nursing homes;
19. Elections, corrupt practices, Section 23-3-27, et seq.;
20. The condition of the county roads and the performance of the duties of contractors, overseers and supervisors under § 65-7-119; and
21. Such other statutes as the circuit judge deems proper.

The oath which you have taken contains essential principles which govern you in your deliberations. The oath is your promise that you will keep secret what takes place in the grand jury room. A grand juror, except when called as a witness in court, shall not disclose any proceedings or action in relation to offenses brought before it for six months after the adjournment of the grand jury upon which the juror served. A grand juror shall not disclose the name or testimony of any witness who has been before the grand jury. Any disclosure of secrets within the six month period is punishable by fine or imprisonment for contempt of court.

The purpose of the secrecy requirement is two-fold:

1. Accusations may be brought before you which you find unfounded. If publicity were given to the fact that the grand jury investigated a person, that person's reputation might be ruined even though the person is entirely innocent; and

2. If anyone charged with a crime learns of your investigation, that person would be given an opportunity to escape and defeat the process of criminal justice.

This requirement of secrecy demands that you do not communicate to anyone what has been said or done in the grand jury room unless you are ordered by a judge in open court to reveal it. You should report any person asking you, or attempting to ask you, what has occurred in the grand jury room. It does not matter if the attempt was in person, by phone, letter or otherwise; you should report such a question or attempt to the court and to the prosecuting attorney(s).

I want to thank each one of you for taking time out of your busy lives to perform this important civic duty. You are making a personal sacrifice, but I believe you will find this experience one of the most interesting in your lives. Furthermore, at the end of your service, you will have the satisfaction of having helped render justice among your neighbors.

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# MISSISSIPPI RULES OF EVIDENCE

### Adopted effective January 1, 1986;
### Amended effective December 1, 2015;
### Restyled effective July 1, 2016;
### Amended effective July 1, 2017

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**Cross References** — Evidence, generally, see Mississippi Code of 1972, § 13-1-1 et seq.

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# ARTICLE I. GENERAL PROVISIONS

## Rule 101. Scope; definitions.

(a) *Scope.* — These rules apply to proceedings in Mississippi courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101.

(b) *Definitions.* — In these rules:

(1) "civil case" means a civil action or proceeding;

(2) "criminal case" includes a criminal proceeding;

(3) "record" includes a memorandum, report, or data compilation; and

(4) a reference to any kind of written material or any other medium includes electronically stored information.

**HISTORY: "Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended July 1, 2016, to note restyling.**

### ADVISORY COMMITTEE NOTE

The language of Rule 101 has been amended, and definitions have been added, as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. Rule 101 (b)(3)-(4) expands the meaning of "record," a term used frequently in Articles VIII-X. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

*The Style Project*

The Rules of Evidence are the first set of Mississippi procedural rules to be restyled. They are based on the restyled Federal Rules of Evidence, which took effect in 2011, and which followed restyling of the Federal Rules of Civil Procedure in 2007, the Federal Rules of Criminal Procedure in 2002, and the Federal Rules of Appellate Procedure in 1998.

*1. General Guidelines*

In addition to following the restyled Federal Rules of Evidence, guidance in drafting, usage, and style was provided by Bryan Garner, Administrative Office of the United States Courts (1996) and Bryan Garner, (2d ed. 1995). Joseph Kimble, at page x (Feb. 2005) (http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Pr elimdraft proposedptl.pdf); Joseph Kimble, 12 Scribes J. Legal Writing 25 (2008-2009). For specific commentary on the Evidence restyling project, see Joseph Kimble, 88 Mich. B.J. 52 (Aug. 2009); 88 Mich. B.J. 46 (Sept. 2009); 88 Mich. B.J. 54 (Oct. 2009); 88 Mich. B.J. 50 (Nov. 2009).

*2. Formatting Changes*

Many changes result from using format to achieve clearer presentations. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. "Hanging indents" are used throughout. These formatting changes make the structure of the rules graphic and make the restyled rules easier to read and understand even when the words remain unchanged. Rules 103, 404(b), 606(b), and 612 illustrate the benefits of formatting changes.

Structural divisions within a rule are identified using standard terms and cascading indents, illustrated by the following:

(a) the first level is a lettered subdivision (e.g. "subdivision (a)");

(1) followed by a numbered paragraph (e.g. "paragraph (a)(l)");

(A) then a subparagraph, identified by a capital letter (e.g. "subparagraph (a)(1)(A)"); and

Bullet points are employed within a rule to set out a list of roughly equal, parallel elements.

While the structural divisions within a rule generally follow this standard pattern throughout, a few exceptions were warranted. Lower-case lettered subdivisions were not used in Rules 803 and 902. Rather, those Rules retained numbered paragraphs as first-level formatting because changing their structure would disrupt electronic search results and thus impose transaction costs that outweigh any benefit in strictly consistent formatting.

3. *Changes to Reduce Inconsistent, Ambiguous, Redundant, Repetitive, or Archaic Words*

The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistencies by using the same words to express the same meaning. For example, consistent expression is achieved by not switching between "accused" and "defendant" or between "party opponent" and "opposing party" or between the various formulations of civil and criminal action/case/proceeding.

The restyled rules minimize the use of inherently ambiguous words. For example, the word "shall" can mean "must," "may," or something else, depending on context. The potential for confusion is exacerbated by the fact the word "shall" is no longer generally used in spoken or clearly written English. The restyled rules replace "shall" with "must," "may," or "should," depending on which one the context and established interpretation make correct in each rule.

The restyled rules minimize the use of redundant "intensifiers." These are expressions that attempt to add emphasis, but instead state the obvious and create negative implications for other rules. The absence of intensifiers in the restyled rules does not change their substantive meaning. See, e.g., Rule 104(c) (omitting "in all cases"); Rule 602 (omitting "but need not"); Rule 611(b) (omitting "in the exercise of discretion").

The restyled rules also remove words and concepts that are outdated or redundant.

4. *Rule Numbers*

The restyled rules keep the same numbers to minimize the effect on research. Subdivisions have been rearranged within some rules, and created within others, to achieve greater clarity and simplicity.

5. *No Substantive Change*

Special efforts were made to reject any purported style improvement that might result in a substantive change in the application of a rule. A change was considered "substantive" if any of the following conditions were met:

(a) Under current practice, the change could lead to a different result on a question of admissibility (e.g., a change that requires a court to provide either a less or more stringent standard in evaluating the admissibility of particular evidence);

(b) Under current practice, it could lead to a change in the procedure by which an admissibility decision is made (e.g., a change in the time in which an objection must be made, or a change in whether a court must hold a hearing on an admissibility question);

(c) The change would restructure a rule in a way that would alter the approach that courts and litigants have used to think about, and argue about, questions of admissibility (e.g. merging Rules 104(a) and 104(b) into a single subdivision); or

(d) The amendment would change a "sacred phrase" – one that has become so familiar in practice that to alter it would be unduly disruptive to practice and expectations. Examples include "unfair prejudice" and "truth of the matter asserted."

This rule requires that The Mississippi Rules of Evidence be applicable both in civil and criminal cases. Rule 1101 delineates more specifically what judicial proceedings are exempted from the rules' coverage.

### JUDICIAL DECISIONS

**Illustrative cases.**

Chancellors do not have discretion in admitting and/or considering relevant evidence in the context of the statute for determining the validity of bond issues; therefore, a chancellor erred by finding that the time had passed for the presentation of evidence as to the sufficiency of the signatures on the petition. Not only was it the correct time for presenting evidence of the sufficiency of the signatures on the petition, but it was the only time. Russell v. Humphreys Cnty. Bd. of Supervisors (In re Validation of Tax Anticipation Note), 187 So. 3d 1025, 2016 Miss. LEXIS 138 (Miss. 2016).

Defendant's embezzlement conviction was proper where the trial court did not err in overruling his motion to suppress the statement he made at the police station pursuant to Miss. R. Evid. 408 because, even if the trial judge had not admitted the testimony regarding his statement at the station, there was substantial evidence with which to convict defendant. Crimm v. State, 888 So. 2d 1178, 2004 Miss. App. LEXIS 933 (Miss. Ct. App. 2004).

## Rule 102. Purpose.

These rules shall be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

**HISTORY: Restyled effective July 1, 2016.**

### ADVISORY COMMITTEE NOTE

The language of Rule 102 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 102 is a statement of the public policy to be served by a uniform set of rules. It is identical to Rule 102 of the Federal Rules of Evidence as well as numerous state codes. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

### JUDICIAL DECISIONS

#### ANALYSIS

Applicability.
Relation to Miss. R. Evid. 404.

**Applicability.**

As a trial court, on remand, failed to give defendant a meaningful opportunity to present evidence of prejudice with respect to the Barker factors for his speedy trial claim, arising from a forfeiture action initiated by the county, the remand order was not complied with and the evidence could not be properly weighed. One 1970 Mercury Cougar v. Tunica County, 115 So. 3d 792, 2013 Miss. LEXIS 349 (Miss. 2013).

**Relation to Miss. R. Evid. 404.**

Prosecution did not violate the pre-trial ruling barring mention of defendant's prior arrests in authenticating the fingerprint card used to identify defendant's prints because unless the authenticity of the fingerprint card was stipulated to, there had to be information that there was a database and the composition of that database; the actions of the circuit court in allowing the evidence were consistent with Miss. R. Evid. 102. Williams v. State,

919 So. 2d 250, 2005 Miss. App. LEXIS 443 (Miss. Ct. App. 2005).

### Rule 103. Rulings on evidence.

(a) *Preserving a claim of error.* — A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

(1) if the ruling admits evidence, a party, on the record:

(A) timely objects or moves to strike; and

(B) states the specific ground, unless it was apparent from the context; or

(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

(b) *Continuing objection.* — The court may allow a continuing objection to evidence of the same or similar nature or subject to the same or similar objection.

(c) *Definitive rulings.* — Once the court rules definitively on the record either before or at trial:

(1) a party need not renew an objection or offer of proof to preserve a claim of error for appeal;

(2) an objecting party does not waive or forfeit a claim of error by offering evidence of a conviction the court held admissible; and

(3) a party preserves a claim of error in a ruling to admit or exclude evidence only if each condition of the ruling is fulfilled at trial.

(d) *Court's statement about the ruling; directing an offer of proof.* — The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.

(e) *Preventing the jury from hearing inadmissible evidence.* — To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.

(f) *Taking notice of plain error.* — A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

**HISTORY: Restyled effective July 1, 2016.**

#### ADVISORY COMMITTEE NOTE

The language of Rule 103 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. The provisions concerning preserving a claim of error and continuing objections – formerly combined in a single paragraph – now appear in separate subdivisions. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 103 concerns the making of an evidentiary record for purposes of appeal.

(a) Subdivision (a) reflects existing Mississippi practice. (1) The objection must state the specific ground of objection unless the specific ground is apparent from the context. This adopts and carries forward the approach taken in *Murphy v. State,* 453 So. 2d 1290, 1293-94 (Miss.

1984). (2) By the same token, when a party objects to the exclusion of evidence, he must make an off er of proof to the court, noting on the record for the benefit of the appellate court what evidence the trial judge excluded. See *Brown v. State,* 338 So. 2d 1008 (Miss. 1976); *King v. State,* 374 So. 2d 808 (Miss. 1979). Federal Rule of Evidence 103, which is identical, has been interpreted to have no effect on the harmless error principle. See *Hughes v. State,* 470 So. 2d 1046, 1048 n. 1 (Miss. 1985).

*Harris v. Buxton T.V., Inc.*, 460 So.2d 828 (Miss. 1984) held that no offer of proof was necessary where a party was improperly prohibited from cross-examining a witness. Rule 103 (a)(2) does not affect this holding.

**(b)** Rule 103 (b) is consistent with prerule Mississippi case law which provided that a trial judge was entitled to explain his rulings. *Ratliff v. State,* 313 So.2d 386 (Miss. 1975); *Ladnier v. State,* 273 So.2d 169 (Miss. 1973).

**(c)** Subdivision (c) has three distinct, but related, effects. First, paragraph (c)(1) provides that a claim of error with respect to a definitive evidentiary ruling (whether at or before trial, including rulings in limine) is preserved for review when the party has otherwise satisfied the objection or offer of proof requirements of Rule 103(a). When the ruling is definitive, a renewed objection or offer of proof at the time the evidence is to be offered is more a formalism than a necessity. See MRCP 46 (formal exceptions unnecessary); *Jones v. Panola County,* 725 So. 2d 774, 775 (Miss. 1998) ("a ruling on 'a motion in limine regarding the introduction of evidence properly preserved the issue for appeal and a contemporaneous objection was not necessary"); see also Lacy v. State, 700 So. 2d 602 (Miss. 1997). On the other hand, when the trial court has reserved its ruling or has indicated that the ruling is provisional, it makes sense to require the party to bring the issue to the court's attention subsequently. Subdivision (c) thus imposes the obligation on counsel to clarify whether an in limine or other evidentiary ruling is definitive when there is doubt on that point. Even when the court's ruling is definitive, nothing in this section prohibits the court from revisiting its decision when the evidence is to be offered. If the court changes its initial ruling, or if the opposing party violates the terms of the initial ruling, objection must be made when the evidence is offered to preserve the claim of error for appeal. The error, if any, in such a situation occurs only when the evidence is offered and admitted. Subdivision (c) does not apply to rulings other than those admitting or excluding evidence, such as rulings regarding, for example, the conduct of opening statements or closing arguments.

A definitive advance ruling is reviewed in light of the facts and circumstances before the trial court at the time of the ruling. If the relevant facts and circumstances change materially after the advance ruling has been made, those facts and circumstances cannot be relied upon on appeal unless they have been brought to the attention of the trial court by way of a renewed, and timely, objection, offer of proof, or motion to strike. See *Old Chief v. United States,* 519 U.S. 172, 182 n.6 (1997) ("It is important that a reviewing court evaluate the trial court's decision from its perspective when it had to rule and not indulge in review by hindsight."). Similarly, if the court decides in an advance ruling that proffered evidence is admissible subject to the eventual introduction by the proponent of a foundation for the evidence, and that foundation is never provided, the opponent cannot claim error based on the failure to establish the foundation unless the opponent calls that failure to the court's attention by a timely motion to strike or other suitable motion. See *Huddleston v. United States,* 485 U.S. 681, 690 n.7 (1988) ("It is, of course, not the responsibility of the judge sua sponte to ensure that the foundation evidence is offered; the objector must move to strike the evidence if at the close of the trial the offeror has failed to satisfy the condition.").

Secondly, paragraph (c)(2) provides that a party who objects to evidence of a prior conviction (under Rules 404 or 609, for example) that the court finds admissible in a definitive ruling, and who then offers the evidence to "remove the sting" of its anticipated prejudicial effect, does not thereby waive the right to appeal the trial court's ruling. This is consistent with prior Mississippi law, see *McGee v. State,* 569 So. 2d 1191 (Miss. 1990), overruled on other grounds by *White v. State,* 785 So. 2d 1059 (Miss. 2001) (a defendant may preempt the state by offering evidence of the defendant's own prior conviction on direct examination without waiving the issue for appeal), *Malone v. State,* 829 So.2d 1253 (Miss. Ct. App. 2002), but contrary to federal law, *Ohler v. United States,* 529 U.S. 753 (2000) (when a trial judge rules that the government may use a prior conviction to impeach a defendant, a defendant waives the right to appeal the issue by introducing the conviction on direct examination). Importantly, paragraph (c)(2) does nothing to vitiate the authority of the trial judge to control the timing of the preemptive admission of evidence of a prior conviction when there is serious doubt about whether the opposing party will, in fact, offer the evidence. For example, the trial judge can impose a condition precedent to preemptive admission, such as by requiring the prosecution first to confirm, at or near the time of the defendant's testimony, its intent actually to offer evidence of a prior conviction. See *Saltzburg, Martin, & Capra,* Federal Rules of Evidence Manual, vol. 1, sec. 103.02[15] (2015). Notably, paragraph (c)(2) states only that a party who objects to evidence of a prior conviction that the court finds admissible in a definitive ruling does not waive the right to appeal the ruling by offering the evidence to remove the sting of its anticipated prejudicial effect. The Rule does not address whether or not a party's offer of other objectionable evidence that the court finds admissible in a definitive ruling operates as a waiver of the right to appeal the ruling. Paragraph (c)(2) leaves the development of the law of waiver in such other situations unaffected.

Third, paragraph (c)(3) embraces the principles of *Luce v. United States,* 469 U.S. 38 (1984), and its progeny. In Luce, the Supreme Court held that a criminal defendant must testify at trial in order to preserve a claim of error predicated upon a trial court's decision to admit the defendant's prior convictions for impeachment. Paragraph (c)(3) extends the Luce principle to all situations in which the occurrence of a trial event is a condition that must be fulfilled before evidence is admitted or excluded (often described as a "condition precedent"). Such a condition might include the pursuit of a certain claim or defense, the introduction of a certain witness, the introduction of particular witness testimony (that the defendant never violated the law, for example), or the fulfillment of a particular evidentiary foundation. Lower federal courts have applied Luce to a wide array of contexts. See *United States v. DiMatteo,* 759 F.2d 831 (11th Cir. 1985) (applying Luce where the defendant's witness would be impeached with evidence offered under Rule 608). See also *United States v. Goldman,* 41 F.3d 785, 788 (1st Cir. 1994) ("Although Luce involved impeachment by conviction under Rule 609, the reasons given by the Supreme Court for requiring the defendant to testify apply with full force to the kind of Rule 403 and 404 objections that are advanced by Goldman in this case."); *Palmieri v. DeFaria,* 88 F.3d 136 (2d Cir. 1996) (where the plaintiff decided to take an adverse judgment rather than challenge an advance ruling by putting on evidence at trial, the in limine ruling would not be reviewed on appeal); *United States v. Ortiz,* 857 F.2d 900 (2d Cir.1988) (where uncharged misconduct is ruled admissible if the defendant pursues a certain defense, the defendant must actually pursue that defense at trial in order to preserve a claim of error for appeal); *United States v. Bond,* 87 F.3d 695 (5th Cir. 1996) (where the trial court rules in limine that the defendant would waive his fifth amendment privilege were he to testify, the defendant must take the stand and testify in order to challenge that ruling on appeal). Paragraph (c)(3) represents a change in Mississippi practice. In *Williams v. State,* 684 So. 2d 11 79 (Miss. 1996), the Mississippi Supreme Court noted it had yet to follow Luce. Rather, " 'a defendant wishing to present the point on appeal, absent having taken the witness stand himself, must preserve for the record substantial and detailed evidence of the testimony he would have given so that we may gauge its importance to his defense.' " ( quoting *Heidelberg v. State,* 584 So. 2d 395 (Miss. 1991)).

**(d)** Rule 103(d) is consistent with pre-rule Mississippi case law which provided that a trial judge was entitled to explain his rulings. *Ratliff v. State,* 313 So. 2d 386 (Miss. 1975); *Ladnier v. State,* 273 So. 2d 169 (Miss. 1973).

The court may also permit the aggrieved party to preserve the record by dictating into the record a statement of the evidence offered but excluded. This accords with the rule announced in such cases as *Murray v. Payne,* 437 So. 2d 47, 55 (Miss. 1983).

**(e)** Subdivision (e) is an attempt to protect the jury from exposure to inadmissible evidence. It conforms to Mississippi practice. See *Cutchens v. State,* 310 So. 2d 273 (Miss. 1975).

**(f)** Subdivision (f), regarding plain error, is a restatement of that doctrine as it existed in pre-rule practice. It reflects a policy to administer the law fairly and justly. A party is protected by the plain error rule when (1) he has failed to perfect his appeal and (2) when a substantial right is affected. Miss.Sup.Ct.R. 6(b) and 11 permit a plain error rule: "The Court may, at its own option, notice a plain error not assigned or distinctly specified." See also Boyd v. State, 204 So. 2d 165 (Miss. 1967). If a party persuades the court of the substantial injustice that would occur if the rule were not invoked, the court may invoke the rule. See *Edwards v. Sears, Roebuck & Co.,* 512 F.2d 276 (5th Cir. 1975). The plain error rule may be applied in either criminal cases or civil cases. See *House v. State,* 445 So. 2d 815 (Miss. 1984). ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

In general.
Harmless error.
Objections.
Offer of proof.
Plain error.
Prejudice.
Review.
Substantial right.

**In general.**

Defendant, by not bringing to a court's attention a previous ruling in limine finding that a police investigator's interrogation of defendant would be excluded as hearsay, and then not asserting that the full statement in the interrogation was to be admitted when the investigator testified, waived the issue on appeal and was procedurally barred from asserting the issue as error at the circuit court level. Peel v. State, 283 So. 3d 203, 2019 Miss. App. LEXIS 104 (Miss. Ct. App. 2019).

Since plaintiff failed to make a proffer as to an expert's expected testimony, she was procedurally barred from appealing the exclusion of the expert's testimony. Howell v. Holiday, 155 So. 3d 839, 2013 Miss. App. LEXIS 134 (Miss. Ct. App. 2013).

In a breach of contract case arising from the failure to pay for services rendered by a rehabilitation company, a nursing home's appeal regarding the proof of lost profits was without merit because evidence of such was reasonably certain; a witness calculated future profits by using invoices from three months in the contract period. Cain v. Cain, 967 So. 2d 654, 2007 Miss. App. LEXIS 445 (Miss. Ct. App. 2007).

As plaintiffs' attorney failed to object at trial to the defense presenting a new theory as to the cause of death, the objection was not preserved for review. Moreover, as the alternative theory of death had been mentioned in the autopsy report, plaintiffs were on notice of the alternative theory. Poole v. Avara, 908 So. 2d 716, 2005 Miss. LEXIS 486 (Miss. 2005).

Under Miss. R. Evid. 103(a), defendant was procedurally barred from raising an issue on appeal because he did not contest a social worker's expert testimony at trial. However, defendant's claim was without merit because the social worker was properly allowed to testify in the child-fondling case regarding the social worker's forensic interview because she qualified as an expert under Miss. R. Evid. 702, and she did not opine as to the victim's truthfulness in the interview; rather she opined that the child's behavior and story were consistent with those of child sex abuse victims. Elkins v. State, 918 So. 2d 828, 2005 Miss. App. LEXIS 483 (Miss. Ct. App. 2005), cert. denied, 921 So. 2d 1279, 2006 Miss. LEXIS 26 (Miss. 2006), cert. denied, 547 U.S. 1194, 126 S. Ct. 2865, 165 L. Ed. 2d 898, 2006 U.S. LEXIS 4564 (U.S. 2006).

Trial court committed plain error under Miss. R. Evid. 103(d) where it sentenced defendant, in part, to 10 years of post-release supervision, as under Miss. Code Ann. § 47-7-34, five years of post-release supervision was the maximum. Stigall v. State, 869 So. 2d 410, 2003 Miss. App. LEXIS 1206 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 864 (Miss. 2004).

Trial court acted within its discretion in a medical malpractice case in excluding a nurse's testimony as to a statement made by a doctor based on the court's prior ruling, which excluded expert testimony by the doctor, and on the plaintiff's declination to opening the door to expert testimony by the doctor. Griffin v. McKenney, 877 So. 2d 425, 2003 Miss. App. LEXIS 942 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 867 (Miss. 2004).

Police officer was permitted to read a written statement taken by him during the investigation allegedly made by a third party discussing his knowledge of defendant's marijuana sales; failure to timely object to that alleged hearsay evidence acted as a bar preventing defendant from raising the issue on appeal pursuant to Miss. R. Evid. 103. Grayson v. State, 850 So. 2d 196, 2003 Miss. App. LEXIS 638 (Miss. Ct. App. 2003).

Trial court did not err in refusing to admit a witness' unsworn affidavit to impeach his trial testimony under Miss. R. Evid. 613(b) because there was no contradiction between the affidavit and the witness's trial testimony regarding the manner in which he ejected defendant and the victim from a nightclub; however, the trial court erred in allowing an officer to read the statement into evidence. Everett v. State, 835 So. 2d 118, 2003 Miss. App. LEXIS 4 (Miss. Ct. App. 2003).

By failing to object to the evidence at trial, defendant failed to preserve his claim that the trial court erred by improperly allowing hearsay testimony of the contents of audio and videotape recordings made by the police of a transaction in which defendant sold cocaine to a police informant. Bounds v. State, 852 So. 2d 51, 2002 Miss. App. LEXIS 597 (Miss. Ct. App. 2002), cert. denied, 842 So. 2d 578, 2003 Miss. LEXIS 325 (Miss. 2003).

Although defendant failed to object to jury voir dire and to closing argument at trial, appellate court could review for plain error, that is, error affecting substantial rights. Cotton v. State, 790 So. 2d 235, 2001 Miss. App. LEXIS 263 (Miss. Ct. App. 2001).

Not all improper questions constitute reversible error, especially where the question was not answered; it is only when the comment or question is so blatantly and clearly prejudicial, and where trial court's instruction would not ordinarily remove it from mind of jury, that reviewing court will reverse. Criddle v. State, 633 So. 2d 1047, 1994 Miss. LEXIS 121 (Miss. 1994).

**Harmless error.**

Even if a trial court erred in allowing a doctor to testify as to how an alleged victim of domestic violence received her injuries when the doctor gained that knowledge from records obtained from a hospital, the error was harmless because both the victim, her daughter, and a police officer who interviewed the victim in the hospital attributed the victim's injuries to an assault by defendant. Henry v. State, 124 So. 3d 87, 2013 Miss. App. LEXIS 164 (Miss. Ct. App.), cert. denied, 123 So. 3d 450, 2013 Miss. LEXIS 559 (Miss. 2013).

Although defendant's attorney's representations should not have been used for impeachment purposes, their admission was harmless error and did not warrant reversal pursuant to Miss. R. Evid. 103(a). Lynch v. State, 24 So. 3d 1043, 2010 Miss. App. LEXIS 15 (Miss. Ct. App. 2010).

Even if the admission of a 911 call placed by defendant's divorce attorney after defendant told the attorney that he was going to kill the victim by was erroneous, the error was harmless under

Miss. R. Evid. 103(a) because defendant received a fundamentally fair trial and any error in the admission of the recording was harmless in light of the overwhelming evidence of defendant's guilt. Shorter v. State, 33 So. 3d 512, 2009 Miss. App. LEXIS 830 (Miss. Ct. App. 2009).

Statements contained in the abuse record were made for the purpose of medical diagnosis and treatment, and the report was relied upon by a hospital in treating defendant's child; further, because the vast majority of the abuse record was cumulative of other evidence presented at trial, any error that resulted from admission of the abuse record was harmless. Anthony v. State, 23 So. 3d 611, 2009 Miss. App. LEXIS 930 (Miss. Ct. App. 2009).

In a murder trial, the court's admission of a forensic pathologist's expert testimony on blood spatter evidence was harmless. Even if such testimony had been excluded, the jury heard defendant admit to stabbing the victim multiple times and there was sufficient evidence from which the jury could conclude that defendant did not act in self-defense in killing the victim. Flaggs v. State, 999 So. 2d 393, 2008 Miss. App. LEXIS 333 (Miss. Ct. App. 2008), cert. dismissed, dismissed without prejudice, cert. denied, 2009 Miss. LEXIS 37 (Miss. Jan. 22, 2009), cert. denied, 999 So. 2d 852, 2009 Miss. LEXIS 53 (Miss. 2009).

In an aggravated assault case, an orthopedic surgeon should have been qualified as an expert witness under Miss. R. Evid. 702 and not been allowed to give a lay opinion under Miss. R. Evid. 701 because he was acting in his professional capacity when he testified that a broken bone was caused by high-energy force. However, the error was harmless because it did not deny a substantial right or render the trial fundamentally unfair; photographs of the injuries suffered by defendant's girlfriend were shown, and the girlfriend testified that defendant forced her out of the car, threw her down, kicked her, and stomped on her back. O'Neal v. State, 977 So. 2d 1252, 2008 Miss. App. LEXIS 177 (Miss. Ct. App. 2008).

In a criminal trial for murder, the court did not err by excluding an out of court statement indicating that the defendant was being beaten at the time of the murder. Defendant was not harmed, because the statement was cumulative of other evidence. Amos v. State, 911 So. 2d 644, 2005 Miss. App. LEXIS 652 (Miss. Ct. App. 2005).

Finding against the driver in her action for injuries resulting from a collision with a train at a railroad crossing was appropriate where the trial court rightfully excluded evidence from an officer about a conversation that he had on the day after the accident with an individual in the city's traffic division because the issue of whether the railroad had negligently failed to comply with its obligations to maintain the crossing would have been unaffected by the challenged evidence. Bowman v. CSX Transp., Inc., 931 So. 2d 644, 2006 Miss. App. LEXIS 418 (Miss. Ct. App. 2006).

Defendant's murder conviction was proper where, although the trial court erred in allowing a doctor's opinion on the ultimate issue of whether the fourth gunshot wound to the victim was deliberate, the error was harmless under Miss. R. Evid. 103(d) and the facts of the case, especially considering the lack of a contemporaneous objection. Davis v. State, 891 So. 2d 256, 2004 Miss. App. LEXIS 914 (Miss. Ct. App. 2004).

Trial court's allowing admission of transcript of videotape into evidence after both the State and the defense had rested and the jury was in deliberations was harmless error, as defendant had not objected that the transcript was inaccurate when it was initially shown to the jury, and it was not shown that defendant's rights were infringed; thus, defendant's motion for new trial was properly denied. Johnson v. State, 872 So. 2d 733, 2004 Miss. App. LEXIS 432 (Miss. Ct. App. 2004).

Error in permitting the State to propound a certain question and requiring defendant to answer was, beyond question, harmless; defendant did not allege any particular basis for concluding that this pointless inquiry by the prosecutor resulted in any prejudice or harm to the defense or in any way undermined the basic integrity of the trial process. Plair v. State, 867 So. 2d 289, 2004 Miss. App. LEXIS 192 (Miss. Ct. App. 2004).

In a malpractice suit in which a patient claimed she was burned by a heating unit used during surgery, the trial court erred in not allowing the patient's expert to testify as to the standard of care for using the heating pad, but the error was harmless as the expert testified that the unit's instruction manual required defendant doctor to prescribe the use and to dictate the temperature setting, and defendant failed to follow these procedures, the patient was able to get her theory of the case as to the cause of her injuries before the jury. Winters v. Wright, 869 So. 2d 357, 2003 Miss. LEXIS 415 (Miss. 2003).

Doctor's testimony, in a medical malpractice suit where he was the defendant but not designated as an expert witness, was permissible where it was explanatory of the doctor's treatment of the patient and of his records and nursing records about the patient's care; however, some of the doctor's testimony as to the symptoms that the patient would have developed had the doctor negligently perforated the patient's bowel in a surgical procedure was clearly impermissible expert testimony. Therefore, the trial court erred in permitting the expert testimony; however, the error did not warrant reversal as the doctor's expert testimony was largely cumulative to that of his expert witnesses and the doctor presented no new information. Griffin v. McKenney, 877 So. 2d 425, 2003 Miss. App. LEXIS 942 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 867 (Miss. 2004).

In a rape and simple assault case, admission of photographs of doors showing what were purported to be new locks already testified to by the victim did not impact a "substantial right" of defendant. Williams v. State, 868 So. 2d 346, 2003 Miss. App. LEXIS 669 (Miss. Ct. App. 2003).

Simply showing an error in a ruling on the admissibility of evidence does not require reversal unless some prejudice to the defense arising from the erroneous ruling can be shown. Ellis v. State, 799 So. 2d 159, 2001 Miss. App. LEXIS 412 (Miss. Ct. App. 2001).

Where no substantial rights of either party were affected by evidence admitted, its introduction was, at worst, harmless error. Brown by & Through Webb v. Blackwood, 697 So. 2d 763, 1997 Miss. LEXIS 168 (Miss. 1997).

Any error from failure of prosecution to produce recorded statement of witness until evening before trial was harmless, where defendant failed to show prejudice from the late discovery. Jones v. State, 669 So. 2d 1383, 1995 Miss. LEXIS 586 (Miss. 1995).

There was no error in exclusion of parts of doctor's deposition, where other expert testimony had been offered regarding standard of care for a gastroenterologist/internist and doctor's testimony would have been cumulative. West v. Sanders Clinic for Women, P.A., 661 So. 2d 714, 1995 Miss. LEXIS 448 (Miss. 1995).

In manslaughter prosecution where defendant claimed self-defense, exclusion of witness's testimony that he had seen victim in fights before was not reversible error, where evidence of victim's violent character had already been admitted through other witnesses. Newsom v. State, 629 So. 2d 611, 1993 Miss. LEXIS 601 (Miss. 1993).

Admission into evidence of lack of inspection sticker and driver's license was error, but was harmless as it affected no substantial right of defendant; evidence was clear that accident was not the result of lack of driver's license or inspection sticker, but of defendant's driving while intoxicated. Hewlett v. State, 607 So. 2d 1097, 1992 Miss. LEXIS 451 (Miss. 1992).

Although title to camp house property on which stolen logging equipment was found was vested in defendant's sister, any error from suggestion of prosecution witnesses that camp house property belonged to defendant was one of form and, in view of other testimony, was harmless. Williams v. State, 595 So. 2d 1299, 1992 Miss. LEXIS 94 (Miss. 1992).

Any error from admission of testimony about plaintiff's altered prescriptions was harmless, where prescriptions were for a diet drug which had nothing to do with plaintiff's alleged injuries, and there was extensive medical evidence in record as to plaintiff's injuries or lack thereof. Ball v. Sloan, 569 So. 2d 1177, 1990 Miss. LEXIS 633 (Miss. 1990).

Error from disallowing cross-examination of prosecution witness as to whether defendant had had an affair with his wife was not harmless; this infringed on defendant's right of cross-examination and substantially affected his rights, since evidence of prosecution was largely circumstantial except for this witness, whom prosecution relied on heavily. Sayles v. State, 552 So. 2d 1383, 1989 Miss. LEXIS 472 (Miss. 1989).

**Objections.**

Patient waived any objection to allegedly undisclosed opinions offered by an expert witness because the patient failed to object; a contemporaneous objection was necessary because the trial court was in no position to know which of the expert's opinions had been disclosed prior to trial. Knight v. Clark, 283 So. 3d 1111, 2019 Miss. App. LEXIS 130 (Miss. Ct. App.), cert. denied, 283 So. 3d 735, 2019 Miss. LEXIS 408 (Miss. 2019), cert. denied, — So. 3d —, 2019 Miss. LEXIS 450 (Miss. 2019).

Trial court properly denied defendant's motion for a new trial on felony evasion because a deputy observed that defendant's license plate was not illuminated, he obstructed traffic, failed to stop when the deputy activated his lights, drove at reckless speeds moving in and out of traffic, passed motorists on the shoulder of the roadway, could not use the affirmative defense of necessity where he had reasonable alternatives to driving himself to a hospital (his wife and the deputy), the potential harm of defendant's reckless driving was disproportionate to the harm avoided (his alleged asthma episode), and his failure to contemporaneously object to the admission of his prior conviction at trial effectively waived the issue on appeal. Carter v. State, 227 So. 3d 416, 2017 Miss. App. LEXIS 523 (Miss. Ct. App. 2017).

Errors relating to the jury selection process were forfeited on appeal due to a failure to object contemporaneously below; at any rate, the outcome would have been the same because, while the trial court erred in appointing a foreperson, the trial court either did not commit error or cured other errors. Personal privilege exemptions had to be asserted by the individual, jurors who sat on a jury in the last 2 years could have been required to serve due to a lack of potential jurors, an error relating to a failure to complete the jury questionnaire was corrected during direct questioning at voir dire, and a juror's answer to a question about prior convictions fulfilled the statutory requirements. Hall v. State, 2016 Miss. LEXIS 125 (Miss. Mar. 17, 2016), op. withdrawn, 2016 Miss. LEXIS 427 (Miss. Oct. 13, 2016), op. withdrawn, sub. op., 201 So. 3d 424, 2016 Miss. LEXIS 540 (Miss. 2016).

In a condemnation proceeding in which the Mississippi Transportation Commission (MTC) took half of a parcel's 23 acres for a highway access ramp, leaving the other half landlocked and obscured from view by a flyover, MTC failed to preserve an objection to the owner's expert's testimony that the remainder was worthless because it did not object until the expert had testified several times that the remainder had no value because it had no access. Miss. Transp. Comm'n v. United Assets, LLC, 188 So. 3d 508, 2016 Miss. LEXIS 67 (Miss. 2016).

In defendant's driving under the influence maiming trial, defendant did not timely object to the admission of the blood-analysis evidence because defendant's objection based on failure to establish a chain of custody was not an objection based on the failure to establish the voluntariness of consent. Irby v. State, 49 So. 3d 94, 2010 Miss. LEXIS 638 (Miss. 2010).

Defendant's conviction for DUI maiming was proper because he consented to a blood sample, he never objected to the introduction of the blood-analysis evidence during the course of the testimony by a witness with the Mississippi Crime Laboratory, defendant did not object to the admission of testimony by a doctor regarding the amount of other substances found in the blood sample and the impairing effects of the other substances under Miss. R. Evid. 103(a)(1), defendant's objection made at trial did not state with requisite specificity the basis for the objection to the admission of the testimony, and a deputy was permitted to testify as to what he personally observed concerning defendant's written consent to the blood test. Irby v. State, 2010 Miss. LEXIS 423 (Miss.

Aug. 12, 2010), op. withdrawn, 2010 Miss. LEXIS 650 (Miss. Dec. 9, 2010), sub. op., 49 So. 3d 94, 2010 Miss. LEXIS 638 (Miss. 2010).

Defendant failed to make any contemporaneous objects to prior bad act testimony at trial and thus he was procedurally barred from raising the issue on appeal; in any event, the court found no error because defendant opened the door to the evidence. Hodges v. State, 14 So. 3d 786, 2009 Miss. App. LEXIS 491 (Miss. Ct. App. 2009).

When defendant introduced his record of prior convictions on his own initiative during direct examination, he effectively denied the trial court the opportunity to perform the appropriate balancing test under Miss. R. Evid. 609(a)(1)(B) and 403 so that it could determine whether the prior convictions constituted admissible evidence, plus when the State cross-examined defendant about his prior convictions, defense counsel failed to object; the trial judge did not abuse his discretion by allowing the State to question defendant about his prior convictions. Butler v. State, 16 So. 3d 751, 2009 Miss. App. LEXIS 485 (Miss. Ct. App. 2009).

Defendant's failure to contemporaneously object to the admission of bad act evidence at trial, as required by Miss. R. Evid. 103, effectively waived the issue on appeal, and in light of governing case law, the court did not find that the State's attempted introduction of the evidence substantially affected defendant's right to a fair trial when defendant failed to object. Butler v. State, 16 So. 3d 751, 2009 Miss. App. LEXIS 485 (Miss. Ct. App. 2009).

In defendant's murder trial for killing a man whom his ex-wife was dating, where defendant objected to his ex-wife's testimony that defendant threatened to kill her and any man with whom he caught her on the basis that such evidence was irrelevant, defendant was restricted to that argument on appeal, and he was precluded from arguing that it was error to admit the testimony into evidence to demonstrate his motive or intent to kill the victim because the victim was already dead when defendant made the statement at issue. Parker v. State, 20 So. 3d 702, 2009 Miss. App. LEXIS 186 (Miss. Ct. App.), cert. denied, 20 So. 3d 680, 2009 Miss. LEXIS 544 (Miss. 2009).

Issue of whether a trial judge erred in admitting a deposition on the ground that its proponent made no showing that the declarant was unavailable to testify at trial as a witness was procedurally barred because the deposition was introduced at trial without objection. Washington v. Kelsey, 990 So. 2d 242, 2008 Miss. App. LEXIS 243 (Miss. Ct. App. 2008).

Failure to make a contemporaneous objection at trial constitutes a waiver of any error subsequently assigned. Mariner Health Care, Inc. v. Estate of Edwards, 964 So. 2d 1138, 2007 Miss. LEXIS 520 (Miss. 2007).

The testimony of a pediatrician, regarding his notes made from conversations with other treating physicians, could not be considered plain error where defense counsel failed to timely object on the basis that the testimony was hearsay. Additionally, the medical records included in the pediatrician's testimony would have otherwise been admissible under Miss. R. Evid. 803(6), as they would have been presumed reliable since they were kept in the ordinary course of business. McClain v. State, 929 So. 2d 946, 2005 Miss. App. LEXIS 602 (Miss. Ct. App. 2005), cert. denied, 929 So. 2d 923, 2006 Miss. LEXIS 294 (Miss. 2006).

Finding in favor of the husband and wife in their action against the city for personal injuries and loss of consortium was appropriate because the city never objected to an expert's opinion that there was a dangerous condition; error could not be predicated upon a ruling admitting evidence unless there was a timely objection under Miss. R. Evid. 103(a)(1). City of Natchez v. Jackson, 941 So. 2d 865, 2006 Miss. App. LEXIS 686 (Miss. Ct. App. 2006).

Husband's argument that the chancellor's comments at the outset of the trial indicated that he prejudged the issue of custody prior to hearing evidence on the issue from either party was improper, in part, where he failed to object to the comment when it was made, Miss. R. Evid. 103(a)(1). Horn v. Horn, 909 So. 2d 1151, 2005 Miss. App. LEXIS 79 (Miss. Ct. App. 2005).

Defendant's conviction for burglary of a dwelling was proper where he argued that evidence of his drug use was inadmissible under Miss. R. Evid. 404(b) or more prejudicial than probative under Miss. R. Evid. 403, but never objected to the admission of the evidence as required by Miss. R. Evid. 103. Therefore, the issue was not preserved for appellate review. Busick v. State, 906 So. 2d 846, 2005 Miss. App. LEXIS 57 (Miss. Ct. App. 2005), cert. denied, 2005 Miss. LEXIS 396 (Miss. June 23, 2005).

Husband's argument that the chancellor's comments at the outset of the trial indicated that he prejudged the issue of custody prior to hearing evidence on the issue from either party was improper, in part, where he failed to object to the comment when it was made, Miss. R. Evid. 103(a)(1). Horn v. Horn, 909 So. 2d 1151, 2005 Miss. App. LEXIS 79 (Miss. Ct. App. 2005).

In defendant's trial on a charge of sexual battery and the State's attempt to elicit prior bad acts on direct examination, with regard to defendant's testimony, the record shows that while defense counsel objected to "the form of the question," counsel did not specifically state an objection on the record, nor base an objection on any rule violation or defendant's motion in limine. Thus, defendant failed to properly preserve the alleged error for appellate review. Dupuis v. State, 2003 Miss. App. LEXIS 1268 (Miss. Ct. App. June 24, 2003).

Defendant was procedurally barred from raising certain issues on appeal because no objections to certain testimony or questions were made under Miss. R. Evid. 103(a). Porter v. State, 869 So. 2d 414, 2004 Miss. App. LEXIS 9 (Miss. Ct. App. 2004).

Defendant's conviction for aggravated assault was proper where his objection to admission of other wrong or criminal acts being admitted was untimely; even if the trial judge had wrongly admitted such testimony, defendant's objection was untimely under Miss. R. Evid. 103(a)(1) because a full six pages in the transcript fell between the testimony and the objection. Ball v. State, 845 So. 2d 736, 2003 Miss. App. LEXIS 441 (Miss. Ct. App. 2003).

Defendant failed to properly preserve the alleged error of violation of a motion in limine for appellate review where defendant did not specifically state his objection on the record, nor did he base his objection on any rule violation or motion in limine. Dupuis v. State, 2003 Miss. App. LEXIS 590 (Miss. Ct. App. June 24, 2003), op. withdrawn, sub. op., 872 So. 2d 724, 2004 Miss. App. LEXIS 705 (Miss. Ct. App. 2004).

Where defendant failed to object to the State's questioning regarding defendant's use of a stolen vehicle during a burglary under Miss. R. Evid. 404(b), the issue was not preserved for appellate review. Cheeks v. State, 843 So. 2d 87, 2003 Miss. App. LEXIS 138 (Miss. Ct. App. 2003).

Although at trial, a defendant's objection to character evidence was based on Miss. R. Evid. 404(b) and on appeal his objection was based on Miss. R. Evid. 404(a), the language of Miss. R. Evid. 103(a)(1) allowed the objection either way, because the specific ground was apparent from the context. Kolberg v. State, 829 So. 2d 29, 2002 Miss. LEXIS 268 (Miss. 2002), cert. denied, 538 U.S. 981, 123 S. Ct. 1787, 155 L. Ed. 2d 672, 2003 U.S. LEXIS 3010 (U.S. 2003), overruled in part, Harrell v. State, 134 So. 3d 266, 2014 Miss. LEXIS 52 (Miss. 2014), overruled in part, Rowsey v. State, 188 So. 3d 486, 2015 Miss. LEXIS 573 (Miss. 2015).

Defendant was procedurally barred from raising claim of error concerning jury instruction for the first time on appeal. Ballenger v. State, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Although defendant objected to jury instruction at trial, she did not object to it on the grounds asserted on appeal, and the issue was therefore procedurally barred. Ballenger v. State, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Any error from introduction of witness's testimony was waived by defendant's failure to object to her testimony not only when she was called but when prosecutor first broached subject of her being called. Eakes v. State, 665 So. 2d 852, 1995 Miss. LEXIS 555 (Miss. 1995).

Objections must be made at the time evidence is offered in order to object to evidence via appeal. Department of Human Servs. v. Moore, 632 So. 2d 929, 1994 Miss. LEXIS 110 (Miss. 1994).

Detective's testimony, which defendant claimed was prejudicial, was not subject to appellate review because defendant failed to make timely objections to it. Stogner v. State, 627 So. 2d 815, 1993 Miss. LEXIS 531 (Miss. 1993).

**Offer of proof.**

In a case in which the chancery court set aside an inter vivos gift of about 40 acres of land, the issue of the exclusion of the physicians' testimony was barred because appellants failed to preserve the issue by making an offer of proof as to the physicians' testimony. Gordon v. Wall (In re Will of Waller), 273 So. 3d 717, 2019 Miss. LEXIS 219 (Miss. 2019).

Although defendant was authorized to offer specific instances of his murder victim's threats in order to support his claim of self-defense, as he failed to proffer any details of the alleged prior threats and the alleged prior violent instances were not clear, there could be no abuse of discretion with respect to the trial court's evidentiary rulings. Davis v. State, 130 So. 3d 1141, 2013 Miss. App. LEXIS 490 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 578, 2014 Miss. LEXIS 73 (Miss. 2014).

In an action arising from a motor vehicle accident, whether testimony regarding the speed at which the driver was traveling at the time of the accident was properly excluded was waived for purposes of appellate review because a proffer was not made. Heflin v. Merrill, 154 So. 3d 887, 2013 Miss. App. LEXIS 688 (Miss. Ct. App. 2013), aff'd, 154 So. 3d 857, 2014 Miss. LEXIS 558 (Miss. 2014).

In a wrongful death case, as a hospital's designation of experts mentioned neither pathologists' opinions nor an autopsy report, and as the hospital failed to make a proffer at trial of its experts' expected testimony, its claim that the trial court erred in preventing them from giving opinions about the autopsy report was not preserved for appeal. Univ. of Miss. Med. Ctr. v. Foster, 107 So. 3d 149, 2013 Miss. LEXIS 52 (Miss. 2013).

Denial of defendant's motion for judgment of acquittal notwithstanding the verdict and, in the alternative, motion for a new trial, after he had been convicted of sexual battery was appropriate because the defense failed to make a sufficient proffer after the trial court excluded a doctor's testimony. Further, even finding that the doctor's testimony would have been relevant, the record was insufficient for the supreme court to determine whether it could have survived under the Miss. R. Evid. 403 balancing test for admissibility. Abernathy v. State, 30 So. 3d 320, 2010 Miss. LEXIS 103 (Miss. 2010).

Landowner did not designate any experts during the discovery phase of the matter and did not indicate his desire to call an expert witness prior to trial, as he was required to do under Miss. R. Civ. P. 26(b)(4)(A)(i). Had the landowner wished to preserve that issue for appeal, he was required to make a proffer of the witness's proposed testimony pursuant to Miss. R. Evid. 103(a)(2), and because the landowner neglected to make a proffer of the proposed expert testimony, the issue was not properly preserved for the appellate court's review. Pittman v. Dykes Timber Co., 18 So. 3d 923, 2009 Miss. App. LEXIS 673 (Miss. Ct. App. 2009).

Trial court did not err in excluding evidence of how many other people drove the car with which defendant rear-ended a sheriff's car and in which cocaine was found. Defendant made no offer as to how he would have answered the question of how many other people drove the car and he therefore failed to make the necessary offer of proof under Miss. R. Evid. 103(a)(2). Magee v. State, 912 So. 2d 1044, 2005 Miss. App. LEXIS 252 (Miss. Ct. App. 2005).

In defendant's drug case, the court did not err in sustaining the state's objection to relevancy concerning cross-examination of an officer because, although the trial court attempted to prompt defense counsel into a proffer, not only was no offer of proof forthcoming, but the line of questioning was voluntarily abandoned. Cook v. State, 953 So. 2d 271, 2007 Miss. App. LEXIS 143 (Miss. Ct. App. 2007).

In a capital murder case, pursuant to Miss. R. Evid. 103(a), the trial court could not be found in error for excluding evidence as hearsay because defense counsel failed to make an offer of proof. Lynch v. State, 877 So. 2d 1254, 2004 Miss. LEXIS 591 (Miss. 2004), cert. denied, 543 U.S. 1155, 125 S. Ct. 1299, 161 L. Ed. 2d 122, 2005 U.S. LEXIS 1592 (U.S. 2005).

Although defendant argued that the trial court had committed reversible error by not allowing a witness to testify at trial; no offer of proof was procured by defendant's attorney in order to preserve the issue for appeal. Granger v. State, 853 So. 2d 830, 2003 Miss. App. LEXIS 658 (Miss. Ct. App. 2003).

Since defendant did not make an offer of proof to provide substance to the theory of his defense, the appellate court could not properly evaluate his claims, and the appellate court had to affirm the judgment. Edwards v. State, 823 So. 2d 1223, 2002 Miss. App. LEXIS 451 (Miss. Ct. App. 2002).

Trial court erred in excluding proffered evidence which may have established that witness had knowledge and an opinion as to drug informant's truth and veracity, since under the rules, defendant had the right to make his offer of proof. Cooper v. State, 628 So. 2d 1371, 1993 Miss. LEXIS 546 (Miss. 1993).

Although defendant failed to specifically place substance of evidence offered but excluded into the record, through either question and answer or proffered statement, the testimony defendant wanted to offer was apparent from the context. Heidel v. State, 587 So. 2d 835, 1991 Miss. LEXIS 646 (Miss. 1991).

**Plain error.**

It was not plain error to hold an option contract and modification were not ambiguous because (1) sellers clearly had a duty to provide clear title, and (2) a buyer's obligation to resume payments under the contract was clearly conditioned upon the sellers' performance. Maness v. K & A Enters. of Mississippi, LLC, 2018 Miss. LEXIS 61 (Miss. Feb. 8, 2018), op. withdrawn, 2018 Miss. LEXIS 349 (Miss. Aug. 9, 2018), sub. op., 250 So. 3d 402, 2018 Miss. LEXIS 338 (Miss. 2018).

In a case involving multiple counts of being a felon in possession of a firearm, no plain error was shown because a trial court did not deviate from or misapply a legal rule in a plain, clear, and obvious way; a double jeopardy argument had not been raised or discussed in prior cases involving multiple counts of this offense. Green v. State, 183 So. 3d 28, 2016 Miss. LEXIS 43 (Miss. 2016).

**Prejudice.**

Excluding defendant's testimony as hearsay erred harmlessly because, while the statement at issue was not offered for the truth of the matter asserted, excluding the statement was not prejudicial, as other testimony on the issue was admitted. Crump v. State, 237 So. 3d 808, 2017 Miss. App. LEXIS 385 (Miss. Ct. App. 2017), cert. denied, 237 So. 3d 1268, 2018 Miss. LEXIS 93 (Miss. 2018).

In a capital murder trial, the trial court committed reversible error in excluding a state witness's statement from evidence without conducting a box hearing and thereby failing to consider the admission of the statement in accordance with Miss. Unif. Cir. & Cty. R. 9.04(I); the trial court's failure to adhere to Rule 9.04(I) prejudiced defendant since the witness's statement was the only direct evidence linking defendant to the crime, and her credibility was the crucial issue in the case. Ross v. State, 954 So. 2d 968, 2007 Miss. LEXIS 235 (Miss. 2007).

Even if the prosecution did not disclose proposed expert testimony regarding the fact that victims of a homicide died from blunt force trauma to the head and defendant apparently tried to conceal the crime with a cleaning solution, defendant failed to show that any prejudice resulted therefrom because the evidence was merely cumulative of other evidence properly admitted into evidence. Le v. State, 913 So. 2d 913, 2005 Miss. LEXIS 151 (Miss.), cert. denied, 546 U.S. 1004, 126 S. Ct. 622, 163 L. Ed. 2d 508, 2005 U.S. LEXIS 8254 (U.S. 2005).

Even though the state did not provide affidavits from prior charges filed by the girlfriend against defendant to defendant as required by Miss. Unif. Cir. & Cty. R. 9.04(A)(3), defendant was not prejudiced by their admission into evidence because he was fully aware that the prior domestic violence charges would be presented at trial and could have easily discovered the contents of the affidavits. Taylor v. State, 954 So. 2d 944, 2007 Miss. LEXIS 183 (Miss. 2007).

Defendant's conviction for the sale of cocaine was inappropriate because the state failed to present evidence that identified the people on the tape in question; moreover, the erroneous admission of the taped conversations substantially prejudiced defendant, necessitating reversal and remand for a new trial, Miss. R. Evid. 103(a). Brown v. State, 969 So. 2d 891, 2007 Miss. App. LEXIS 19 (Miss. Ct. App.), rev'd, 969 So. 2d 855, 2007 Miss. LEXIS 680 (Miss. 2007).

Although the evidence in a medical malpractice case tended to show that a doctor was drinking during his treatment of the patient, and the evidence was relevant to the patient's claim, the trial court did not abuse its discretion in denying the evidence from admission on the ground that it was too prejudicial. Griffin v. McKenney, 877 So. 2d 425, 2003 Miss. App. LEXIS 942 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 867 (Miss. 2004).

Trial court did not improperly limit defendant's testimony when it sustained an objection by the State to defense counsel's invitation to defendant to proceed with particulars about why defendant believed, through talking with others, that a prison correctional officer was violent; while in a self-defense case, pursuant to Miss. R. Evid. 404(a)(2), the reputation of the victim, in this case the officer, was relevant when there was a claim that the victim was the initial aggressor, the defense was not truly based on such a claim, and defendant did not submit a proffer that gave greater details as to exactly what defendant understood about the officer's violent behavior, and pursuant to Miss. R. Evid. 103(a), the court failed to find that a substantial right of defendant's was affected by the trial court's ruling. Sheffield v. State, 844 So. 2d 519, 2003 Miss. App. LEXIS 374 (Miss. Ct. App. 2003).

Admission of full-color, close-up photographs of murder victim's decomposed, maggot-infested skull substantially adversely affected defendant's right to a fair trial, especially where proof in case was primarily, if not completely, based on circumstantial evidence. McNeal v. State, 551 So. 2d 151, 1989 Miss. LEXIS 333 (Miss. 1989).

**Review.**

Patient failed to make a timely objection and failed to preserve for appeal her claim that an expert witness offered undisclosed opinions because the allegedly improper testimony came significantly earlier during direct examination; the patient's act of cross-examining the expert was not an "objection" but was just a question of a witness. Knight v. Clark, 283 So. 3d 1111, 2019 Miss. App. LEXIS 130 (Miss. Ct. App.), cert. denied, 283 So. 3d 735, 2019 Miss. LEXIS 408 (Miss. 2019), cert. denied, — So. 3d —, 2019 Miss. LEXIS 450 (Miss. 2019).

Defendant's argument that the sexual assault victim's medical records could have shown prior facial or vaginal injuries was procedurally barred because it was not raised before the trial court. Roberts v. State, 234 So. 3d 1251, 2017 Miss. LEXIS 383 (Miss. 2017).

Record failed to show that the State's closing-argument comments resulted in a manifest miscarriage of justice as required for reversal by the plain-error rule where the statements regarding the coroner's classification of the victim's manner of death as a homicide rather than an accident fell within the wide latitude afforded to attorneys when arguing their cases before a jury. Tillis v. State, 176 So. 3d 37, 2014 Miss. App. LEXIS 446 (Miss. Ct. App. 2014), cert. denied, 178 So. 3d 333, 2015 Miss. LEXIS 528 (Miss. 2015).

In an armed robbery case, defendant's claim that his 19.5 year sentence was illegal because it exceeded his life expectancy was procedurally barred as he did not object at sentencing and the circuit court did not commit plain error under Miss. R. Evid. 103(d). Hampton v. State, 148 So. 3d 1038, 2013 Miss. App. LEXIS 73 (Miss. Ct. App. 2013), aff'd, 148 So. 3d 992, 2014 Miss. LEXIS 513 (Miss. 2014).

In a case in which defendant was convicted of violating Miss. Code Ann. § 63-

11-30(1)(c), the circuit court incorrectly applied the Porter decision. The Porter decision stood for the proposition that in a driving under the influence (DUI) per-se case, defendant could not offer evidence regarding whether or not he was under the influence which would impair his ability to drive a vehicle; the Porter decision did not hold that in a DUI-per-se case, evidence regarding the consumption of alcohol could not be introduced to prove whether or not defendant was at a certain blood alcohol concentration when he or she was driving a motor vehicle. Evans v. State, 25 So. 3d 1054, 2010 Miss. LEXIS 18 (Miss. 2010).

Although defendant argued that the trial court allowed impermissible hearsay testimony, the appellate court found that error could not be predicated upon a ruling that admitted or excluded evidence unless a substantial right was affected by the ruling, Miss. R. Evid. 103(a), and defendant failed to identify what rights, if any, were affected by the trial court's decision. Furthermore, defendant repeatedly argued that the negative result of the fingerprint analysis was exculpatory, and clearly, reversible error could not be found in the wrongful admission of exculpatory evidence. Pilgrim v. State, 19 So. 3d 148, 2009 Miss. App. LEXIS 702 (Miss. Ct. App. 2009).

Defendant failed to object to the admission of two of the photographs and the other photographs that he claimed were improperly admitted were admitted upon the advance agreement of the prosecution and defense counsel. Therefore, under Miss. R. Evid. 103(a)(1), defendant's arguments regarding the photographs were procedurally barred. Staten v. State, 989 So. 2d 938, 2008 Miss. App. LEXIS 76 (Miss. Ct. App.), cert. denied, 993 So. 2d 832, 2008 Miss. LEXIS 400 (Miss. 2008).

Trial court did not abuse its discretion in admitting defendant's statement that he drove in the middle of the road because it was part of the story of the crime and it was so interrelated with the manslaughter charge against defendant, which arose from the victim's death from an automobile accident with defendant, that it constituted a closely related series of occurrences; however, even though it was error for the prosecution to elicit testimony from the officer that defendant had committed a crime by driving in the middle of the road, the trial court cured the error by advising the jury to disregard the testimony. Bell v. State, 963 So. 2d 1124, 2007 Miss. LEXIS 400 (Miss. 2007).

Motion for post-conviction relief was properly dismissed based on an allegation of in effective assistance of counsel because defendant was correctly informed of the 10-year maximum penalty for uttering forgery; however, the case was remanded for resentencing because plain error was committed when a trial court improperly imposed a 15-year sentence. Jefferson v. State, 958 So. 2d 1276, 2007 Miss. App. LEXIS 440 (Miss. Ct. App. 2007).

Although defendant alleged that he was not allowed to demonstrate bias or prejudice, the trial court did not abuse its discretion in determining that the mother's motive of money was a collateral matter that would not help the jury decide whether the statutory rape or fondling occurred; thus, pursuant to Miss. R. Evid. 103(a), the trial court did not err in excluding that evidence. Poynor v. State, 962 So. 2d 68, 2007 Miss. App. LEXIS 292 (Miss. Ct. App.), cert. denied, 962 So. 2d 38, 2007 Miss. LEXIS 416 (Miss. 2007).

In a criminal prosecution for conspiracy to commit armed robbery, the trial court did not commit reversible error by allowing the store manager to give his lay opinion testimony as to the view of the safe from where he was standing. The manager was familiar with the store's layout so his testimony was based on personal knowledge. Herring v. State, 938 So. 2d 1251, 2006 Miss. App. LEXIS 82 (Miss. Ct. App.), cert. denied, 939 So. 2d 805, 2006 Miss. LEXIS 752 (Miss. 2006).

In a statutory rape and child fondling case, defendant asserted that the trial court erred in not allowing him to demonstrate the bias or prejudice of the victims' mother, which alleged that her motive for accusing defendant of abusing the victims was to get money out of him; however, the trial court did not abuse its discretion in determining that the mother's motive was a collateral matter that would not help the jury decide whether the statutory rape or fondling occurred and in excluding that

evidence under Miss. R. Evid. 103(a). Poynor v. State, 2006 Miss. App. LEXIS 857 (Miss. Ct. App. Nov. 21, 2006), op. withdrawn, sub. op., 962 So. 2d 68, 2007 Miss. App. LEXIS 292 (Miss. Ct. App. 2007).

Where defendant was charged with aggravated assault, an eyewitness to the shooting was permitted to testify that the declarant told her that defendant had a gun, and immediately after the declarant made the statement, she jumped out of the car and ran for shelter; the hearsay statement was both an excited utterance and a present sense impression, and the trial court did not abuse its discretion by admitting the statement. Wheeler v. State, 943 So. 2d 106, 2006 Miss. App. LEXIS 866 (Miss. Ct. App. 2006).

Where defendant was tried for the stabbing murder of his wife, the trial court admitted photographs of the victim's body and a videotape of the bloody crime scene; in the absence of a specific objection under Miss. R. Evid. 103(a)(1), no error concerning the admission of the evidence was preserved for review. Lang v. State, 931 So. 2d 689, 2006 Miss. App. LEXIS 458 (Miss. Ct. App. 2006).

Defendant's conviction for murder was proper where the trial court did not err in allowing into evidence photographs of the location in which the victim's body was found. Defendant had asserted that the trial court erred in its ruling, but made no claim that the introduction was adverse to his case; thus, the court was not required to address the issue pursuant to Miss. R. Evid. 103(a). Wright v. State, 915 So. 2d 527, 2005 Miss. App. LEXIS 976 (Miss. Ct. App. 2005).

Circuit judge did not commit prejudicial error under Miss. R. Evid. 103(a) by allowing three circuit judges to testify and offer opinions about the competency of public defenders after instructing the county to "stay away from" expert testimony on ultimate questions of fact under Miss. R. Evid. 704 in the county's action against the state alleging that state statutes requiring counties to provide legal services for indigent criminal defendants were unconstitutional. The circuit judge relied on the judges' testimony to help her determine whether the public defenders' caseload was excessive, whether indigent defendants were entering into ill-advised plea agreements, and whether the public defenders take their obligations as such seriously, and further, the circuit judge did not treat their testimony as expert testimony. Quitman County v. State, 910 So. 2d 1032, 2005 Miss. LEXIS 438 (Miss. 2005).

Circuit judge did not commit prejudicial error under Miss. R. Evid. 103(a) in disallowing "ultimate issue" opinion testimony by an expert under Miss. R. Evid. 704 in a county's action against the state alleging that state statutes requiring counties to provide legal services for indigent criminal defendants were unconstitutional because the expert had already addressed his specific concerns about the indigent defense system in his extensive testimony, and allowing one final, sweeping opinion during re-direct examination was redundant and unnecessary under Miss. R. Evid. 401. Quitman County v. State, 910 So. 2d 1032, 2005 Miss. LEXIS 438 (Miss. 2005).

In a criminal trial for sexual battery, where defendant failed to object to the admission of hearsay statements that the child victim made to witnesses for the State, the error was not preserved for review. Perry v. State, 904 So. 2d 1122, 2004 Miss. App. LEXIS 974 (Miss. Ct. App. 2004).

In defendant's trial for unlawfully taking possession of a motor vehicle, the trial court was acting within its discretion in finding: (1) that the knife on defendant's person had evidentiary value in helping the jury understand how defendant might have been able to start the vehicle, and (2) that its probative value was not outweighed by prejudice from the jury learning that defendant was armed with a knife. Parks v. State, 859 So. 2d 1084, 2003 Miss. App. LEXIS 1087 (Miss. Ct. App. 2003).

Appellate court reversed the trial court's rulings on the appellant's evidentiary issues because the appellate court was convinced that the trial court abused its discretion, and then, that the rulings resulted in prejudice or harm to the appellants, or adversely affected their substantial right. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564, 2003 Miss. App. LEXIS 752 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 2005 Miss. LEXIS 21 (Miss. Jan. 13, 2005), aff'd in part and rev'd in part, 904 So. 2d 1077, 2005 Miss. LEXIS 247 (Miss. 2005).

Relevancy and admissibility of evidence are largely within discretion of trial court and reversal may be had only where that discretion has been abused; unless trial judge's discretion is so abused as to be prejudicial to a party, supreme court will not reverse the ruling. Beech v. Leaf River Forest Prods., 691 So. 2d 446, 1997 Miss. LEXIS 86 (Miss. 1997).

**Substantial right.**

In a case where the theory of defense was that defendant had been forced to commit the armed robbery and armed carjacking by an alleged female gang member, the trial court did not abuse its discretion in excluding any evidence and a substantial right of defendant was not affected by any exclusion of evidence because defendant was able to present to the jury testimony regarding his lack of education, the female gang member's association with other gang members, and numerous instances of the female gang member's prior bad acts. Chancellor v. State, 161 So. 3d 145, 2015 Miss. LEXIS 173 (Miss. 2015).

Trial court's exclusion of opinion testimony from the defense witnesses that the victim was reaching for a weapon when defendant shot him did not violate defendant's right to present a meaningful defense and did not constitute reversible error because two of the defense witnesses testified that the victim was reaching behind his back during their exchange, from which the jury was free to infer that the victim was going for a gun; defendant testified that the victim was the aggressor and that the victim had previously threatened him with a pistol and even shot at him a little over a week earlier; and defendant testified that he believed the victim was reaching for a gun when he shot him. Love v. State, 121 So. 3d 952, 2013 Miss. App. LEXIS 387 (Miss. Ct. App. 2013).

While the trial court erred by sustaining the State's hearsay objection, the error was not reversible because defendant's substantial rights were not affected by the exclusion of the statement where it was cumulative of defendant's own testimony. Pauley v. State, 113 So. 3d 557, 2013 Miss. LEXIS 304 (Miss. 2013).

Defendant's conviction for armed robbery and the denial of his motion for a new trial were both proper because the appellate court failed to see how the judge's decision to change his mind and sustain the State's objection on a ground not specified by the State had any effect on defendant's trial. Further, the exclusion of the victim's testimony concerning the officer's belief as to the victim's intoxication did not affect any substantial right of defendant, Miss. R. Evid. 103(a)(2). McClendon v. State, 17 So. 3d 184, 2009 Miss. App. LEXIS 550 (Miss. Ct. App. 2009).

In defendant's trial for statutory rape, the trial court did not abuse its discretion in allowing the victim's hearsay testimony under the "tender years" exception of Miss. R. Evid 803(25). The trial court weighed its concerns with the victim's credibility against the other circumstances and found substantial indicia of reliability in her hearsay statements, and the reviewing court could not state with a definite and firm conviction that the trial court reached the wrong result pursuant to Miss. R. Evid. 103(a). Grimes v. State, 1 So. 3d 951, 2009 Miss. App. LEXIS 32 (Miss. Ct. App. 2009).

Defendant never invoked the right to remain silent but repeatedly asked what defendant was doing at the police station; the police asked defendant about where defendant got the credit cards and defendant never indicated in any way that defendant was invoking th right to remain silent, and thus no substantial right was affected, the plain error rule did not protect defendant, and any error was waived. Smith v. State, 984 So. 2d 295, 2007 Miss. App. LEXIS 643 (Miss. Ct. App. 2007).

Trial court did not err in admitting the victim's hearsay statement under the dying declaration exception, Miss. R. Evid. 804(b)(2), because the admission of the statement did not affect a substantial right as provided in Miss. R. Evid. 103(a). Defendant admitted to stabbing the victim, and the only question for the jury was whether the stabbing was done in self-defense. Johnson v. State, 908 So. 2d 758, 2005 Miss. LEXIS 492 (Miss. 2005).

Defendant's convictions for aggravated assault and conspiracy to murder the victim were proper under Miss. R. Evid. 103(a) because the admission of a witness's previous statement did not affect a substantial right of defendant to a fair trial as the record showed that the statement was not the only evidence of defendant's gang involvement. Robinson v. State, 940 So. 2d 235, 2006 Miss. LEXIS 576 (Miss. 2006).

### Rule 104. Preliminary questions.

(a) *In general.* — The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

(b) *Relevance that depends on a fact.* — When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later. If the proof is not introduced, the objector may request an instruction directing the jury to disregard the evidence. This request is not prerequisite to a motion for mistrial.

(c) *Conducting a hearing so that the jury cannot hear it.* — The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:

(1) the hearing involves the admissibility of a confession;
(2) a defendant in a criminal case is a witness and so requests; or
(3) justice so requires.

(d) *Cross-examining a defendant in a criminal case.* — By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

(e) *Evidence relevant to weight and credibility.* — This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

(f) *Punitive damages.* — If the court allows the jury to consider punitive damages, evidence of net worth may not be offered until the close of evidence.

**HISTORY: Restyled effective July 1, 2016.**

#### ADVISORY COMMITTEE NOTE

The language of Rule 104 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. The provisions regarding punitive damages – formerly subsumed in subdivision (a) – now appear as separate subdivision (f). These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

**(a)** Subdivision (a) recognizes that a significant amount of a trial judge's responsibility is to make preliminary rulings. For instance, the judge, in cases where there is a question of the witness's competency, must first make a determination that the witness is competent before the witness is allowed to testify concerning the issue at bar. Other preliminary questions might concern privileges, the exclusionary rule, the voluntariness of confessions, and qualifications of experts. In *House v. State,* 445 So. 2d 815 (Miss. 1984), the Supreme Court set forth extremely explicit guidelines for the trial court to use in determining whether a witness who has been hypnotized may testify in a criminal prosecution about matters explored while under hypnosis.

Oftentimes preliminary matters will involve a determination of facts. In such instances, the judge is the trier of facts. *See* FRE 104, Advisory Committee Notes. When the judge hears evidence on these preliminary questions, he is not bound under Rule 104 to apply the rules of evidence. The one exception to this, which is explicitly stated, is the evidentiary law relating to privileges.

**(b)** Subdivision (b) refers to conditional relevancy. If before we determine X, we must determine that condition Y exists, then the court must admit evidence of the condition precedent. The evidence is admitted only after the judge makes an initial determination that a sufficient predicate has been laid. If later the judge believes that the condition was never fully established, he may withdraw the preliminary evidence from the jury's consideration. It is within the judge's discretion as to how the proof should be presented. *See* FRE 104, Advisory Committee Notes.

**(c)** Subdivision (c) is designed to prevent the jury from hearing what may be prejudicial evidence which may be later ruled inadmissible. Rather than exposing the jury to this evidence, the rule requires that the admissibility hearing be held outside the jury's presence. This procedure must always be followed in cases where the preliminary matter under discussion is the voluntariness of a criminal defendant's confession. This is in accord with long-standing Mississippi practice. *See, e.g., Hall v. State,* 427 So. 2d 957 (Miss. 1983); *McElroy v. State,* 204 So. 2d 463 (Miss. 1967); see also *Jackson v. Denno,* 378 U.S. 368, 84 S. Ct. 1774, 12 L.Ed.2d 908 (1964). The admissibility of possibly illegally obtained evidence may be another matter to be considered outside the jury's presence. To protect the criminal defendant, the rule provides he may have a hearing outside the jury's presence at his request. In other cases, the judge's discretion governs. For instance, in determining the competency of a child to testify, the judge would most likely not dismiss the jury. To dismiss the jury in such a case would be needlessly time-consuming.

**(d)** Subdivision (d) allows the defendant to challenge preliminary questions without exposing himself to a full cross-examination. Thus, if the defendant in a hearing to consider a motion to suppress evidence or in a hearing to consider the voluntariness of a confession testifies, the prosecutor on cross-examination may not inquire into other issues. This subdivision is necessary to provide a limitation on the wide-open cross-examination provision of Rule 611(b). Subdivision (d) does not address the issue of whether a defendant's testimony at a hearing on a preliminary matter may be used by the prosecutor at trial. *But see Harris v. New York,* 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971).

**(e)** Subdivision (e) is self-explanatory. For a similar provision *see* FRE 104(e). ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 20016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

Applicability.
Hearing not required.
Photographs.
Relevancy conditioned on fact.
Review.

**Applicability.**

Trial judge was not strictly bound by the rules of evidence in making a ruling in a pretrial motion in limine. Brown v. Prof'l Bldg. Servs., 284 So. 3d 754, 2017 Miss. App. LEXIS 605 (Miss. Ct. App. 2017), aff'd, 252 So. 3d 23, 2018 Miss. LEXIS 372 (Miss. 2018).

**Hearing not required.**

As the Mississippi Supreme Court has recognized the medical diagnosis of child abuse, there was no need for a pretrial hearing regarding whether child abuse was a generally medically accepted diagnosis. Kolberg v. State, 829 So. 2d 29, 2002 Miss. LEXIS 268 (Miss. 2002), cert. denied, 538 U.S. 981, 123 S. Ct. 1787, 155 L.

Ed. 2d 672, 2003 U.S. LEXIS 3010 (U.S. 2003), overruled in part, Harrell v. State, 134 So. 3d 266, 2014 Miss. LEXIS 52 (Miss. 2014), overruled in part, Rowsey v. State, 188 So. 3d 486, 2015 Miss. LEXIS 573 (Miss. 2015).

**Photographs.**

In a prosecution of defendant for vehicular homicide, defendant failed to preserve his argument that the trial court erred in admitting photographs of beer cans inside his truck; defendant's objection to the beer can photographs was conditioned on the State's being unable to connect the beer cans to the accident; when the State offered testimony from a convenience store worker that, before the accident, defendant purchased a case of beer of the same brand as the cans appearing in the picture, defendant offered no further objection to the admission of the pictures. Dunaway v. State, 919 So. 2d 67, 2005 Miss. App. LEXIS 300 (Miss. Ct. App. 2005), cert. dismissed, 920 So. 2d 1008, 2005 Miss. LEXIS 652 (Miss. 2005), cert. denied, 921 So. 2d 1279, 2006 Miss. LEXIS 35 (Miss. 2006).

**Relevancy conditioned on fact.**

Wife's propensity for violence with a butcher knife was admissible as a character trait, and it was admissible at the time defendant offered it, where defendant satisfied mandate of subdivision (b) of this rule that he offer "evidence sufficient to support a finding of the fulfillment of the condition." Heidel v. State, 587 So. 2d 835, 1991 Miss. LEXIS 646 (Miss. 1991).

**Review.**

Trial court did not permit a nurse practitioner who treated the victim of an assault to testify as an expert witness beyond her expertise because the nurse practitioner was qualified to testify that the victim's injuries were obviously serious; the admission of her testimony was within the trial court's discretion under Miss. R. Evid. 104(a). Briggs v. State, 16 So. 3d 696, 2008 Miss. App. LEXIS 737 (Miss. Ct. App. 2008), cert. denied, 17 So. 3d 99, 2009 Miss. LEXIS 412 (Miss. 2009).

Relevancy and admissibility of evidence are largely within discretion of trial court and reversal may be had only where that discretion has been abused; unless trial judge's discretion is so abused as to be prejudicial to a party, supreme court will not reverse his ruling. Beech v. Leaf River Forest Prods., 691 So. 2d 446, 1997 Miss. LEXIS 86 (Miss. 1997).

Finding against the driver in her action for injuries resulting from a collision with a train at a railroad crossing was appropriate where a witness's misstatement did not seriously impact deliberations on whether the notch or hole by the tracks was negligently allowed to exist and made the railroad at fault also; that inappropriate lay opinion did not affect a substantial right and was not reversible error under Miss. R. Evid. 104. Bowman v. CSX Transp., Inc., 931 So. 2d 644, 2006 Miss. App. LEXIS 418 (Miss. Ct. App. 2006).

State clearly produced the two officers who were present when defendant was questioned and the confession was signed, as caselaw mandated; thus, the trial judge did not find credible defendant's claim that defendant was forced to give a statement that defendant had committed murder of the child while in the commission of felonious abuse and/or battery of the child, because the officers beat defendant. Seeling v. State, 844 So. 2d 439, 2003 Miss. LEXIS 119 (Miss. 2003).

## RESEARCH REFERENCES

**ALR.**

Admissibility of evidence relating to accused's attempt to commit suicide. 73 A.L.R.5th 615.

**Law Reviews.**

Recent Trends in Mississippi Judicial Rule Making: Court Power, Judicial Recusals, and Expert Testimony, 23 Miss. C. L. Rev. 1, Fall, 2003.

### Rule 105. Limiting evidence that is not admissible against other parties or for other purposes.

If the court admits evidence that is admissible against a party or for a purpose – but not against another party or for another purpose – the court, unless expressly waived or rebutted, shall restrict the evidence to its proper scope, contemporaneously instruct the jury accordingly, and give a written instruction if requested.

**HISTORY: Amended and comment deleted effective July 1, 2015.**

## ADVISORY COMMITTEE NOTE

Rule 105 was amended while the restyling project was pending and has not been restyled. (Advisory Committee Note approved for publication July 1, 2016.)

## JUDICIAL DECISIONS

### ANALYSIS

Limiting instructions.
Illustrative cases.

**Limiting instructions.**

Defendant failed to demonstrate constitutional ineffectiveness for defense counsel's failure to request a limiting instruction or a balancing test with regard to a prosecution witness's prior unsworn statements because the decision was trial strategy; the witness's prior sworn and unsworn statements coincided, and given the admissibility of his prior sworn inconsistent statements, any success in keeping his prior unsworn inconsistent statements out of the trial would have been minimal at most. Thames v. State, 310 So. 3d 1163, 2021 Miss. LEXIS 17 (Miss. 2021).

Because defendant did not object at trial to the State's use of a prosecution witness's prior inconsistent statements (sworn or unsworn) or request a limiting instruction or a balancing test, the issue was barred from review absent plain error. Thames v. State, 310 So. 3d 1163, 2021 Miss. LEXIS 17 (Miss. 2021).

Because defendant never requested a limiting instruction about his prior alcohol and drug use, the trial court was not bound to give one. Bowman v. State, 283 So. 3d 154, 2019 Miss. LEXIS 359 (Miss. 2019).

Trial court properly allowed evidence of defendant's prior disciplinary violations and the prosecutor's closing arguments because defendant's direct examination opened the door to cross-examination about his prior disciplinary violations where they were relevant and probative with respect to his claim that he acted in self-defense and out of fear, and any "unfair prejudice" was minimal, even assuming that the trial judge erred by not offering a limiting instruction, the error was harmless and did not deprive defendant of a fair trial, the prosecutor's comments during closing were within the bounds of legitimate argument and in response to defense counsel's arguments, and defendant failed to show that his counsel was ineffective. Curry v. State, 202 So. 3d 294, 2016 Miss. App. LEXIS 635 (Miss. Ct. App. 2016).

Because the injured passenger's mother, who filed the negligence action on his behalf, did not request a limiting instruction under this rule regarding the limited admissibility of the driver's payment of the failure to yield traffic ticket the trial court did not err by failing to give such an instruction. Owens v. Kelly, 191 So. 3d 738, 2015 Miss. App. LEXIS 480 (Miss. Ct. App. 2015), cert. denied, 202 So. 3d 208, 2016 Miss. LEXIS 226 (Miss. 2016).

Since a property owner failed to request a limiting instruction as a result of statements made by opposing counsel, the court could not find that the trial court committed error in not giving a limiting instruction. Gilmer v. Morris Goodman

Builders, Inc., 131 So. 3d 1203, 2013 Miss. App. LEXIS 397 (Miss. Ct. App. 2013), cert. denied, 132 So. 3d 579, 2014 Miss. LEXIS 105 (Miss. 2014).

Since defendant's counsel failed to request a limiting instruction concerning the jurors' use of a transcript that the State contended depicted a telephone call between defendant and the sexual battery victim's mother, the court could not find any error in the trial court's admission of the transcript. The burden of requesting a limiting instruction, pursuant to Miss. R. Evid. 105, fell on trial counsel. Fulgham v. State, 46 So. 3d 396, 2010 Miss. App. LEXIS 572 (Miss. Ct. App. 2010).

Defendant's conviction for murder under Miss. Code Ann. § 97-3-19(1)(b) was proper, in part because defendant's trial counsel did not request a limiting instruction regarding impeached testimony and in the absence of such a request, the trial court could not be held in error. Franklin v. State, 72 So. 3d 1129, 2011 Miss. App. LEXIS 125 (Miss. Ct. App.), cert. denied, 71 So. 3d 1207, 2011 Miss. LEXIS 508 (Miss. 2011).

Defendant's conviction for aggravated assault was appropriate because he failed to request a limiting instruction at the trial court level. Therefore, his issue on appeal that the trial court erred in failing to instruct the jury that it was permitted to use the gang evidence only to make determinations of credibility of those witnesses was procedurally barred. Dao v. State, 984 So. 2d 352, 2007 Miss. App. LEXIS 816 (Miss. Ct. App. 2007), cert. denied, 984 So. 2d 277, 2008 Miss. LEXIS 281 (Miss. 2008).

Although the limiting instruction given during defendants' trial was inadequate in that it did not instruct the jury only to consider the statement against the defendant who made it, no prejudice or manifest injustice resulted as to any of the defendants; each defendant gave sufficient evidence of his individual participation in the robbery of a gun store in his separate statements to support a capital murder charge. Anderson v. State, 5 So. 3d 1088, 2007 Miss. App. LEXIS 677 (Miss. Ct. App. 2007), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 171 (Miss. 2009), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 184 (Miss. 2009), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 177 (Miss. 2009).

Because the burden to request a limiting instruction falls upon defense counsel in the admittance of Miss. R. Evid. 404(b) evidence, the burden falls upon defense counsel to request a limiting instruction in the context of the admittance of prior convictions through impeachment under Miss. R. Evid. 609. Moss v. State, 977 So. 2d 1201, 2007 Miss. App. LEXIS 632 (Miss. Ct. App. 2007), cert. denied, 977 So. 2d 1144, 2008 Miss. LEXIS 151 (Miss. 2008).

Denial of defendant's motion for a new trial after he had been convicted of aggravated assault and rape was appropriate because defendant did not request a limiting instruction and was barred from bringing the issue on appeal; the trial judge was not obligated to provide a limiting instruction sua sponte regarding the admission of defendant's prior convictions. Moss v. State, 977 So. 2d 1201, 2007 Miss. App. LEXIS 632 (Miss. Ct. App. 2007), cert. denied, 977 So. 2d 1144, 2008 Miss. LEXIS 151 (Miss. 2008).

Sufficient evidence supported defendant's conviction for felony shoplifting under Miss. Code Ann. § 97-23-93 based on two prior misdemeanor shoplifting offenses because the trial court was not required to give a sua sponte instruction to buffer the alleged damage done by the presentation of the prior misdemeanor convictions, and Miss. R. Evid. 105 placed the burden on trial counsel to request a limiting instruction regarding Miss. R. Evid. 404(b)evidence. Biggs v. State, 942 So. 2d 185, 2006 Miss. App. LEXIS 1 (Miss. Ct. App.), cert. denied, 942 So. 2d 164, 2006 Miss. LEXIS 715 (Miss. 2006).

Defendant's convictions for two counts of the sale of methadone and one count of the sale of morphine were appropriate because the trial court did not err in failing to give a limiting jury instruction since Miss. R. Evid. 105 required that the limiting jury instruction being presented to the trial court by counsel. Palmer v. State, 939 So. 2d 792, 2006 Miss. LEXIS 549 (Miss. 2006).

In a trial for statutory rape, evidence that defendant had asked the victim to don a white tee shirt, and nothing else, on other occasions was inadmissible to prove defendant guilty of the charge; however, the trial court properly ruled that the evidence was more probative than prejudicial, and moreover, the trial court gave the jury a limiting instruction. Miley v. State, 935 So. 2d 998, 2006 Miss. LEXIS 410 (Miss. 2006).

Miss. R. Evid. 105 clearly places the burden of requesting a Miss. R. Evid. 404(b) limiting jury instruction upon counsel. Tate v. State, 912 So. 2d 919, 2005 Miss. LEXIS 194 (Miss. 2005).

Jury instructions that reference prior arrests and convictions may be counterproductive to defendant; while serving to limit the jury's consideration of the prior wrongs, such instructions also remind and emphasize to the jury that defendant committed prior bad acts. Whether to request such an instruction is a matter of trial strategy in the exclusive province of defendant, in consultation with his or her attorney; thus, without a request by defense counsel, the trial court properly did not sua sponte give a limiting jury instruction in defendant's case. Tate v. State, 912 So. 2d 919, 2005 Miss. LEXIS 194 (Miss. 2005).

Trial court need not issue a sua sponte limiting instruction when other bad acts evidence is admitted under Miss. R. Evid. 404(b) and 403; Miss. R. Evid. 105 clearly places the burden of requesting a limiting instruction under Miss. R. Evid. 404(b) on the party objecting to the evidence. Brown v. State, 890 So. 2d 901, 2004 Miss. LEXIS 1104 (Miss. 2004), cert. denied, 544 U.S. 981, 125 S. Ct. 1842, 161 L. Ed. 2d 735, 2005 U.S. LEXIS 3424 (U.S. 2005).

Trial court was not required to give the jury a limiting instruction, sua sponte, with regard to Miss. R. Evid. 404(b) evidence of prior bad acts; under recent case law, it was the obligation of defense counsel to make that request. Moore v. State, 921 So. 2d 381, 2005 Miss. App. LEXIS 662 (Miss. Ct. App. 2005), cert. denied, 926 So. 2d 922, 2006 Miss. LEXIS 166 (Miss. 2006).

The requirements of this rule were met where no limiting instruction was requested by defendant, but one-defense proposed instruction was given that instructed the jury to consider separately the evidence for a conviction for each co-defendant. Buggs v. State, 754 So. 2d 569, 2000 Miss. App. LEXIS 11 (Miss. Ct. App. 2000).

Where defendant's prior conviction was not offered for general impeachment purposes but was introduced to impeach specific false statements made by defendant, and where defendant failed to request a limiting instruction, there was no reversible error in trial court's failure to offer a limiting instruction sua sponte. Johnson v. State, 666 So. 2d 499, 1995 Miss. LEXIS 618 (Miss. 1995).

**Illustrative cases.**

Resolution of whether defense counsel was ineffective for failing to request a cautionary instruction was better left to be assessed on a complete record because the matter was beyond the contents and face of the record. Brown v. State, 282 So. 3d 1192, 2019 Miss. App. LEXIS 468 (Miss. Ct. App. 2019).

Reversal was not warranted based upon the trial court's failure to issue a cautionary instruction, sua sponte, to the jury on their use of interview transcripts because defendant made no argument that he was deprived of a fair trial on the ground that the trial court did not issue a transcript-based cautionary instruction; nor was there any indication in the record that the absence of such a cautionary instruction deprived defendant of a fair trial. Brown v. State, 282 So. 3d 1192, 2019 Miss. App. LEXIS 468 (Miss. Ct. App. 2019).

The circuit court did not abuse its discretion in allowing testimony regarding OSHA regulations for the limited purpose of demonstrating reasonable care consistent with industry standards; the circuit court gave a limiting instruction that OSHA standards were not to be considered in determining whether appellant was negligent. Fairley Constr. Servs. v. Savage, 265 So. 3d 203, 2019 Miss. App. LEXIS 61 (Miss. Ct. App. 2019).

Although defendant asserted that the trial court should have restricted evidence of a carjacking and a robbery by defendant to its proper purpose, to establish defendant's plan and motive in committing a string of armed robberies and to establish defendant's identity, defendant's attorney did not request a limiting instruction, and the appellate court found the absence of any limiting instruction by the court did not deprive defendant of a fair trial. Horton v. State, 253 So. 3d 334, 2018 Miss. App. LEXIS 42 (Miss. Ct. App.), cert. denied, 252 So. 3d 595, 2018 Miss. LEXIS 390 (Miss. 2018).

In a case in which defendant was convicted of violating Miss. Code Ann, § 47-5-193, he unsuccessfully argued on appeal that the trial judge failed to instruct the jury to disregard evidence of other crimes, wrongs, or acts where there was no foundation for their admissibility and no showing that the probative value outweighed the prejudicial effect. Defense counsel failed to request a limiting instruction, and the trial judge was not required to issue the limiting instruction sua sponte after defense counsel objected; Rule 105 clearly placed the burden of requesting a Miss. R. Evid. Rule 404(b) limiting instruction upon counsel. Lindsey v. State, 29 So. 3d 121, 2010 Miss. App. LEXIS 89 (Miss. Ct. App. 2010).

In a depraved-heart murder case, as the prior bad acts evidence was introduced by defendant himself through his direct examination, any objection he may have had concerning its entry into evidence was waived. Further, defendant did not object to the admissibility of this conviction until the State cross-examined him and there was nothing unduly prejudicial in the way the prosecutor cross-examined defendant . Harris v. State, 861 So. 2d 1003, 2003 Miss. LEXIS 872 (Miss. 2003).

When the defendant objects to the admission of character evidence, the trial court must balance the probative value of this evidence against the danger of unfair prejudice, pursuant to Miss. R. Evid. 105, 403, 609(a), and the court finds that the rule envisions an objection contemporaneous with the admission of the testimony; as the prior bad acts evidence was introduced by one defendant, any objection thereto by that defendant was waived, and because none of defendants objected to the closing argument that referred to the prior bad acts evidence, which was not unduly prejudicial in the first place, the court found that error was not preserved on appeal and the issue had no merit. Harris v. State, 2003 Miss. LEXIS 80 (Miss. Feb. 20, 2003), op. withdrawn, sub. op., 861 So. 2d 1003, 2003 Miss. LEXIS 872 (Miss. 2003).

In an action against a general contractor and a subcontractor arising from the death of an iron worker while constructing a casino on a barge on a navigable waterway, OSHA standards were properly introduced to aid the trier of fact in determining whether the actions complained of were reasonable and consistent with industry standards where the jury was properly instructed as to the limited nature for which the OSHA standards were admissible. Accu-Fab & Constr., Inc. v. Ladner by & Through Ladner, 970 So. 2d 1276, 2000 Miss. App. LEXIS 111 (Miss. Ct. App. 2000), aff'd, 778 So. 2d 766, 2001 Miss. LEXIS 38 (Miss. 2001).

Evidence of prior sales of drugs, offered to show intent to distribute, is properly admissible if trial court finds its probative value outweighs its prejudicial effect, and if evidence is accompanied by a proper limiting instruction. Smith v. State, 656 So. 2d 95, 1995 Miss. LEXIS 260 (Miss. 1995), overruled in part, Brown v. State, 890 So. 2d 901, 2004 Miss. LEXIS 1104 (Miss. 2004).

Rules of Evidence

## Rule 106. Remainder of or related writings or recorded statements.

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part – or any other writing or recorded statement – that in fairness ought to be considered at the same time.

**HISTORY: Restyled effective July 1, 2016.**

## ADVISORY COMMITTEE NOTE

The language of Rule 106 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

This rule is a codification of the common law doctrine of completeness. The rule is already codified with regard to depositions in M.R.C.P. 32(a)(4). However, Rule 106 is somewhat narrower than Mississippi common law. The rule only applies the doctrine of completeness to written or recorded statements of a specific document. Under Mississippi case law the rule of completeness is extended to other writings and even to oral statements. *See Davis v. State,* 230 Miss. 183, 92 So. 2d 359 (1957); *Sanders v. State,* 237 Miss. 772, 115 So. 2d 145 ( 1969). Such a rule attempts to prevent misleading the jury by taking evidence out of context. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July restyling.)

## COMMENT

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## JUDICIAL DECISIONS

### ANALYSIS

In general.
Illustrative cases.

**In general.**

The rule does not necessarily require that all the remainder of a document must be offered into evidence, but only that part which "ought in fairness to be considered." Washington v. State, 726 So. 2d 209, 1998 Miss. App. LEXIS 1030 (Miss. Ct. App. 1998).

**Illustrative cases.**

Defendant, by not bringing to a court's attention a previous ruling in limine finding that a police investigator's interrogation of defendant would be excluded as hearsay, and then not asserting that the full statement in the interrogation was to be admitted when the investigator testified, waived the issue on appeal and was procedurally barred from asserting the issue as error at the circuit court level. Peel v. State, 283 So. 3d 203, 2019 Miss. App. LEXIS 104 (Miss. Ct. App. 2019).

Defendant failed to invoke the rule or make any argument for it to the trial court, and the matter could not be considered on direct appeal; furthermore, given defense counsel's contention that portions of the audio recording would have to be redacted, it was presumable that counsel did not want to proceed under this rule. Otherwise, the door would have been opened for the State to have the audio recording played in its entirety, unredacted. Jackson v. State, 245 So. 3d 433, 2018 Miss. LEXIS 270 (Miss. 2018).

Because defendant failed to proffer the remainder of an audio-recorded polygraph interview, the court of appeals was left without the ability to determine whether the trial court abused its discretion in not allowing admission of the whole recording. Fontaine v. State, 256 So. 3d 615, 2018 Miss. App. LEXIS 124 (Miss. Ct. App.), cert. denied, 256 So. 3d 593, 2018 Miss. LEXIS 447 (Miss. 2018).

State did not err in failing to play the video of defendant's interview with the police in its entirety because defendant possessed the ability to play any portion of the video during the defense's case-in-chief, but he rested without presenting any evidence; and the jury had access to and was encouraged to watch the video during its deliberations. Moss v. State, 190 So. 3d 9, 2015 Miss. App. LEXIS 645 (Miss. Ct. App. 2015).

Court did not err by refusing to admit defendant's recorded statement taken at the police department into evidence because defendant sought to introduce a self-serving statement into evidence without being subject to cross-examination. Defendant had no right to introduce such a statement into evidence in lieu of taking the stand to testify to the matter herself. Teston v. State, 44 So. 3d 977, 2008 Miss. App. LEXIS 681 (Miss. Ct. App. 2008), cert. dismissed, 44 So. 3d 969, 2010 Miss. LEXIS 520 (Miss. 2010).

Defendant's convictions for armed robbery and arson were proper where merely presenting a document which, testimony revealed, was inaccurate and written at the behest of defendant, was insufficient to establish that the judge had an interest in the outcome; defendant did not explain what benefit, other than to disqualify the judge, the testimony would have been to his case or how he was prejudiced by its absence. Payton v. State, 897 So. 2d 921, 2003 Miss. LEXIS 602 (Miss. 2003).

Trial court's ruling allowing a car manufacturer in a wrongful death case to introduce only the portion of the owner's manual tending to show that the warnings given were adequate, while excluding the portion of the manual that indicated otherwise was error under Miss. R. Evid. 106 because the jury was misled about what information was contained in the owner's manual. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564, 2003 Miss. App. LEXIS 752 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 2005 Miss. LEXIS 21 (Miss. Jan. 13, 2005), aff'd in part and rev'd in part, 904 So. 2d 1077, 2005 Miss. LEXIS 247 (Miss. 2005).

In a murder trial, defendant's written statement was properly excluded and defendant was properly prohibited from cross-examining law officials concerning the contents of the statement, because defendant would not be subject to cross-examination. Adams v. State, 851 So. 2d 366, 2002 Miss. App. LEXIS 696 (Miss. Ct. App. 2002), cert. denied, 849 So. 2d 899, 2003 Miss. App. LEXIS 699 (Miss. Ct. App. 2003).

Trial court did not abuse its discretion in refusing to admit the entire police report regarding an accident in which the plaintiff's daughter and granddaughter were killed as the report had only been used to cross-examine the plaintiff's expert and no portion of the report had been offered into evidence by the defendants. Rials v. Duckworth, 822 So. 2d 283, 2002 Miss. LEXIS 213 (Miss. 2002).

Trial judge's limitation on use of transcript of defendant's statement during testimony of officer was an infringement of defendant's right of cross-examination, where statement was relevant to show full story of what happened and to show that defendant's contemporaneous statement as to what occurred was consistent with his testimony at trial. Banks v. State, 631 So. 2d 748, 1994 Miss. LEXIS 9 (Miss. 1994).

### RESEARCH REFERENCES

**ALR.**

Construction and Application of Uniform Rule of Evidence 106, Applying Doctrine of Completeness to Writings and Recorded Statements. 27 A.L.R.6th 183.

## ARTICLE II. JUDICIAL NOTICE

### Rule 201. Judicial notice of adjudicative facts.

(a) *Scope.* — This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) *Kinds of facts that may be judicially noticed.* — The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) *Taking notice.* — The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) *Timing.* — The court may take judicial notice at any stage of the proceeding.

(e) *Opportunity to be heard.* — On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) *Instructing the jury.* — In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

**HISTORY: Restyled effective July 1, 2016.**

## ADVISORY COMMITTEE NOTE

The language of Rule 201 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. Subdivision (a) has been reworded to underscore that Rule 201 does not cover the entire field of judicial notice. Rather, it governs only judicial notice of "adjudicative" facts – the facts of the particular case – not "legislative" facts. No Rule deals with judicial notice of legislative facts. The Rule has also been restructured, combining two subdivisions and reordering others. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

**(a)** The entire codification of the law of judicial notice is in Rule 201. Professor Kenneth Davis, in his now famous article, *"An Approach to Problems of Evidence in the Administrative Process,"* 65 Harv. L. Rev. 364 (1942), divided judicial notice into two parts, adjudicative and legislative. Adjudicative facts are easily understood; they are specific to the litigation. Legislative facts, on the other hand, are more amorphous. To determine legislative facts one must look at the public policy or policies involved in judge-made law. Despite the existence of two types of judicial notice, Rule 201 only governs judicial notice of adjudicative facts. A court's application of judicial notice of legislative facts is more an inherent part of the judicial process rather than an evidentiary matter.

**(b)** Subdivision (b) provides that only certain kinds of facts may be susceptible to judicial notice. The first kind of fact that can be judicially noticed is one that is commonly known in the jurisdiction in which the court sits. The judge himself need not know the fact. Indeed, it is altogether irrelevant whether he does. The test is whether the fact is common knowledge in the area. The use of judicial notice for matters of common knowledge has long been practiced in Mississippi. On what street the local department store is located is the kind of commonly known fact of which a court may take judicial notice. The second kind of fact susceptible to judicial notice is one readily ascertainable. This would include such items as maps, census data, mortality tables, dates and time, and history. *See* Ellis and Williams, Miss. Evid. § 12-2 and the cases cited therein. See also *Nicketta v. Na-*

*tional Tea Co.,* 338 Ill. App. 159, 87 N.E.2d 30 (1949), and *Walls v. Mississippi State Bar,* 437 So. 2d 30, 33 (Miss. 1983).

Subdivision (b) does not allow judicial notice to be used when the fact is a dubious one or one in controversy.

**(c)** Subdivision (c) and (d) govern the use of the judicial discretion. The judge has discretion to take judicial notice of adjudicative facts, regardless of whether a party has requested him to do so. The basis for the exercise of such discretion is to expedite matters. On occasion a judge may be required to take judicial notice. If a party makes a request and supplies the judge with the necessary information, he must take judicial notice.

**(e)** Subdivision (e) provides for a procedure not formerly required in Mississippi. By providing an opportunity for a hearing on the matter of judicial notice, the rule is a safeguard for fairness. If a party requests an opportunity to be heard, under the rule he must be granted that opportunity. Because frequently there is no advance notice that judicial notice will be taken, a party has a right to be heard even after judicial notice has been taken.

**(f)** Subdivision (f) contains an important deviation from pre-rule Mississippi practice. The common law rule in Mississippi had been that evidence admitted pursuant to judicial notice was not conclusive. Subdivision (f), insofar as it concerns criminal cases, is not inconsistent with that rule. However, in civil cases under subdivision (f) the jury must accept such evidence as conclusive. The jury in criminal cases may choose to accept the evidence or reject it. This avoids any possible allegation that the defendant's right to a jury trial under the Sixth Amendment was violated. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

Construction.
Kinds of facts.
Illustrative cases.

**Construction.**

This rule did not require trial court to take judicial notice of asserted fact that the term "going with" meant sexual intercourse. Thornton v. Shows, 537 So. 2d 1363, 1989 Miss. LEXIS 27 (Miss. 1989).

**Kinds of facts.**

Judicial notice may be taken that a certain street is in a specific county, at least if the street has a sufficiently unusual name. Thomas v. State, 784 So. 2d 247, 2000 Miss. App. LEXIS 577 (Miss. Ct. App. 2000).

**Illustrative cases.**

In a lawsuit relating to a tax anticipation note, judicial notice was taken of a certified copy of the minutes from a county board of supervisors because it was a certified public record; moreover, judicial notice of a publication of a budget was taken, even though it was not a certified public record, because it was capable of accurate and ready determination by resort to sources whose accuracy could not have reasonably been questioned. Russell v. Humphreys Cnty. Bd. of Supervisors (In re Validation of Tax Anticipation Note), 187 So. 3d 1025, 2016 Miss. LEXIS 138 (Miss. 2016).

Although the deeds supporting a development company's claim to an 11-acre tract of land were not entered into evidence during a quiet title trial, the company submitted the deeds with its pleadings, and as the deeds were duly recorded public records, the trial court did not abuse its discretion by taking judicial notice of their existence. Riverview Dev. Co. v. Golding Dev. Co., 109 So. 3d 572, 2013 Miss. App. LEXIS 22 (Miss. Ct. App. 2013).

In a driving under the influence case, the State established the court's jurisdiction; although the arresting officer did not testify that the events occurred in the relevant city and county, there was direct and circumstantial evidence to show the crimes occurred there, and the court properly took judicial notice that the area where defendant was stopped was within the city. Russell v. State, 126 So. 3d 145, 2013 Miss. App. LEXIS 786 (Miss. Ct. App. 2013).

In a case in which a school district (District) appealed a decision by a chancery court finding that the school board's decision not to uphold a superintendent's recommendation to renew appellee employee's contract was not supported by any substantial evidence and was arbitrary and capricious, the District argued that the chancellor failed to follow the proper standard of review under Miss. Code Ann. § 37-9-113. The chancellor abused his discretion by taking judicial notice that school districts around the state had employees who retired and were rehired after 45 days on a half-time basis at half-time salary; while the chancellor might know that to be true and accurate, that fact was not generally known in the territorial jurisdiction of the trial court or capable of accurate determination by a source whose accuracy could not be questioned. Smith County Sch. Dist. v. Campbell, 18 So. 3d 335, 2009 Miss. App. LEXIS 646 (Miss. Ct. App. 2009).

In personal injury action, pursuant to Miss. R. Evid. 201, the trial judge was permitted to take judicial notice of the information found in the life expectancy tables even if they had not been admitted into evidence. Martin v. Weatherford, 31 So. 3d 1252, 2009 Miss. App. LEXIS 590 (Miss. Ct. App. 2009), cert. denied, 31 So. 3d 1217, 2010 Miss. LEXIS 173 (Miss. 2010).

During a trustee removal proceeding, the chancellor did not err in taking judicial notice that the trustee had an adverse position to the beneficiary's position; Miss. R. Evid. 201(e) expressly provided the trustee with a mechanism to challenge the chancellor's decision to take judicial notice of the adverse position, but the trustee failed to do so. McWilliams v. McWilliams, 994 So. 2d 841, 2008 Miss. App. LEXIS 423 (Miss. Ct. App. 2008).

In this rezoning appeal, the court took judicial notice that the county in question was devastated by the effects of a hurricane, but the effects thereof were not alleged to have been the basis for any change in the condition of the property at issue. Childs v. Hancock County Bd. of Supervisors, 1 So. 3d 862, 2007 Miss. App. LEXIS 748 (Miss. Ct. App. 2007), rev'd, 1 So. 3d 855, 2009 Miss. LEXIS 8 (Miss. 2009).

In making his findings in ruling on an inmate's postconviction relief (PCR) motion, the trial judge, pursuant to Miss. Code Ann. § 99-39-11, properly took judicial notice of his own docket and the prior proceedings had and conducted in both the criminal proceedings forming the basis for the attack via the civil PCR motion, as well as all proceedings had and conducted in the civil matter related to the PCR motion. Gulley v. State, 870 So. 2d 652, 2004 Miss. LEXIS 218 (Miss. 2004).

In a family dispute pertaining to the manner in which a securities account should be divided by the wife and children of a decedent, it was error for the chancellor to take judicial notice of the manner in which securities may be held based on his own personal experience with securities. In re Estate of Baker v. Baker, 760 So. 2d 759, 2000 Miss. LEXIS 129 (Miss. 2000).

Minutes of particular Board of Supervisors meeting were properly included in trial record, where facts were easily ascertainable through certified public records, and trial judge took judicial notice of contents of all minutes from Board of Supervisors, including minutes from the particular date in question. Ditto v. Hinds County, 665 So. 2d 878, 1995 Miss. LEXIS 585 (Miss. 1995).

Supreme court hearing appeal in election contest could take judicial notice of adjudicative fact that a special election was subsequently held and the incumbent was declared the victor. Rogers v. Holder, 636 So. 2d 645, 1994 Miss. LEXIS 59 (Miss. 1994).

## ARTICLE III. PRESUMPTIONS IN CIVIL CASES

### Rule 301. Presumptions in civil cases generally.

In a civil case, unless a Mississippi statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

**HISTORY: Restyled effective July 1, 2016.**

### ADVISORY COMMITTEE NOTE

The language of Rule 301 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 301 is only concerned with presumptions in civil proceedings. Once the party with the burden of proof has raised a presumption, a motion to dismiss by the opposing party will not be ordered. If the opposing party enters no evidence to rebut the presumption, then the court should instruct the jury that it may accept the presumption. The presumption does not disappear until credible or substantial evidence has been produced by the opposing party. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

### RESEARCH REFERENCES

**Law Reviews.**

The Little Rule That Never Was: Mississippi Rule of Evidence 301: Presumptions in Civil Actions and Proceedings, 70 Miss. L.J. 457 (2000).

# ARTICLE IV. RELEVANCE AND ITS LIMITS

## Rule 401. Test for relevant evidence.

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the case.

**HISTORY: Restyled effective July 1, 2016.**

### ADVISORY COMMITTEE NOTE

The language of Rule 401 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. The Rule has been restructured, adding subdivisions. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 401 makes no distinction between relevancy and materiality. The concept of materiality is merged into the concept of relevancy and retains no independent viability. Evidence is relevant if it is likely to affect the probability of a fact of consequence in the case. *Mississippi State Highway Commission v. Dixie Contractors, Inc.,* 375 So. 2d 1202, appeal after remand 402 So. 2d 811 (1979). If the evidence has any probative value at all, the rule favors its admission. Such has been the experience under Federal Rule of Evidence 401 which is identical to this rule. *Young v. Illinois Cent. Gulf R. Co.,* 618 F.2d 332 (5th Cir. 1980). Evidence to prove a collateral fact is relevant if the collateral fact has a tendency to prove or disprove an issue in the case. *American Potash & Chemical Corp. v. Nevins,* 163 So. 2d 224, 249 Miss. 450 (1964).

## JUDICIAL DECISIONS

### ANALYSIS

In general.
Admissions.
Adultery.
Audiotapes.
Bias.
Blood-stained clothing.
Blood test results.
Collateral-source payments.
Confidential informant.
Controlled substances.
Criminal history.
DNA evidence.
Doctor's testimony.
Drug paraphernalia.
Manufacturer's manual.
Marital status.
Money.
Other crimes, acts, or wrongs.
Photographs.
Polygraph results.
Real estate appraisals.
Redundancy.
Routine practices.
Separate victims.
Sexually explicit material.
Social media.
Videotapes.
Weapons.
Writings.
Illustrative cases.

**In general.**

Trial court committed no error by excluding any reference to the underinsured-motorist insurance carrier in the insured's automobile-accident lawsuit where the only issue was the amount of the insured's damages, and the carrier's role as the insured's underinsured motorist insurer would have been of no help in deciding the issues before the jury. Heflin v. Merrill, 154 So. 3d 857, 2014 Miss. LEXIS 558 (Miss. 2014).

Supreme Court of Mississippi holds as a matter of first impression that, in Mississippi, the proponent of evidence of the role of an uninsured-or underinsured-motorist carrier's role in litigation over benefits due under the policy as a result of a tortfeasor's negligence must demonstrate the relevance of the evidence and that it passes Miss. R. Evid. 403's balancing test. Heflin v. Merrill, 154 So. 3d 857, 2014 Miss. LEXIS 558 (Miss. 2014).

Trial judge did not abuse his discretion in excluding certain testimony from defendant's expert witness as it was irrelevant, but he allowed the expert to testify regarding his other conclusions. Grant v. State, 8 So. 3d 213, 2008 Miss. App. LEXIS 495 (Miss. Ct. App. 2008), cert. denied, 12 So. 3d 531, 2009 Miss. LEXIS 207 (Miss. 2009).

Trial judge is capable of sorting through exhibits based upon their relevancy. State v. Bass, 4 So. 3d 353, 2008 Miss. App. LEXIS 85 (Miss. Ct. App. 2008), cert. dismissed, 2009 Miss. LEXIS 113 (Miss. Mar. 12, 2009).

Male suspect's testimony about shoplifting plan related to acts and conduct that occurred during the course and in furtherance of a conspiracy at a time when the defendant, based upon the evidence and reasonable inferences drawn from the evidence, could be deemed to be a co-conspirator, and was thus not hearsay under Miss. R. Evid. 801(a)(1) or (2) and was both relevant and admissible under Miss. R. Evid. 401, 402, and 403. Wilson v. State, 967 So. 2d 32, 2007 Miss. LEXIS 593 (Miss. 2007).

Trial court erred in refusing to allow defense counsel to cross-examine to question about a fingerprint analysis on a bag of cocaine because defendant's theory of the defense was that he only attempted to possess cocaine, but he never actually possessed the cocaine; nevertheless, the error was harmless. Randolph v. State, 973 So. 2d 254, 2007 Miss. App. LEXIS 506 (Miss. Ct. App. 2007).

Admission of defendant's shirt and gun were relevant to the issue of identity and were not too remote in space nor time; the shirt and gun were similar to the description given by the victims and defendant admittedly wore the shirt and possessed the gun during the time in question. Jackson v. State, 969 So. 2d 124, 2007 Miss. App. LEXIS 472 (Miss. Ct. App. 2007).

In defendant's murder trial, the presence of fingerprints on the beer bottle and the "mag light" defendant used to attack the victim with, were irrelevant as to whether he acted in self-defense. Before trial, several witnesses had proffered testimony as to how the attack occurred, and there was no question that defendant struck the victim before shooting him moments later; thus, the circuit court judge did not abuse his discretion in denying defendant's motion for discovery and a continuance in that respect. Conway v. State, 915 So. 2d 521, 2005 Miss. App. LEXIS 979 (Miss. Ct. App. 2005), cert. denied, 927 So. 2d 750, 2006 Miss. LEXIS 217 (Miss. 2006).

Excluded testimony of a witness was in regards to a witness's location as of the time of trial, and the witness's whereabouts as of January 11, 2006, did not make it less probable that defendant and another burglarized the victims' storage shed on June 15, 2005; the excluded testimony was therefore irrelevant. Moore v. State, 958 So. 2d 824, 2007 Miss. App. LEXIS 144 (Miss. Ct. App.), cert. dismissed, 966 So. 2d 172, 2007 Miss. LEXIS 552 (Miss. 2007).

Trial court did not err in excluding evidence of defendant's accomplice's acquittal because, had defendant's accomplice been convicted, that information could not have been introduced by the State at defendant's trial; therefore, the reverse proposition also applied. Garner v. State, 856 So. 2d 729, 2003 Miss. App. LEXIS 936 (Miss. Ct. App. 2003).

Evidence that is remote in time or is otherwise far-removed from an issue at trial is not relevant, and may be excluded by trial court in the exercise of discretion. Tillis v. State, 661 So. 2d 1139, 1995 Miss. LEXIS 491 (Miss. 1995).

Demonstrations using anatomically correct dolls in child sex offense cases are generally relevant to corroborate that child knows body parts he or she is describing, and to assure that jury understands exactly to what child is referring. Murriel v. State, 515 So. 2d 952, 1987 Miss. LEXIS 2902 (Miss. 1987).

**Admissions.**

In a statutory rape case, counsel was not deficient in failing to seek suppression of a statement that defendant made to police based on relevance grounds; even though the statement did not include the name of the person defendant had sexual relations with or the date of the encounter, it was highly probative of his guilt. At the time the statement was made, defendant was being questioned about his encounter with the victim, and his statement was corroborative of the statement the victim made. Giles v. State, 187 So. 3d 116, 2016 Miss. LEXIS 122 (Miss. 2016).

In a prosecution for the sale of crack cocaine, statements by the defendant that he smoked crack, but did not sell it, and that he was merely "helping them guys out" were relevant. Ragin v. State, 724 So. 2d 901, 1998 Miss. LEXIS 618 (Miss. 1998).

**Adultery.**

In an action for alienation of affections, the defendant was improperly precluded from introducing evidence of the plaintiff's prior adultery, notwithstanding that it had occurred more than 10 years earlier and that the plaintiff and his wife had thereafter reconciled, since such evidence was still relevant on the issue of causation. Bland v. Hill, 735 So. 2d 414, 1999 Miss. LEXIS 158 (Miss. 1999).

**Audiotapes.**

It was no error to exclude a victim's voice mail messages in a murder prosecution because (1) the messages were too remote in time to show defendant feared the victim, and (2) defendant's subsequent amicable contacts with the victim showed a lack of fear. Brisco v. State, 295 So. 3d 498, 2019 Miss. App. LEXIS 481 (Miss. Ct. App. 2019), cert. denied, 293 So. 3d 834, 2020 Miss. LEXIS 142 (Miss. 2020).

Trial judge did not abuse the judge's discretion in defendant's criminal trial by excluding proffered recordings of 911 calls because, although it was relevant what law enforcement knew or believed about a shooting and who they identified as a suspect in the calls, the suspicions or statements of unidentified persons had no probative value as the calls were speculative and cumulative. Byrd v. State, — So. 3d —, 2019 Miss. App. LEXIS 146 (Miss. Ct. App. Apr. 9, 2019), cert. denied, 283 So. 3d 734, 2019 Miss. LEXIS 435 (Miss. 2019), cert. denied, — So. 3d —, 2019 Miss. LEXIS 473 (Miss. 2019).

Admission of audiotapes of sexually explicit telephone conversations between defendant and a 13-year-old victim was relevant to show defendant's disposition towards the child in a statutory rape case, and the recordings were authenticated when defendant admitted having made the statements in order to raise the child's self-confidence. Walker v. State, 878 So. 2d 913, 2004 Miss. LEXIS 589 (Miss. 2004).

Whether another individual committed statutory rape against the victim did not make it more or less probable as to whether defendant committed statutory rape against the victim; thus, the trial court did not abuse its discretion when it excluded audio cassette tapes of such evidence on the basis of relevance. Terrell v. State, 952 So. 2d 998, 2006 Miss. App. LEXIS 816 (Miss. Ct. App. 2006).

Defendant's conviction for the sale of cocaine was proper where the audiotape recording of the transaction was properly admitted into evidence pursuant to Miss. R. Evid. 401 because the tape was properly identified and authenticated; there was ample testimony by the officers and informants that they all had had previous contacts with defendant and were thus in a position to recognize his voice. Wilburn v. State, 856 So. 2d 686, 2003 Miss. App. LEXIS 873 (Miss. Ct. App. 2003).

In a prosecution for a transfer of cocaine, an audiotape of the transaction was relevant, notwithstanding that it did not capture a conversation about drugs, as it demonstrated that the defendant was present at the time and place of the transaction. Feazell v. State, 800 So. 2d 1175, 2001 Miss. App. LEXIS 193 (Miss. Ct. App. 2001).

Audiotapes of two drug transactions were properly admitted into evidence where (1) defense counsel conceded on a motion that the tapes were relevant evidence, (2) three witnesses having first hand knowledge of the transactions were presented by the state and all testified that they had listened to the tapes prior to trial and that the tapes were accurate depictions of the drug transaction, and (3) the fact that portions of the recording were inaudible did not render it inadmissible. Lawrence v. State, 780 So. 2d 652, 2001 Miss. App. LEXIS 4 (Miss. Ct. App. 2001).

The court applied the relevancy test of this rule and the holding of Stromas v. State, 618 So. 2d 116 (Miss. 1993), to find that the tape recordings at issue passed the relevancy test. Ratliff v. State, 752 So. 2d 416, 1999 Miss. App. LEXIS 690 (Miss. Ct. App. 1999).

Tape recordings of a drug transaction were relevant under the rule, notwithstanding that the tape was partially inaudible, where, when accompanied by a transcript outlining the taped conversation, it was clear that the recording at least provided the name of the defendant which was probative that he was involved in the drug transaction. Ragin v. State, 724 So. 2d 901, 1998 Miss. LEXIS 618 (Miss. 1998).

A tape recording of a sale of a controlled substance is relevant evidence at the trial of the person charged with making that sale. Martin v. State, 724 So. 2d 420, 1998 Miss. App. LEXIS 974 (Miss. Ct. App. 1998).

**Bias.**

Whatever bias might be shown by the indications of interest by the victim in receiving some compensation from defendant, the appellate court found that it was within the trial judge's discretion to refuse to permit the matter to be explored before the jury. Armstead v. State, 805 So. 2d 592, 2001 Miss. App. LEXIS 485 (Miss. Ct. App. 2001).

**Blood-stained clothing.**

Defendant's murder conviction was proper where the victim's blood-stained clothing was admissible pursuant to Miss. R. Evid. 401 because the clothing corroborated the testimony of the investigators and the photographs of the scene. Dendy v. State, 931 So. 2d 608, 2005 Miss. App. LEXIS 855 (Miss. Ct. App. 2005), cert.

denied, 933 So. 2d 303, 2006 Miss. LEXIS 346 (Miss. 2006).

**Blood test results.**

Trial court's exclusion of evidence of the victim's blood-alcohol content as not an abuse of discretion, as defendant did not offer any evidence to support a self defense theory and thus, the proffered evidence was not relevant. Evans v. State, 226 So. 3d 1, 2017 Miss. LEXIS 249 (Miss. 2017), cert. denied, — U.S. —, 138 S. Ct. 2567, 201 L. Ed. 2d 1104, 2018 U.S. LEXIS 4033 (U.S. 2018).

It was within the circuit court's discretion to sustain the prosecution's objection to defendant's testimony that he had passed a drug test because defendant passing a drug test sometime prior to the events at issue did not make it more or less probable that he was guilty of the charges he faced. Dowden v. State, 203 So. 3d 743, 2016 Miss. App. LEXIS 717 (Miss. Ct. App. 2016).

The fact that a blood test was not conducted within two hours of an accident and/or that the exact time of the accident and the exact time of the test were not recorded as required by § 63-11-8 does not require that the results of the blood test be excluded from evidence; the question of admissibility depends, instead, on whether the information is relevant. Acklin v. State, 722 So. 2d 1264, 1998 Miss. App. LEXIS 816 (Miss. Ct. App. 1998).

The results of a blood test were properly admitted into evidence, even though the blood test was not conducted within two hours of the accident and the exact time of the accident and the exact time of the test were not recorded as required by § 63-11-8, since there was no evidence that the defendant had ingested additional alcohol after the accident or that there was a general scientific concern that blood alcohol measured more than two hours after an occurrence is unreliable in demonstrating some degree of alcohol impairment at the time of the earlier event. Acklin v. State, 722 So. 2d 1264, 1998 Miss. App. LEXIS 816 (Miss. Ct. App. 1998).

Blood test results in paternity action were relevant to whether sexual intercourse took place during period of possible conception. Department of Human Servs. v. Moore, 632 So. 2d 929, 1994 Miss. LEXIS 110 (Miss. 1994).

**Collateral-source payments.**

In an automobile collision case, a trial court erred by allowing the jury to consider the income of plaintiff's husband as a personal injury attorney. Even if there was some probative value that could have been derived from the husband's ability to pay more for plaintiff's services as his office manager, the evidence should have been excluded because it served to show that plaintiff did not need to be compensated due to her financial ability to cover her own injuries. Loyacono v. Travelers Ins. Co., 163 So. 3d 932, 2014 Miss. LEXIS 304 (Miss. 2014).

A trial court did not err in excluding collateral-source evidence and in refusing to allow a partnership to use evidence to impeach an injured party when the injured party's testimony about medical bills and nonmedical evidence was not unduly prejudicial. Robinson Prop. Group, L.P. v. Mitchell, 7 So. 3d 240, 2009 Miss. LEXIS 195 (Miss. 2009).

To the extent that Mississippi courts have held that evidence of collateral-source payments may not be introduced for the purpose of impeaching false or misleading testimony, those decisions are expressly overruled. Permitting evidence of collateral-source payments for the narrow purpose of impeaching false or misleading testimony is consistent with the Mississippi Rules of Evidence. Robinson Prop. Group, L.P. v. Mitchell, 7 So. 3d 240, 2009 Miss. LEXIS 195 (Miss. 2009).

**Confidential informant.**

Defendant's conviction for murdering her husband was proper where an informant's identity was not relevant to any issues regarding whether defendant had committed the crime charged. Thus, the trial court was correct in refusing to disclose the identity of the informant. Stephens v. State, 911 So. 2d 424, 2005 Miss. LEXIS 386 (Miss. 2005).

**Controlled substances.**

In a prosecution of defendant for possession of a controlled substance, the trial court did not err in excluding a packet of powdered sweetener from evidence. The sweetener packet did not make the existence of any fact that was of consequence to the determination of the action more probable or less probable. Sherrod v. State, 148 So. 3d 24, 2014 Miss. App. LEXIS 544 (Miss. Ct. App. 2014).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the trial court did not err in allowing the decedent's sister and mother testify about the substance found in the decedent's pocket, which was identified as crystal meth. In part, their testimony corroborated the friend's testimony to the extent that the drugs were divided at a house and placed into plastic bags and the testimony also helped refute the testimony of another friend that he did not see any drugs and no one had used drugs in his home on the day of the accident. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450, 2010 Miss. LEXIS 200 (Miss. 2010).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the trial court did not err in not excluding the testimony of the decedent's friend concerning the decedent's alleged making, using, or selling methamphetamine before the accident since the testimony was relevant and concerned the type of activity that the decedent was involved in prior to the accident and what impact that activity might have had on the decedent's alertness at the time of the accident. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450, 2010 Miss. LEXIS 200 (Miss. 2010).

In defendant's trial for possession of cocaine, evidence that someone else drove the car in which the cocaine was found and was known to use drugs was not, without more, sufficient to show that defendant did not know about the presence of the cocaine. In the absence of other proof, the evidence was not relevant, and therefore, not admissible. Magee v. State, 912 So. 2d 1044, 2005 Miss. App. LEXIS 252 (Miss. Ct. App. 2005).

**Criminal history.**

Trial judge did not abuse the judge's discretion by admitting certified records of defendant's prior convictions and by overruling defendant's request for extensive redactions of the certified records because defendant would not stipulate that defendant was a prior convicted felon and the records were used to prove the charge against defendant of illegal possession of a firearm by a convicted felon. Page v. State, 269 So. 3d 440, 2018 Miss. App. LEXIS 305 (Miss. Ct. App. 2018), cert. dismissed, 2018 Miss. LEXIS 524 (Miss. Dec. 13, 2018).

In a murder case, the trial judge should have allowed defendant to introduce evidence of his knowledge of victim's violent criminal history. The trial judge committed reversible error by refusing to allow defendant to defend himself with evidence that tended to show his state of mind at the time of the killing, as the evidence was crucial to defendant's claim of self defense. Richardson v. State, 147 So. 3d 838, 2014 Miss. LEXIS 310 (Miss. 2014).

State of Mississippi was permitted to impeach defense witnesses, who testified at a sentencing hearing as to defendant's good character, by asking if the witnesses were aware that defendant had pleaded guilty to a felony charge of credit-card fraud. Batiste v. State, 121 So. 3d 808, 2013 Miss. LEXIS 295 (Miss. 2013), cert. denied, 572 U.S. 1117, 134 S. Ct. 2287, 189 L. Ed. 2d 178, 2014 U.S. LEXIS 3424 (U.S. 2014).

In a vehicular homicide case, the court properly admitted evidence of defendant's arrest for driving with a suspended driver's license because that evidence relevant, not only in regard to why a field sobriety test was not performed, but also to explain the sequence of events leading up to defendant's blood test. Additionally, the trial judge did instruct the jurors that they could not consider evidence of defendant's arrest as an inference of guilt. Teston v. State, 44 So. 3d 977, 2008 Miss. App. LEXIS 681 (Miss. Ct. App. 2008), cert. dismissed, 44 So. 3d 969, 2010 Miss. LEXIS 520 (Miss. 2010).

Certified indictment charging defendant with aggravated assault was relevant to prove aggravating circumstance that defendant had been under a sentence of imprisonment at the time he committed murder. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 19 (Miss.), op. withdrawn, sub. op., 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss. 1996).

Past criminal history, or drug use, of witness and her husband were not relevant, since witness and her husband were not on trial. Johnston v. State, 618 So. 2d 90, 1993 Miss. LEXIS 181 (Miss. 1993).

Trial court erred in preventing defendant, on relevance grounds, from questioning assailant and other witnesses about assailant's prior drug arrest, and specifically that assailant blamed his arrest on defendant, since these facts substantiated defendant's fear and the need for defendant to arm himself. Owens v. State, 605 So. 2d 817, 609 So. 2d 410, 1992 Miss. LEXIS 587 (Miss. 1992).

**DNA evidence.**

Expert was admitted as an expert in the field of molecular biology, forensic DNA analysis and DNA hair analysis, and she was allowed to testify as to the results of her DNA analysis without a specific objection from the defense, and the specific arguments made by defendant on appeal were not presented to the trial court; further, Miss. Code Ann. § 93-9-27, regarding the presumption of paternity genetic tests, did not provide the standard for admission of DNA evidence here, and the trial court did not abuse its discretion in allowing in the statistical results of the DNA tests. Rankin v. State, 963 So. 2d 1255, 2007 Miss. App. LEXIS 553 (Miss. Ct. App. 2007).

Where defendant's husband was attacked in the middle of the night and defendant was charged with assault, the trial court did not abuse its discretion in excluding DNA evidence that did not rule out the presence of a third party on the night of her husband's attack. Favre v. State, 877 So. 2d 554, 2004 Miss. App. LEXIS 656 (Miss. Ct. App. 2004).

**Doctor's testimony.**

Because the average lay juror could not rationally connect the chains of a causal link between two variables, an expert's proffered testimony was clearly relevant. Childers v. Ill. Cent. R.R. Co., 281 So. 3d 1175, 2019 Miss. App. LEXIS 264 (Miss. Ct. App. 2019).

Trial court was well within its discretion in allowing a doctor's expert testimony in a medical malpractice action because the court found that the doctor's testimony was both relevant and reliable, that the doctor was a board-certified OBGYN surgeon and medical professor, that the doctor had substantial medical experience, and that the doctor personally reviewed the patient's medical records and formulated an opinion as to the cause of the patient's post-surgical injury based on those records. Thomas v. Purdy, 231 So. 3d 190, 2017 Miss. App. LEXIS 190 (Miss. Ct. App.), cert. denied, 229 So. 3d 712, 2017 Miss. LEXIS 477 (Miss. 2017).

In an aggravated assault case under Miss. Code Ann. § 97-3-7(2), admission of a doctor's testimony was proper as the extent of the victim's injury was relevant to prove that the bodily harm was caused by means likely to produce serious bodily injury. Ford v. State, 975 So. 2d 859, 2008 Miss. LEXIS 102 (Miss. 2008).

**Drug paraphernalia.**

In an aggravated assault case, a trial court did not err by refusing to admit drug paraphernalia evidence because there was little probative value in the photo of a pipe. The trial judge permitted defendant to address the victim's intoxication on the night in question by other means. Ferguson v. State, 137 So. 3d 240, 2014 Miss. LEXIS 84 (Miss. 2014).

**Manufacturer's manual.**

Trial court's ruling to exclude material depicting a small child in a rearward facing passenger seat from a wrongful death lawsuit following the death of a 10-year-old child when a car air bag deployed on the ground that the material was not similar enough to the subject case was an abuse of the trial court's discretion. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564, 2003 Miss. App. LEXIS 752 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 2005 Miss. LEXIS 21 (Miss. Jan. 13, 2005), aff'd in part and rev'd in part, 904 So. 2d 1077, 2005 Miss. LEXIS 247 (Miss. 2005).

Trial court did not abuse its discretion by allowing decedent's beneficiaries in products liability action to refer to the blanked pages in the tire manufacturer's manual where the manual was introduced to show the quality requirements for a tire as set forth by the tire manufacturer so that those requirements could be compared to the tire that had a separated tread. Cooper Tire & Rubber Co. v. Tuckier, 826 So. 2d 679, 2002 Miss. LEXIS 9 (Miss.), cert. denied, 537 U.S. 820, 123 S. Ct. 97, 154 L. Ed. 2d 27, 2002 U.S. LEXIS 5585 (U.S. 2002).

**Marital status.**

References to mother's marital status and illegitimate children had no probative value in paternity action, since they had no tendency to make proposition that defendant was the child's father any more or less probable than without the evidence. Department of Human Servs. v. Moore, 632 So. 2d 929, 1994 Miss. LEXIS 110 (Miss. 1994).

**Money.**

Judge at trial for possession of illegal drugs with intent to distribute did not err in excluding evidence of judgment in civil forfeiture proceeding declaring money found in defendant's car to be nonforfeitable, since its admission into evidence would add no probative value on issue of defendant's guilt or innocence of possession with intent to distribute, and there was danger of confusing the issues or misleading the jury. Sample v. State, 643 So. 2d 524, 1994 Miss. LEXIS 466 (Miss. 1994).

Sum of $2,700 in cash found at scene of arrest made it more likely that defendants were involved in drug-dealing, and evidence was therefore relevant; the evidence was not prejudicial, as defendants were not convicted of intent to transfer but only of possession. Haddox v. State, 636 So. 2d 1229, 1994 Miss. LEXIS 182 (Miss. 1994), modified, 1994 Miss. LEXIS 323 (Miss. June 16, 1994).

Evidence of bank bag and its contents was relevant in that it had a great impact upon credibility of murder defendant's story that he had been robbed, and probative value of evidence substantially outweighed any legally cognizable prejudice. Jackson v. State, 551 So. 2d 132, 1989 Miss. LEXIS 330 (Miss. 1989).

**Other crimes, acts, or wrongs.**

Defendant's conviction for robbery by use of a deadly weapon was appropriate because the sparse reference by the State to defendant's possible gang membership was not part of the State's case-in-chief; the evidence had some probative weight; its probative value substantially outweighed the danger of unfair prejudice; and limited statements about gang membership went to show possible motive, opportunity, intent, or preparation. Pritchett v. State, 32 So. 3d 545, 2010 Miss. App. LEXIS 155 (Miss. Ct. App. 2010).

Defendant's manslaughter conviction was proper because, assuming for the sake of discussion that a witness's testimony was not irrelevant, it would have been confusing and misleading to the jury; the jury would have been led to believe that because the victim was verbally aggressive with the witness approximately four years earlier, he was more likely to have been the initial aggressor for the current series of events. Accordingly, the nonexistent probative value of the witness's testimony would have been outweighed by the massive prejudicial effect that would have stemmed from misleading the jury. Booker v. State, 64 So. 3d 988, 2010 Miss. App. LEXIS 329 (Miss. Ct. App. 2010), aff'd, 64 So. 3d 965, 2011 Miss. LEXIS 316 (Miss. 2011).

Defendant's manslaughter conviction was proper because a witness's testimony that the victim had cursed the witness's father and that the victim had a bad temper and was overbearing was correctly deemed not admissible. The hearsay testimony was not only too remote in time to be admissible, it was also irrelevant, and its probative value was outweighed by its prejudicial effect. Booker v. State, 64 So. 3d 988, 2010 Miss. App. LEXIS 329 (Miss. Ct. App. 2010), aff'd, 64 So. 3d 965, 2011 Miss. LEXIS 316 (Miss. 2011).

Defendant's murder convictions were proper because testimony regarding his prior threats against one of the victim, his former girlfriend, and his previous arrest for domestic violence were properly admitted into evidence. The evidence was relevant for the impeachment of a prior statement made by defendant, as well as relevant evidence of defendant's motive, intent, knowledge, and preparation. Madden v. State, 42 So. 3d 566, 2010 Miss. App. LEXIS 10 (Miss. Ct. App.), cert. dismissed, 49 So. 3d 106, 2010 Miss. LEXIS 460 (Miss. 2010).

While a witness's use of a victim's bank card possessed a tendency to establish a motive or intent for his involvement in the crime, for purposes of Miss. R. Evid. 401, the exact number of withdrawals and/or the exact amount actually withdrawn by the witness was not a fact of consequence to the determination of the case, and even if determined relevant, the evidence would have been properly excluded under Miss. R. Evid. 403, and this evidence was properly excluded under Miss. R. Evid. 402. Williams v. State, 994 So. 2d 808, 2008 Miss. App. LEXIS 183 (Miss. Ct. App.), cert. denied, 998 So. 2d 1010, 2008 Miss. LEXIS 665 (Miss. 2008).

While prior convictions which have been found relevant under Miss. R. Evid. 401, and which satisfy Miss. R. Evid. 404(b) may be potentially admissible to prove disposition, they may be allowed into evidence only after passing a Miss. R. Evid. 403 balancing test, which must be conducted on the record. Tate v. State, 912 So. 2d 919, 2005 Miss. LEXIS 194 (Miss. 2005).

Finding against the driver in her action for injuries resulting from a collision with a train at a railroad crossing was appropriate where the exclusion of testimony about three wrecks at the same railroad crossing was proper because events 10 years earlier were irrelevant in the dispute; further, the city and railroad corporation did not open the door to irrelevant evidence. Bowman v. CSX Transp., Inc., 931 So. 2d 644, 2006 Miss. App. LEXIS 418 (Miss. Ct. App. 2006).

In defendant's capital murder case, defendant's right to a fair trial was not violated by the trial court's admission of testimony about the sexual assault of the victim, which defendant was not charged with, that occurred in the moments preceding her murder, where sexual molestation was integrally so related to her murder that one could not coherently present the facts of her demise without reference to it, and the testimony described part of the res gestae of the crime charged and helped shed light on defendant's motive. McGowen v. State, 859 So. 2d 320, 2003 Miss. LEXIS 413 (Miss. 2003).

**Photographs.**

Trial court did not err in admitting two autopsy photographs of the murder victim where the two pictures were relevant and of probative value to assist a forensic pathologist in his explanation to the jury of the nature and extent of the injuries suffered by the victim. Martin v. State, 289 So. 3d 703, 2019 Miss. LEXIS 272 (Miss. 2019).

Trial court properly excluded five photographs of the victim and one social media post after defendant attacked her where she was shown smiling or enjoying life because they were not relevant inasmuch as they did not establish whether or not the victim's allegations were credible or to whether defendant attacked her, and the evidence was uncontested that she was injured and suffered major loss of blood. Phillips v. State, 285 So. 3d 685, 2019 Miss. App. LEXIS 278 (Miss. Ct. App.), cert. denied, 284 So. 3d 754, 2019 Miss. LEXIS 441 (Miss. 2019), cert. denied, — So. 3d —, 2019 Miss. LEXIS 469 (Miss. 2019).

Trial court did not abuse its discretion at defendant's trial for murder and desecration of a human corpse by admitting into evidence photographs showing parts of the victim's decomposed and dismembered corpse and the victim's dry bones from an autopsy because the photos were relevant to establish the desecration of the corpse, to explain the path of the fatal gunshot wound and the manner of dismemberment, and to corroborate an accomplice's testimony. The danger of unfair prejudice, if any, did not substantially outweigh the probative value. McCarty v. State, 262 So. 3d 553, 2018 Miss. App. LEXIS 294 (Miss. Ct. App. 2018), cert. denied, 260 So. 3d 798, 2019 Miss. LEXIS 43 (Miss. 2019).

Trial judge's decision that a photograph's content was not too remote in time to be relevant was not an abuse of discretion because it was within the trial judge's discretion to determine that the photograph of handcuffs in defendant's car was relevant, even though it was taken more than two months after the alleged attempted kidnapping; the presence of the handcuffs in defendant's car was offered to show that on his trips to "look for women," defendant was not looking for consensual relationships, and the presence of handcuffs made it more probable that defendant grabbed the victim with the intent to kidnap her. Tucker v. State, 64 So. 3d 594, 2011 Miss. App. LEXIS 324 (Miss. Ct. App. 2011).

Defendant's convictions for capital murder during the commission of a robbery were proper because the admission of autopsy photographs was not erroneous. A few of the photographs were introduced to show the initial state of the victims' bodies as received by the doctor, and the remainder depicted different parts of the victims' bodies to illustrate the various injuries they suffered; the photographs were not repetitive since each depicted different injuries. Gillett v. State, 56 So. 3d 469, 2010 Miss. LEXIS 337 (Miss. 2010), cert. denied, 565 U.S. 1095, 132 S. Ct. 844, 181 L. Ed. 2d 552, 2011 U.S. LEXIS 8944 (U.S. 2011).

Trial court did not err in admitting photographs of the murder victims into evidence because (1) the photographs had probative value; (2) they aided in describing the circumstances of the killing, in describing the location of the body and cause of death, or in supplementing or clarifying the testimony of a witness; and (3) their probative value was not substantially outweighed by the danger of unfair prejudice. Chamberlin v. State, 989 So. 2d 320, 2008 Miss. LEXIS 352 (Miss. 2008), cert. denied, 555 U.S. 1106, 129 S. Ct. 908, 173 L. Ed. 2d 122, 2009 U.S. LEXIS 495 (U.S. 2009).

In an aggravated assault case under Miss. Code Ann. § 97-3-7(2), the trial court did not abuse its discretion by finding that the probative value of the photographs of the victim's injury outweighed any danger of unfair prejudice as they were relevant to prove that defendant used means likely to produce death or serious bodily harm, and they were small and blurry and not particularly gruesome. Ford v. State, 975 So. 2d 859, 2008 Miss. LEXIS 102 (Miss. 2008).

In a case where defendant was charged with capital murder after he slammed his car into a patrol car that was blocking his path during a chase, a trial court did not err by allowing the introduction of pictures of the deceased officer since they were relevant and clarified the circumstances and manner of death for the jury. White v. State, 964 So. 2d 1181, 2007 Miss. App. LEXIS 576 (Miss. Ct. App. 2007).

In a capital murder case, a court properly admitted photographs of defendant's tattooed body where part of the defense was that he killed the victim in self-defense; however, had defendant been engaged in self-defense, it would likely have resulted in injuries greater than the bruise he suffered on his hand, and therefore, the photographs were relevant. Further, they were not prejudicial because they did not depict gruesome images that would inflame the mind of the jury. Spicer v. State, 921 So. 2d 292, 2006 Miss. LEXIS 20 (Miss.), cert. denied, 549 U.S. 993, 127 S. Ct. 493, 166 L. Ed. 2d 364, 2006 U.S. LEXIS 8022 (U.S. 2006).

Crime scene photograph was relevant within the meaning of Miss. R. Evid. 401, Miss. R. Evid. 402, and Miss. R. Evid. 403, as it was not prejudicial to defendant in any way. Bradley v. State, 948 So. 2d 506, 2007 Miss. App. LEXIS 33 (Miss. Ct. App. 2007).

Admission of photographs of the victim in a murder case was not an abuse of discretion because they were not overly gruesome and they were relevant to show that defendant killed the victim, as they depicted the circumstances of the shooting, the location of the body, and the cause of death, and they supplemented and clarified testimony regarding the location of the wounds, the trajectory of the bullets, the number of the bullets, and the cause and manner of death. Cotton v. State, 933 So. 2d 1048, 2006 Miss. App. LEXIS 520 (Miss. Ct. App. 2006).

Defendant's manslaughter conviction was proper pursuant to Miss. R. Evid. 401 where the trial judge did not abuse his discretion in admitting the challenged photographs because the photos served a valid evidentiary purpose in establishing whether defendant acted in self-defense. Thus, their admission did not deny defendant a fair trial under the Sixth and Fourteenth Amendments. Moore v. State, 932 So. 2d 833, 2005 Miss. App. LEXIS 800 (Miss. Ct. App. 2005), cert. dismissed, 921 So. 2d 1279, 2005 Miss. LEXIS 780 (Miss. 2005), cert. denied, 933 So. 2d 303, 2006 Miss. LEXIS 520 (Miss. 2006).

In defendant's trial for the sale of cocaine and marijuana to an undercover officer, the trial court did not abuse its discretion under Miss. R. Evid. 401 and 403 in excluding photographs that showed defendant with long braided hair because the photographs were untimely in relation to the drug sale. Defendant's mother testified that defendant could have changed his hairstyle between the months when the photographs were taken and the drug transaction. Johnson v. State, 908 So. 2d 100, 2005 Miss. LEXIS 363 (Miss. 2005).

In a criminal trial for sexual battery, the court did not err in admitting photographs of the victim and her injuries; the photographs supported the victim's claim that the sexual encounter was nonconsensual and was the result of force on the part of defendant and his accomplice. Norris v. State, 893 So. 2d 1071, 2004 Miss. App. LEXIS 806 (Miss. Ct. App. 2004), cert. denied, 893 So. 2d 1061, 2005 Miss. LEXIS 122 (Miss. 2005).

Trial court did not err by admitting the photographs of the deceased; the crime scene photograph aided in describing the circumstances surrounding the crime and the location of the victims, and the autopsy photographs helped the jury understand the location of the wounds. Lewis v. State, 905 So. 2d 729, 2004 Miss. App. LEXIS 1188 (Miss. Ct. App. 2004).

Photograph of bank bags found behind an office after the robbery were admissible evidence because they were relevant as they helped tell the story of the robbery and it was likely that someone involved in the robbery had run past the office and dropped the bags, even if the witness could not identify either defendant. Collins v. State, 817 So. 2d 644, 2002 Miss. App. LEXIS 313 (Miss. Ct. App. 2002).

In a prosecution for murder, there was no error in the introduction into evidence of photographs of the murder victim where (1) there was nothing in the record to indicate that the admission of the photographs was simply a ploy on the part of the prosecutor to arouse the passion and prejudice of the jury, (2) the photographs established that the victim was dead as a result of a criminal act, and the extent, position, and nature of the wounds the victim sustained, and (3) the photographs assisted the jury in visualizing the crime scene and corroborated the testimony of the investigators of the crime scene. Humphrey v. State, 759 So. 2d 368, 2000 Miss. LEXIS 101 (Miss. 2000).

The display of photographs which quite graphically showed the gruesome means by which a murder victim's life was ended did not constitute reversible error where the defense advanced the theory of self-defense and presented a witness who seemed to be testifying that the purpose of the blows inflicted on the victim was merely to incapacitate him while the defendant and his cousin made good their escape from the range of the victim's pistol. Dean v. State, 746 So. 2d 891, 1998 Miss. App. LEXIS 1001 (Miss. Ct. App. 1998).

Photographs of the two murder victims were relevant where the lower court heard witness testimony concerning the injuries of the victims, specifically relating to the placement of the gunshot wounds, and the photographs in question were corroborative of such testimony. Jordan v. State, 728 So. 2d 1088, 1998 Miss. LEXIS 566 (Miss. 1998), cert. denied, 527 U.S. 1026, 119 S. Ct. 2375, 144 L. Ed. 2d 778, 1999 U.S. LEXIS 4276 (U.S. 1999).

Color photographs of murder victim taken during pathologist's postmortem examination had probative value to show location, angulation, and trajectory of gunshot wounds, and probative value was not outweighed by any prejudicial effect. Hart v. State, 637 So. 2d 1329, 1994 Miss. LEXIS 115 (Miss. 1994).

**Polygraph results.**

In a capital murder case, when it was revealed that an inmate testifying against defendant had previously given false information to the police, it was reversible error for the trial court to allow the inmate's testimony that he had volunteered to take a polygraph examination as to his current testimony. Manning v. State, 903

So. 2d 29, 2004 Miss. LEXIS 587 (Miss. 2004).

In defendant's murder trial, a witness's polygraph results were not admissible into evidence. Adams v. State, 851 So. 2d 366, 2002 Miss. App. LEXIS 696 (Miss. Ct. App. 2002), cert. denied, 849 So. 2d 899, 2003 Miss. App. LEXIS 699 (Miss. Ct. App. 2003).

**Real estate appraisals.**

Trial court erred when it allowed appraisals to be admitted in a probate case because the appraiser failed to appear as a foundational witness under Miss. R. Evid. 901; the appraiser's evaluations were relevant, thus meeting the first prong of the modified Daubert standard, but the decedent's son offered no proof of the appraiser's methods or procedures for appraising either property, and none of applicable reliability factors were considered prior to admitting the appraisals. Additionally, the widow never had the ability to cross-examine the appraiser on his methods or procedures. Hodges v. Hodges (In re Estate of Hodges), 109 So. 3d 150, 2013 Miss. App. LEXIS 106 (Miss. Ct. App. 2013).

**Redundancy.**

Circuit judge did not commit prejudicial error under Miss. R. Evid. 103(a) in disallowing "ultimate issue" opinion testimony by an expert under Miss. R. Evid. 704 in a county's action against the state alleging that state statutes requiring counties to provide legal services for indigent criminal defendants were unconstitutional because the expert had already addressed his specific concerns about the indigent defense system in his extensive testimony, and allowing one final, sweeping opinion during re-direct examination was redundant and unnecessary under Miss. R. Evid. 401. Quitman County v. State, 910 So. 2d 1032, 2005 Miss. LEXIS 438 (Miss. 2005).

**Routine practices.**

Course of conduct evidence introduced by plaintiff was relevant and was not substantially more prejudicial than probative; as defendants were sued for punitive damages based on an allegedly bad faith failure to pay, evidence which tended to prove defendants had a routine practice of bad faith dealings with other companies became important and relevant. Hans Constr. Co. v. Drummond, 653 So. 2d 253, 1995 Miss. LEXIS 144 (Miss. 1995).

**Separate victims.**

In a capital murder case where defendant was indicted separately for each of four murders, the trial court committed reversible error and denied defendant a fair trial because it admitted irrelevant evidence regarding the other three victims; throughout the trial, the prosecution referred continually to all four individuals who had been killed, through the testimony of its witnesses and the evidence it introduced. Flowers v. State, 842 So. 2d 531, 2003 Miss. LEXIS 149 (Miss. 2003).

**Sexually explicit material.**

Admission of sexually explicit pictures which were not seen during sexual battery constituted reversible error. Wade v. State, 583 So. 2d 965, 1991 Miss. LEXIS 461 (Miss. 1991).

**Social media.**

Snapchat video was relevant and its probative value was not substantially outweighed by the danger of unfair prejudice or misleading the jury. The video was relevant because it showed the victim's condition during the incident and corroborated the State's testimony regarding the incident, and given the testimony, simply because defendant was not actually recorded and/or depicted in the Snapchat video was of no consequence. Pugh v. State, 270 So. 3d 949, 2018 Miss. App. LEXIS 455 (Miss. Ct. App. 2018).

**Videotapes.**

There was no abuse of discretion by admitting into evidence a video of the victim sleeping recorded on defendant's phone because the trial court heard testimony from both parties regarding the validity and veracity of the cell phone video recording and found that the video was more probative than prejudicial; defendant failed to show how the admission of the video adversely affected a substantial right. Marion v. State, 281 So. 3d 174,

2019 Miss. App. LEXIS 91 (Miss. Ct. App. 2019).

Probative value of videos was not substantially outweighed by any danger of unfair prejudice to defendant because the State used the videos to aid its identification of defendant as one of the perpetrators of a home invasion; the videos helped the State establish that defendant and an accomplice knew each other, and they also showed the men in possession of weapons like those used to commit the home invasion and in possession of property actually stolen during the home invasion. Jarvis v. State, 281 So. 3d 133, 2019 Miss. App. LEXIS 72 (Miss. Ct. App. 2019).

There was no abuse of discretion in the trial court's decision to exclude a videotape, which was not relevant; there was evidence implying that defendant did not necessarily wear a mask in the bank to conceal his identity, and thus it was inconsequential that he appeared to have the same mask and clothes on from the video during the robbery. Chilton v. State, 245 So. 3d 525, 2017 Miss. App. LEXIS 622 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 883, 2018 Miss. LEXIS 288 (Miss. 2018).

In a case in which a jury found defendant guilty of accessory after the fact to murder, the trial court did not abuse its discretion in admitting into evidence a profane rap video featuring defendant and others, who acted out a violent scene at the end of the video. The video was relevant to show defendant's attempt to prevent a witness from testifying at trial, through intimidation, and the video's probative value was not substantially outweighed by the danger of unfair prejudice. Henderson v. State, 211 So. 3d 761, 2016 Miss. App. LEXIS 426 (Miss. Ct. App. 2016).

Denial of appellant's, an inmate's, motion for postconviction relief was proper because his appellate counsel was not ineffective in choosing not to file a motion for rehearing. The presence of fingerprints on the items in question was irrelevant given the eyewitness testimony expected and thus, it was clear that while the admission of the videotape might have influenced the trial court's decision to deny the inmate's motion to examine and test the physical evidence, it was not the only reason cited in its denial. Conway v. State, 48 So. 3d 588, 2010 Miss. App. LEXIS 270 (Miss. Ct. App.), cert. denied, 49 So. 3d 1139, 2010 Miss. LEXIS 627 (Miss. 2010).

In a negligence case, a trial court abused its discretion by failing to admit a videotape of an injured party into evidence, which showed her riding roller coasters at an amusement park, because the evidence was relevant under Miss. R. Evid. 401; a reasonable juror could have concluded that it casted doubt on the severity of her injuries and her medical expenses, even though she claimed to not be seeking damages after the date of a second epidural injection. Further, the evidence was not subject to exclusion under Miss. R. Evid. 403 because its probative value was not substantially outweighed by the danger of unfair prejudice. James v. Carawan, 995 So. 2d 69, 2008 Miss. LEXIS 423 (Miss. 2008).

In a possession of marijuana case, the trial court did not abuse its discretion in sustaining the state's objection to defendants' cross-examination of the chief narcotics officer regarding whether he had been instructed not to videotape interviews, as the issue of videotaping the interviews was irrelevant under Miss. R. Evid. 401 and Miss. R. Evid. 402 to guilt or innocence where there was no dispute regarding the substance of either defendants' interviews or written statements. Juarez v. State, 965 So. 2d 1061, 2007 Miss. LEXIS 555 (Miss. 2007).

Trial court improperly admitted two-day-in-the-life videos. The first video included prejudicial photos of the decedent's wedding and the decedent's stepson, who was not a party; the second video showed the decedent's mother sobbing, and it was redundant. Eckman v. Moore, 876 So. 2d 975, 2004 Miss. LEXIS 287 (Miss. 2004).

In a wrongful death case, a court did not abuse its discretion in admitting photographs of the decedent and two "day in the life" videos where the photographs were relevant to show plaintiff's loss, and to prove plaintiff's case. The footage showed the type of person the decedent was prior to his injuries, the type of care decedent subsequently required and his drastically diminished capacity to interact with his wife, child and family, among other things. Eckman v. Moore, 2003 Miss. LEXIS 552 (Miss. Oct. 23, 2003), op. withdrawn, 2004 Miss. LEXIS 310 (Miss. Mar. 25, 2004), sub. op., 876 So. 2d 975, 2004 Miss. LEXIS 287 (Miss. 2004).

Videotape taken at booking of defendant charged with assaulting police officers was properly admitted for impeachment purposes; tape was not collateral or too remote in time, probative value of tape substantially outweighed its prejudicial value, and tape was relevant to credibility of defendant's brother, whose recollection of events wavered significantly. Johnson v. State, 655 So. 2d 37, 1995 Miss. LEXIS 232 (Miss. 1995).

**Weapons.**

In a murder case, a knife, golf club, and brass knuckles were probative and admissible because the forensic pathologist testified that the victim had suffered blunt-force trauma and multiple cuts or stab wounds; the items, as well as the hair fibers, rubber strap, and mop, constituted a part of the surrounding scene of the crime and were probative; defendant did not show how he was prejudiced by the introduction of any of the items; and defendant had the opportunity to cross-examine the witnesses who testified regarding the evidence, and to emphasize to the jury his argument that the items were not used in the commission of the crime. Affleck v. State, 210 So. 3d 1067, 2015 Miss. App. LEXIS 675 (Miss. Ct. App. 2015), cert. denied, 203 So. 3d 598, 2016 Miss. LEXIS 388 (Miss. 2016), cert. denied, 2016 Miss. LEXIS 391 (Miss. Sept. 15, 2016), cert. denied, 580 U.S. 1128, 137 S. Ct. 1091, 197 L. Ed. 2d 201, 2017 U.S. LEXIS 1278 (U.S. 2017).

Since an expert specifically opined that a knife found in defendant's car was consistent with the type of knife that caused the victim's stab wounds, and because defendant admitted to stabbing the victim with a knife, the knife was relevant and its probative value was not outweighed by any arguable prejudicial effect. Ronk v. State, 172 So. 3d 1112, 2015 Miss. LEXIS 219 (Miss. 2015), cert. denied, 578 U.S. 926, 136 S. Ct. 1657, 194 L. Ed. 2d 773, 2016 U.S. LEXIS 2643 (U.S. 2016).

To convict a defendant of trafficking in stolen firearms, the State did not need to enter the actual firearms into evidence as (1) there was no best evidence rule with regard to physical evidence that was not writings, recordings, or photographs; (2) requiring the State to offer actual firearms into evidence would impose a high burden on prosecutors and the courts in cases where there were large quantities of physical evidence; and (3) the State satisfied the relevancy and authentication requirements permitting the photographs of the firearms to be introduced into evidence. Riley v. State, 1 So. 3d 877, 2008 Miss. App. LEXIS 378 (Miss. Ct. App. 2008), cert. denied, 999 So. 2d 1280, 2009 Miss. LEXIS 18 (Miss. 2009).

In a capital murder case, the trial court did not abuse its discretion pursuant to Miss. R. Evid. 401 and Miss. R. Evid. 403 in admitting .22 caliber pistol into evidence, and while the pistol was not directly connected to defendant through any forensic evidence, other evidence in the case demonstrated that it was of the same caliber as the one that killed the victim and that defendant had access to the weapon; further, the forensic scientist called by the state did not state that the pistol introduced into evidence could have been the weapon used in the victim's murder, but he was careful to note only that the weapon had the same caliber, and that both the weapon in evidence and the murder weapon lacked distinguishing characteristics that would allow a positive identification, and therefore the state's witness did not impermissibly speculate whether the pistol had been used in the crime. Ross v. State, 954 So. 2d 968, 2007 Miss. LEXIS 235 (Miss. 2007).

In an aggravated assault case, a trial court did not err by failing to exclude a victim's identification of a gun under Miss. R. Evid. 401 and Miss. R. Evid. 402 because whether the victim was able to identify it was a question for the jury; the victim testified that she saw this particular gun earlier in the night and when she was shot with it. Parks v. State, 950 So. 2d 184, 2006 Miss. App. LEXIS 463 (Miss. Ct. App. 2006).

**Writings.**

Admission of defendant's letters to a child abuse victim's mother a year prior to an incident were admissible evidence under Miss. R. Evid. 401 as they contained defendant's views on disciplining children. Baker v. State, 70 So. 3d 235, 2011 Miss. App. LEXIS 24 (Miss. Ct. App.), cert. denied, 69 So. 3d 767, 2011 Miss. LEXIS 445 (Miss. 2011).

Defendants' conspiracy convictions were proper where the trial court did not err in admitting a letter to the first defendant, pursuant to Miss. R. Evid. 401 and 402, because the critical fact at issue was whether the first defendant was engaged in a conspiracy, and that letter was evidence that tended to make that fact more probable or less probable than without the evidence. Farris v. State, 906 So. 2d 113, 2004 Miss. App. LEXIS 1126 (Miss. Ct. App. 2004).

In a rape and simple assault case, the trial court did not abuse its discretion in admitting letters that defendant had apparently written to the victim, because, although their introduction may have had little probative value as to the pivotal issues of the case, it seemed likewise true that there was no real prejudice to the defense in permitting the jury to discover defendant's apparently strong, perhaps even excessively strong, emotional ties to his estranged wife. Williams v. State, 868 So. 2d 346, 2003 Miss. App. LEXIS 669 (Miss. Ct. App. 2003).

Court at trial for possession of drugs erred in admitting handwritten note into evidence; State failed to establish who wrote the note and when it was written, and without adequate authentication and identification the note was irrelevant and should have been excluded. Frierson v. State, 606 So. 2d 604, 1992 Miss. LEXIS 568 (Miss. 1992).

**Illustrative cases.**

Trial judge did not abuse their discretion by excluding an accident-reconstruction expert as an expert witness because, although the witness was qualified through training, certification, and experience, and the testimony was relevant, the judge did not find the testimony of the witness sufficiently reliable in that without laws governing private gas-station parking lots and without the parties' estimated speeds in a parking lot at the time of an accident the witness could not connect the dots between any factual basis and a finding of fault. Thompson v. Holliman, 283 So. 3d 718, 2019 Miss. LEXIS 389 (Miss. 2019).

Wills were clearly relevant as to the decedent's intent and his wishes for his property after his death. Quinn v. Quinn, 278 So. 3d 1160, 2019 Miss. App. LEXIS 57 (Miss. Ct. App. 2019).

Evidence of a parent's methamphetamine use years earlier that resulted in the parent's older child from an earlier relationship testing positive for methamphetamine and the parent's losing custody and parental rights to the child was relevant in a later termination of parental rights and adoption proceeding because the parent essentially repeated the same conduct with respect to the children from a different relationship in the later case. J.P. v. L.S., 290 So. 3d 345, 2019 Miss. App. LEXIS 46 (Miss. Ct. App. 2019).

Chancellor's evidentiary rulings on the parties' motion-in-limine requests in a will contest resulted in the admission of evidence that was relevant to the question of the will's validity as the deeds and bank records admitted were probative of the pattern of conduct that existed between the proponents of the will and the decedent, the confidential relationship that existed between the proponents and the decedent, and the impeachment of one proponent's direct-examination testimony. Posey v. Pope, 269 So. 3d 1213, 2018 Miss. App. LEXIS 407 (Miss. Ct. App. 2018).

Defendant's recorded interview with police officers, which was made after defendant voluntarily waived defendant's Miranda rights, was erroneously entered into evidence at defendant's trial for child molestation because defendant's statements in the interview pertaining to defendant's watching pornography on a computer at home, consensual sexual activity with defendant's wife, and defendant's marijuana use were inflammatory and neither relevant, nor probative to any issue. Gabriel v. State, 270 So. 3d 58, 2018 Miss. App. LEXIS 344 (Miss. Ct. App. 2018).

Admission of a detective's testimony was not plain error because the jury was not exposed to inadmissible hearsay, and defendant's rights under the Confrontation Clause were not implicated; the detective's testimony was relevant and related to his decisionmaking in his investigatory process. Smith v. State, 258 So. 3d 292, 2018 Miss. App. LEXIS 343 (Miss. Ct. App. 2018).

State's motions in limine were properly granted because the evidence of the shooting of defendant's mother months earlier was not relevant and allowing the evidence to be introduced certainly would have confused the jury. Wells v. State, 233 So. 3d 279, 2017 Miss. LEXIS 409 (Miss. 2017).

While evidence of a prior victim's pregnancy and adoption was not relevant and thus, improperly admitted, the error was harmless, as defendant failed to object and was not unfairly prejudiced. Roberson v. State, 287 So. 3d 219, 2017 Miss. App. LEXIS 526 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 67, 2018 Miss. LEXIS 239 (Miss. 2018).

Trial court did not err in not allowing defendant to make an adequate offer of proof regarding what a domestic violence victim had done in the past for a living. The victim's career choices would not have made any fact of consequence more or less probable and therefore were not relevant. Johnson v. State, 204 So. 3d 763, 2016 Miss. LEXIS 487 (Miss. 2016).

Trial court erred in prohibiting defendant from offering evidence to rebut the State's argument that his flight indicated consciousness of guilt because the evidence was relevant; defendant's guilt was a fact of consequence in the case, and once the State used flight to prove that fact, any evidence supporting defendant's alternative explanation for that flight had some tendency to make that fact more or less probable. Kuebler v. State, 204 So. 3d 1220, 2016 Miss. LEXIS 462 (Miss. 2016).

Circuit court did not abuse its discretion in prohibiting defendant from cross-examining the victim about alleged prior instances of inappropriate touching because there was no evidence that the victim described sexual touching; the victim was six years old when he described sexual abuse, and that evidence would not have made it more or less probable that defendant was guilty. Dowden v. State, 203 So. 3d 743, 2016 Miss. App. LEXIS 717 (Miss. Ct. App. 2016).

Trial judge did not err when he struck the opinion testimony of an accident victim's expert witness regarding a neutral wire theory as irrelevant because it was undisputed that the injury to the victim while attempting to attach a metal conduit to an electrical pole was not caused by the presence of an unrelated, neutral wire. Griffith v. Entergy Miss., Inc., 203 So. 3d 579, 2016 Miss. LEXIS 372 (Miss. 2016).

Shotgun and shells recovered behind defendant's home were admissible relevant evidence, as a shell of the same brand and gauge was found in a closet inside the defendant's home near where the victim was shot and the pathologist testified that the victim's wounds indicated he had been shot with something larger than a handgun. Roberson v. State, 199 So. 3d 660, 2016 Miss. LEXIS 348 (Miss. 2016).

Testimony explaining the absence of the bullet and spent shell casing was relevant in a murder case in which the victim was killed by bullet wounds and nothing suggested that the officers had conspired to discard the evidence. Jones v. State, 203 So. 3d 600, 2016 Miss. LEXIS 319 (Miss. 2016).

In an inverse condemnation proceeding against the Mississippi Transportation Commission (Commission), it was not error to grant the Commission's motion in limine to bar evidence of the Commission's alleged abandonment of an easement, apart from the Commission's minutes, because (1) the Commission could not abandon the easement by nonuse, and (2) any determination releasing the easement had to be on the Commission's minutes, making such minutes the only relevant admissible evidence of such a release. Bay Point Props. v. Miss. Transp. Comm'n, 201 So. 3d 1046, 2016 Miss. LEXIS 282 (Miss. 2016), cert. denied, — U.S. —, 137 S. Ct. 2002, 198 L. Ed. 2d 750, 2017 U.S. LEXIS 4057 (U.S. 2017).

Trial court did not abuse its discretion in limiting a defense witness's testimony because defendant failed to prove the relevance of the testimony regarding the occasion he smoked marijuana with the victim; the evidence did not support defendant's theory that he fought with the victim over drug money because the testimony did not relate to any occurrences involving defendant, the victim, and the incident or show that either the victim or defendant was involved in buying or selling drugs. Scott v. State, 231 So. 3d 1024, 2016 Miss. App. LEXIS 404 (Miss. Ct. App. 2016), aff'd, 231 So. 3d 995, 2017 Miss. LEXIS 440 (Miss. 2017).

Defendant's cross-examination of an officer was not improperly limited because (1) defendant sought to examine the officer about an unrelated traffic stop, and (2) such inquiry would have elicited irrelevant evidence that would have confused the jury. Johnson v. State, 194 So. 3d 191, 2016 Miss. App. LEXIS 384 (Miss. Ct. App. 2016).

Trial court did not err by allowing the prosecution to cross-examine defendant at defendant's trial for sexual battery about defendant's previous paramours to discredit defendant's alibi witness because defendant's omission of the name of the alibi witness from defendant's list of previous paramours tended to make it more probable that the testimony of the alibi witness was not credible. Grant v. State, 198 So. 3d 400, 2016 Miss. App. LEXIS 139 (Miss. Ct. App. 2016).

Cell phone records did not have any tendency to make the existence of any fact that was of consequence to the determination of the action, which involved whether defendant was guilty, more or less likely than it would have been without the evidence; whether defendant actually made the phone calls and sent some text messages before the attack was not relevant and the trial court did not abuse its discretion in excluding the cell phone records. Burgess v. State, 210 So. 3d 569, 2016 Miss. App. LEXIS 314 (Miss. Ct. App. 2016), cert. denied, 209 So. 3d 431, 2017 Miss. LEXIS 59 (Miss. 2017).

Witness's testimony that she believed defendant was responsible for the victim's death when she heard that the victim had been killed was not irrelevant and was admissible because it was based on her involvement in the events that preceded the victim's death including defendant following her and threatening the victim; and because the prejudicial effect of the witness's testimony was substantially mitigated by the circuit court's instruction that it was the jurors' exclusive province to determine the facts in the case and to consider and weigh the evidence for that purpose. Ellis v. State, 196 So. 3d 1029, 2015 Miss. App. LEXIS 680 (Miss. Ct. App. 2015), cert. denied, 202 So. 3d 613, 2016 Miss. LEXIS 316 (Miss. 2016).

Trial court did not err by refusing to allow defendant to obtain the child victim's mother's mental health records and introduce them into evidence where defendant did not clarify how her previous treatment would be relevant to his trial for capital murder, as there was no evidence that the mother was mentally unstable, violent, or that she had ever been hospitalized or medicated for a mental health issue. Gray v. State, 202 So. 3d 243, 2015 Miss. App. LEXIS 560 (Miss. Ct. App. 2015).

Trial court did not abuse its discretion in finding that defendant's voice message was relevant to the State's prosecution for manslaughter and admissible evidence because the message tended to support the State's theory that defendant acted with malice toward the victim since he thought the victim was one of his wife's lovers; the probative value of the evidence was not substantially outweighed by any prejudicial effect it could possess. Newell v. State, 175 So. 3d 1260, 2015 Miss. LEXIS 505 (Miss. 2015).

In a statutory rape prosecution, it was not error to bar defense counsel from asking a witness about a desire to drop the charges because (1) this did not tend to make facts constituting the crime more or less probable, and (2) this did not show bias, prejudice, or interest by tending to make facts the witness testified to less probable. Cage v. State, 149 So. 3d 1038, 2014 Miss. LEXIS 536 (Miss. 2014).

Because defendant's theory of the defense was that his brother committed the burglary and then pinned it on defendant, the brother's use of defendant's identity when dealing with the police was relevant, and defendant should have been permitted to cross-examine the former detective regarding the brother's use of defendant's identity. Ervin v. State, 136 So.

3d 1053, 2014 Miss. LEXIS 216 (Miss. 2014).

Even though a trial court properly excluded evidence of a contractor's other companies on the question of liability in his multi-claim action, alleging legal malpractice and other claims that arose from the destruction in value of his business, the evidence was relevant for damages with respect to the alleged harm caused to him. Baker & McKenzie, LLP v. Evans, 123 So. 3d 387, 2013 Miss. LEXIS 548 (Miss. 2013).

In an action arising from a motor vehicle accident, the trial court did not err in excluding, by a motion in limine, the motorist's uninsured insurer's name and existence because liability was not an issue in the case and the parties had stipulated to the insurer's responsibility up to the policy limits, such that it was not relevant. Heflin v. Merrill, 154 So. 3d 887, 2013 Miss. App. LEXIS 688 (Miss. Ct. App. 2013), aff'd, 154 So. 3d 857, 2014 Miss. LEXIS 558 (Miss. 2014).

Rifle and the pictures of the rifle were relevant evidence at defendant's murder trial where: (1) the cases and shells at the crime scene were of the same class as defendant's rifle; (2) the photograph of the rifle and the rifle matched the description of the murder weapon; (3) the pictures of the rifle were taken in defendant's bedroom before the shooting; and (4) the rifle went missing after the shooting until defendant's mother gave it to the police. Lawrence v. State, 124 So. 3d 91, 2013 Miss. App. LEXIS 294 (Miss. Ct. App.), cert. denied, 123 So. 3d 450, 2013 Miss. LEXIS 555 (Miss. 2013).

Trial court did not abuse its discretion in sustaining the State's relevance objections because the trial court had prohibited defendant from presenting his insanity defense. Pauley v. State, 113 So. 3d 557, 2013 Miss. LEXIS 304 (Miss. 2013).

Ammunition was properly admitted in defendant's aggravated assault trial because it was recovered shortly defendant's arrest in the same area where defendant was found hiding with a rifle and the rifle was the only weapon recovered in the area. Ferguson v. State, 95 So. 3d 1279, 2012 Miss. App. LEXIS 536 (Miss. Ct. App. 2012).

Grant of summary judgment in favor of a window manufacturer and seller in the homeowners' action against them concerning leaking windows was appropriate because the circuit court did not abuse its discretion in excluding the homeowners' expert from providing expert testimony since he utilized no methodology, much less a scientifically recognized one. Therefore, even assuming that the circuit court abused its discretion on the qualification issue, which it did not, the application of relevance and reliability principles also called for the exclusion of the testimony. McKee v. Bowers Window & Door Co., 64 So. 3d 926, 2011 Miss. LEXIS 218 (Miss. 2011).

Defendant's convictions for murder and kidnapping were proper because he failed to show any connection between the fact that the victims had used cocaine, or had been shot in a place where cocaine might have been used, and defendant's alleged misidentification as the perpetrator of the crimes. Lipsey v. State, 50 So. 3d 341, 2010 Miss. App. LEXIS 295 (Miss. Ct. App. 2010), cert. denied, 50 So. 3d 1003, 2011 Miss. LEXIS 13 (Miss. 2011).

Defendant's convictions for felonious child abuse were appropriate because the exclusion of exhibits was warranted since they were not relevant. The documentation of the victim's sexual conduct and her behavior at school was not probative of whether defendant or someone else had abused her. Clark v. State, 40 So. 3d 531, 2010 Miss. LEXIS 410 (Miss. 2010).

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Circuit court did not abuse its discretion in prohibiting cross-examination regarding a victim's statement to the police about defendant's other possible sexual encounters with other teenage girls because it was within the circuit court's discretion to find that the victim had insufficient personal knowledge about the other encounters and that her statement was too speculative to be deemed relevant for impeachment as a prior inconsistent statement under Miss. R. Evid. 613(b); furthermore, what the victim could have been told by another teenage girl was inadmissible hearsay under Miss. R. Evid. 801 and 802. Timmons v. State, 44 So. 3d 1021, 2010 Miss. App. LEXIS 32 (Miss. Ct. App.), cert. denied, 49 So. 3d 106, 2010 Miss. LEXIS 517 (Miss. 2010).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the trial court did not err in excluding the truck driver's driving record. The record was not relevant to the issue of the wrongful-death case and was too remote in time to have had any relevance to the case; further, the number and severity of the violations did not demonstrate a routine or practice sufficient to support the widow's arguments. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450, 2010 Miss. LEXIS 200 (Miss. 2010).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the trial court did not err by excluding evidence of the trucking company's carrier rating; the carrier rating was not relevant to the litigation that arose from the decedent's death because the widow's main contention was that the tractor-trailer did not have any reflective tape on the back panel. The carrier rating at issue was for violations occurring after the date of the decedent's wreck, and none of the violations involved a violation for non-use of reflective tape. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450, 2010 Miss. LEXIS 200 (Miss. 2010).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because issue of visibility, or lack thereof, of the trailer was presented to the jury for consideration. The testimony on visibility was not expressed in terms of the decedent's actual ability to see the truck on the night of the accident; however, without the decedent's testimony, which unfortunately was not possible in the case, any testimony concerning that issue was properly excluded. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450, 2010 Miss. LEXIS 200 (Miss. 2010).

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Defendant's murder conviction was appropriate because, although not conclusive evidence that defendant was the perpetrator, taillight analysis showed that defendant's taillight's composition was consistent with the evidence of the broken taillight found at the victim's home and was thus relevant. Ross v. State, 22 So. 3d 400, 2009 Miss. App. LEXIS 861 (Miss. Ct. App. 2009).

In defendant's trial on charges of sexual batttery and child fondling, the trial court did not err in permitting the State to introduce prior statements of the victim's mother in cross-examining her. Because the victim's mother testified that her daughter was lying about the abuse and because, by the time of trial, the mother had abandoned her child and resumed her residence with defendant, the mother's prior statements–including the affidavit that she signed under oath charging defendant with the child molestation of her daughter and her statement that defendant promised her that he would not touch her daughter again–were relevant and admissible. Tate v. State, 20 So. 3d 623, 2009 Miss. LEXIS 529 (Miss. 2009).

Defense counsel's attempt to introduce new relevant evidence probative of a material fact of consequence–identity–through the exhibition of the defendant's physical characteristics of his nose to the jury during closing arguments, pursuant to Miss. R. Evid. 401, was improper because defendant failed to request to reopen the record for further evidence. Mendenhall v. State, 18 So. 3d 915, 2009 Miss. App. LEXIS 670 (Miss. Ct. App. 2009).

In a case in which defendant was convicted on two counts of capital murder, in violation of Miss. Code Ann. § 97-3-19(2)(e), the trial court did not err when it excluded evidence that he attempted to commit suicide after he shot the two murder victims because evidence of his attempted suicide was not relevant. Defendant argued that his attempted suicide was relevant to his state of mind and bolstered his argument that he acted in the heat of passion; while his attempted suicide could arguably be viewed as evidence that he regretted his actions, under the circumstances, it did not tend to make it more probable that he acted in the heat of passion when he killed the two victims. Williams v. State, 29 So. 3d 53, 2009 Miss. App. LEXIS 532 (Miss. Ct. App. 2009), cert. denied, 29 So. 3d 774, 2010 Miss. LEXIS 116 (Miss. 2010).

In a personal injury products liability lawsuit, the tire maker argued that the decedent's estate was allowed to introduce two pieces of evidence regarding the tire maker's testing of light truck tires that it claimed were irrelevant and prejudicial. However, the trial judge took care to allow only those portions of the single-page summary document about which he had heard testimony and the deposition dealt with a fact of consequence and tended to make the proof of the tread-throw problem more probably, thus satisfying the definition of relevant evidence. Goodyear Tire & Rubber Co. v. Kirby, 156 So. 3d 281, 2009 Miss. App. LEXIS 221 (Miss. Ct. App. 2009), cert. dismissed, 36 So. 3d 455, 2010 Miss. LEXIS 327 (Miss. 2010).

In defendant's murder trial for killing a man whom his ex-wife was dating, the trial court did not err in permitting defendant's ex-wife to testify that defendant threatened to kill her and any man with whom he caught her. According to the ex-wife's testimony, on the same day that someone killed the victim, defendant told his ex-wife, who had been dating the victim, that he would kill any man she dated; this testimony tended to reveal defendant's state of mind and his motive, and because this testimony tended to make it more probable that defendant killed the victim, the testimony was relevant and admissible. Parker v. State, 20 So. 3d 702, 2009 Miss. App. LEXIS 186 (Miss. Ct. App.), cert. denied, 20 So. 3d 680, 2009 Miss. LEXIS 544 (Miss. 2009).

Trial judge did not err in not allowing defendant to question arresting police officers regarding their termination from the police department; the testimony was not relevant because defendant's assertions were general in nature, and defense counsel never established with certainty why the two officers were terminated and what effect that had on defendant's case. Betts v. State, 10 So. 3d 519, 2009 Miss. App. LEXIS 29 (Miss. Ct. App. 2009).

Trial court did not abuse its discretion in sustaining State's relevancy objection because there was no relevancy connection between a jail assault of defendant and the aggravated assault of a defendant's victim. Because they were separate incidents, disconnected both temporally and by location, the evidence was irrelevant under Miss. R. Evid. 401 and thus, inadmissible under Miss. R. Evid. 402. Miller v. State, 996 So. 2d 752, 2008 Miss. LEXIS 605 (Miss. 2008).

In a case in which defendant was convicted of violating Miss. Code Ann. § 97-3-7(2)(b), the trial judge did not err by not admitting evidence of the victim's continued intimacy with defendant after the assault. Defendant had argued that such evidence might be relevant in assessing her veracity, but the trial judge would not allow the testimony into evidence finding that any subsequent fraternization between defendant and the victim was irrelevant; the trial judge stated that the crime was committed not only against the victim but also against the laws of the State of Mississippi, and defendant cited no relevant authority for the appellate court to determine otherwise. Carter v. State, 995 So. 2d 847, 2008 Miss. App. LEXIS 700 (Miss. Ct. App. 2008).

In a dispute over insurance coverage, the trial court did not abuse its discretion by redacting a prior carpet cleaning receipt and disallowing evidence of flood insurance because the jury would have had to infer that the similarity in cleaning services in 2003 and 2004 was an indication that the damage in both years resulted from the same cause. Additionally, the jury would have had to infer from the fact that the insured made a successful flood insurance claim with a different company in 2004 that the damage in 2004 resulted entirely from a flood and not in part from sewer or drain backup. United States Fid. & Guar. Co. v. Martin, 998 So. 2d 956, 2008 Miss. LEXIS 555 (Miss. 2008).

Defendant's conviction for capital murder was appropriate because the trial court did not err in not qualifying defendant's proffered firearms expert. Although it was clear that the expert had vast experience with military and police training, there simply was not enough information available about the particular shotgun used by defendant to provide the necessary relevancy and reliability for the expert's testimony. Nelson v. State, 995 So. 2d 799, 2008 Miss. App. LEXIS 319 (Miss. Ct. App.), cert. denied, 999 So. 2d 374, 2008 Miss. LEXIS 660 (Miss. 2008).

While the trial court erred in excluding testimony without conducting the three-part test of Miss. Unif. Cir. & Cty. R. 9.04(I), the court found no miscarriage of justice, as the testimony of drug use was irrelevant due to the remoteness in time between the witness's observation and the arrest. Davis v. State, 995 So. 2d 767, 2008 Miss. App. LEXIS 181 (Miss. Ct. App.), cert. denied, 999 So. 2d 374, 2008 Miss. LEXIS 678 (Miss. 2008).

Trial court did not abuse its discretion in allowing Mississippi Transportation Commission's (MTC) appraiser to testify, Miss. R. Evid. 401, as it was relevant and based upon established appraisal methods. Adcock v. Miss. Transp. Comm'n, 981 So. 2d 942, 2008 Miss. LEXIS 145 (Miss. 2008).

As to the issue of the existence of a confidential relationship between a testator and a beneficiary, the evidence at the heirs' trial against the decedent's beneficiary pertained to events that occurred post-execution, and character evidence was irrelevant to a determination of whether a confidential relationship existed between the two. Thus, the trial court did not err in excluding the evidence. In re Will of Boyles, 990 So. 2d 230, 2008 Miss. App. LEXIS 167 (Miss. Ct. App.), cert. denied, 994 So. 2d 186, 2008 Miss. LEXIS 462 (Miss. 2008).

There was no error in the admission of 50 exhibits at one time to speed up the post-conviction process, even though the state did not have a chance to argue the exhibit's relevancy or rebut hearsay statements contained in the exhibits; moreover, the state was unable to specifically point to any prejudicial exhibit. State v. Bass, 4 So. 3d 353, 2008 Miss. App. LEXIS 85 (Miss. Ct. App. 2008), cert. dismissed, 2009 Miss. LEXIS 113 (Miss. Mar. 12, 2009).

Trial court did not violate defendant's Sixth Amendment right to confrontation by excluding testimony that his victims were smoking marijuana at the time he assaulted them by limiting his ability to cross-examine one victim regarding the intoxication; the evidence was properly excluded under Miss. R. Evid. 401 and 402 because defendant presented no evidence that smoking marijuana increased a person's propensity for violence generally or that smoking marijuana increased the victim's propensity for violence. Since defendant did not meet the threshold for establishing the probative value of the evidence, the testimony on whether the victim had been smoking marijuana the morning of the assault was irrelevant. Rouster v. State, 981 So. 2d 314, 2007 Miss. App. LEXIS 781 (Miss. Ct. App. 2007).

In a statutory rape case, evidence that defendant's ex-wife stole his tax returns was properly excluded because it was irrelevant to the charge; the evidence did not support defendant's theory that semen was planted to help his ex-wife's divorce action since there was no connection between the alleged theft and the person who he contended planted the semen in the victim's vagina. Ladd v. State, 969 So. 2d 141, 2007 Miss. App. LEXIS 762 (Miss. Ct. App. 2007).

Certificate of title and a bill of sale that were produced to the State during discovery were admissible into evidence because they were relevant under Miss. R. Evid. 401, as a reasonable juror could conclude that, because defendant produced the fraudulent documents during discovery, he knew the vehicle was stolen. In addition, to authentic the documents, the State had only to show that the documents were what the State claimed them to be, and defendant offered no objection to their authenticity. Hayden v. State, 972 So. 2d 525, 2007 Miss. LEXIS 646 (Miss. 2007).

Trial court did not err in disallowing testimony of defendant's bad childhood and relationship with her mother, as her defense of entrapment was whether she was predisposed to commit the crime and was induced by law enforcement to do so; defendant testified to everything that she claimed her mother would have testified, and the jury was able to hear the effect of the mother's illness on defendant, plus other testimony concerning an alleged grudge by one agent would have been irrelevant and confusing and misleading to the jury, plus that agent turned over the information to another agent, who made the decision to proceed with the buy. Pittman v. State, 987 So. 2d 1010, 2007 Miss. App. LEXIS 747 (Miss. Ct. App. 2007), cert. dismissed, 2008 Miss. LEXIS 368 (Miss. July 31, 2008).

Denial of defendant's motion for a new trial after he had been convicted of aggravated assault and rape was appropriate because each of the prerequisites of Miss. R. Evid. 801(d)(1)(B) were satisfied so as to remove the witnesses' statements from the category of impermissible hearsay; because evidence of a prior consistent statement was not hearsay if the statement fit the definition of Miss. R. Evid. 801(d)(1)(B), such a statement was ordinarily relevant evidence and thus, the statement became admissible under Miss. R. Evid. 402 and the trial judge properly allowed the state to elicit witness statements in order to rebut defendant's defense of consensual sex. Moss v. State, 977 So. 2d 1201, 2007 Miss. App. LEXIS 632 (Miss. Ct. App. 2007), cert. denied, 977 So. 2d 1144, 2008 Miss. LEXIS 151 (Miss. 2008).

In a wrongful death action, several assistants testified that they either provided or saw the effects of substandard care on a decedent; such testimony was probative under Miss. R. Evid. 401. Mariner Health Care, Inc. v. Estate of Edwards, 964 So. 2d 1138, 2007 Miss. LEXIS 520 (Miss. 2007).

Finding against the life insurance company in the beneficiary's action after her claim was denied was proper in part because the training of agents who solicited answers from prospective insureds that might result in material misrepresentations was pertinent to the resolution of the issues of the case; thus, the trial judge did not abuse his discretion by allowing the testimony. United Am. Ins. Co. v. Merrill, 978 So. 2d 613, 2007 Miss. LEXIS 510 (Miss. 2007), cert. denied, 552 U.S. 1185, 128 S. Ct. 1257, 170 L. Ed. 2d 68, 2008 U.S. LEXIS 1280 (U.S. 2008).

In defendant's murder case, the court did not err by not allowing defendant to introduce evidence of a witness's status as an informant because no impeaching material was concealed; moreover, the witness's status as a confidential informant to the Hinds County Sheriff's Department was irrelevant to the case because the department had no involvement with the case. Brown v. State, 965 So. 2d 1023, 2007 Miss. LEXIS 430 (Miss. 2007).

Information regarding the decedent's condition prior to the alleged negligence by the nursing home would certainly be relevant to determine whether or not the decedent had indeed suffered new and distinct injuries at the hand of either of the owners; thus, it was proper for defense counsel to question the similarities of these damages to determine whether or not they were actually caused by a third party. Beverly Enters. v. Reed, 961 So. 2d 40, 2007 Miss. LEXIS 409 (Miss. 2007).

Evidence that a child victim had allegedly caused injuries to his own rectum by sticking objects there was properly excluded in a sexual battery case because it was irrelevant under Miss. R. Evid. 401 and highly prejudicial under Miss. R. Evid. 403, and it was also a collateral issue that was too remote in time to rebut the charges based on the fact that it was a year before the charges in an indictment; case law under Miss. R. Evid. 412 was helpful in making this determination, despite the fact that the victim's actions did not constitute clear sexual activity. Mason v. State, 971 So. 2d 618, 2007 Miss. App.

LEXIS 327 (Miss. Ct. App.), cert. denied, 973 So. 2d 244, 2007 Miss. LEXIS 701 (Miss. 2007).

In a capital murder trial, the trial court did not abuse its discretion in excluding a defense expert's testimony regarding his inability to destroy a wallet by burning it; the expert's testimony regarding statements made to him by the witness were inadmissible since the introduction of any such statements would have been mere commentary on the veracity of a witness, which was not appropriate expert testimony under Miss. R. Evid. 702, and while the expert was proffered to be an expert on police investigatory techniques, his proffer failed to establish the reliability of his testimony under Daubert and McLemore. Ross v. State, 954 So. 2d 968, 2007 Miss. LEXIS 235 (Miss. 2007).

In a capital murder trial, the trial court did not err in admitting glass shards consistent with a motor vehicle's tail light found at a murder victim's residence and a pile of ashes that a state witness testified were the remains of the victim's wallet; although the tail light fragments may have been of slight probative value, defendant had ample opportunity to highlight that the state's own expert could not mechanically fit the fragments into the tail light frame. Ross v. State, 954 So. 2d 968, 2007 Miss. LEXIS 235 (Miss. 2007).

Trial court did not abuse its discretion in admitting a second knife into evidence during defendant's aggravated assault trial because the second knife was relevant; after defendant had stabbed the victim with a butcher knife, he tried to stab him with a different knife. The police had also found defendant with the second knife in his hands. Clark v. State, 928 So. 2d 192, 2006 Miss. App. LEXIS 135 (Miss. Ct. App.), cert. denied, 929 So. 2d 923, 2006 Miss. LEXIS 241 (Miss. 2006).

In a murder case, the court properly admitted evidence of an ongoing family feud between defendant's family and the victim's family because whether or not defendant was directly involved in each individual altercation, the evidence was relevant and was not so prejudicial as to constitute reversible error because the testimony had the tendency of making the action more or less probable; defendant obviously knew of the ongoing feud and had participated in several altercations with members of the victim's family. Morris v. State, 963 So. 2d 1170, 2007 Miss. App. LEXIS 165 (Miss. Ct. App.), cert. denied, 964 So. 2d 508, 2007 Miss. LEXIS 502 (Miss. 2007).

In a murder case, evidence of a victim's drinking was properly excluded as irrelevant where there was already evidence regarding an abusive relationship, the victim's penchant for drinking was already mentioned, and there was no evidence connecting the drinking to the crime. Clemons v. State, 952 So. 2d 314, 2007 Miss. App. LEXIS 174 (Miss. Ct. App. 2007), overruled in part, Williams v. State, 32 So. 3d 486, 2010 Miss. LEXIS 202 (Miss. 2010).

In a business burglary case, defendant's motion in limine to preclude introduction of evidence regarding cartons of cigarettes found in defendant's vehicle was properly denied because the cartons were clearly relevant to defendant's burglary of the store, because the primary items taken were the dozens of cartons of cigarettes, and the evidence was highly probative of defendant's burglary of the store. Cridiso v. State, 956 So. 2d 281, 2006 Miss. App. LEXIS 745 (Miss. Ct. App. 2006), cert. denied, 957 So. 2d 1004, 2007 Miss. LEXIS 285 (Miss. 2007).

Defendant's conviction for fondling was appropriate because the fact that the victim's father was in prison for child molestation was not relevant evidence under Miss. R. Evid. 401 since the evidence regarding the victim's father did not affect the credibility of the victim and she had not seen her father in over four years; thus, the father was not responsible for committing the crime, contrary to defendant's suggestion. Higdon v. State, 938 So. 2d 340, 2006 Miss. App. LEXIS 699 (Miss. Ct. App. 2006).

Finding in favor of the husband and wife in their action against the city for personal injuries and loss of consortium under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., was proper pursuant to Miss. R. Evid. 401 and Miss. R. Evid. 402 because an expert's testimony tended to make the fact that the city negligently repaired and maintained the grate and sidewalk more probable than that without his proffered evidence. City of Natchez v. Jackson, 941 So. 2d 865, 2006 Miss. App. LEXIS 686 (Miss. Ct. App. 2006).

It was not an abuse of discretion for the trial court to suppress evidence of a statement made by the victim's father that the victim "must have been buying drugs" and a package of rolling papers found in the victim's truck after the shooting because there was no indication that the victim's father had any personal knowledge that the victim visited the convenience store to purchase drugs, and the trial court expressed concern that the question of whether the victim was a marijuana user could confuse the jury and lead it to condemn the victim. Bailey v. State, 952 So. 2d 225, 2006 Miss. App. LEXIS 393 (Miss. Ct. App. 2006), cert. denied, 2007 Miss. LEXIS 166 (Miss. Mar. 1, 2007), cert. denied, 951 So. 2d 563, 2007 Miss. LEXIS 167 (Miss. 2007).

In a former client's assault claim against his former attorney, arguably, evidence of the client's domestic violence was prejudicial, however, in light of its impeachment value, the appellate court could not say that the circuit court abused its discretion in admitting the evidence. Walker v. Benz, 914 So. 2d 1262, 2005 Miss. App. LEXIS 903 (Miss. Ct. App. 2005).

Admission of the evidence of the anchorperson's subsequent job performance was appropriate in her breach of contract claim pursuant to Miss. R. Evid. 401 and 403 because that evidence was relevant to disprove the corporation's contention that the anchorperson was fired for cause. Morris Newspaper Corp. v. Allen, 2004 Miss. App. LEXIS 981 (Miss. Ct. App. Oct. 12, 2004), op. withdrawn, sub. op., 932 So. 2d 810, 2005 Miss. App. LEXIS 765 (Miss. Ct. App. 2005).

Exclusion of the mortgage company representative's deposition from evidence at trial was proper in the couple's fraud and misrepresentation claims because the testimony did not make any fact or consequence to the fraud claim more or less probable. Johnson v. Bay City South Mortg. Co., 928 So. 2d 888, 2005 Miss. App. LEXIS 732 (Miss. Ct. App. 2005), cert. denied, 929 So. 2d 923, 2006 Miss. LEXIS 272 (Miss. 2006).

Defendant's convictions for kidnapping and sexual battery were proper where the handcuffs were properly admitted during trial pursuant to Miss. R. Evid. 401 and 403 because they tended to lend credence to the testimony of the victim and of an investigator that defendant masqueraded as a police officer in order to carry out the crimes in question. Winding v. State, 908 So. 2d 163, 2005 Miss. App. LEXIS 332 (Miss. Ct. App. 2005).

Where defendant was convicted of aggravated assault with a weapon, a violation of Miss. Code Ann. § 97-3-7, the trial court did not err in admitting a second knife into evidence because a witness testified that after defendant stabbed the victim with a butcher knife, he tried to stab him with a different knife, and the police found defendant with the second knife in his hands when he was arrested, and it was not a butcher knife, thereby corroborating the witness's testimony. Clark v. State, 2005 Miss. App. LEXIS 371 (Miss. Ct. App. June 7, 2005), sub. op., op. withdrawn, 928 So. 2d 192, 2006 Miss. App. LEXIS 135 (Miss. Ct. App. 2006).

Trial court did not err in excluding evidence of defendant's fear of the victim that defendant claimed was relevant to his self-defense claim because defendant was able to testify about his fears; furthermore, the prosecution offered evidence regarding defendant's alleged fears; the trial court merely excluded the repetition of such testimony on re-direct. Clark v. State, 2005 Miss. App. LEXIS 371 (Miss. Ct. App. June 7, 2005), sub. op., op. withdrawn, 928 So. 2d 192, 2006 Miss. App. LEXIS 135 (Miss. Ct. App. 2006).

Other than defendant's testimony, the record did not show that any evidence was provided that indicated possession of the cocaine at issue by anyone other than defendant. The State presented an eyewitness, an officer, who testified that he had seen defendant in possession of the cocaine; therefore, under Miss. R. Evid. 401, the trial court did not err in denying the admission of another defendant's sentencing order into evidence. Harris v. State, 921 So. 2d 366, 2005 Miss. App. LEXIS 423 (Miss. Ct. App. 2005), cert.

denied, 926 So. 2d 922, 2006 Miss. LEXIS 155 (Miss. 2006).

Defendant murdered the victim, a relative, outside his home some four years after the subject drive-by shooting. Furthermore, neither defendant nor his wife knew the identity of the individuals involved in the drive-by, but both merely associated the incident with the victim; although that information may shed light on why defendant owned the gun, it had little relevance as to why defendant approached the victim, who was not associated with the drive-by shooting, and the trial judge did not abuse his discretion in excluding it. Smith v. State, 911 So. 2d 541, 2004 Miss. App. LEXIS 1104 (Miss. Ct. App. 2004), cert. denied, 920 So. 2d 1008, 2005 Miss. LEXIS 634 (Miss. 2005).

State credibly presented the evidence regarding race to show defendant's intent to commit the crime of embezzlement and the testimony was critical to establishing the witness's credibility, and for showing how defendant induced that witness into conducting business outside the car dealership where he worked. There were no loathsome, inflammatory racial slurs and in reviewing the complete testimony in context, the probative value of the evidence outweighed any potential prejudice, and did not exhibit a tendency to move the jury to decide the case on an improper basis; the testimony was properly admitted as relevant as it showed the existence of a plan, helped to present the complete picture of defendant's conduct to the jury, and did not unduly prejudice defendant. Bell v. State, 910 So. 2d 640, 2005 Miss. App. LEXIS 159 (Miss. Ct. App. 2005).

Finding in favor of the patient in his medical malpractice action was improper pursuant to Miss. R. Evid. 401 where portions of the patient's mother-in-law's testimony should have been admitted as it was clearly relevant because she raised issues regarding the legitimacy of the patient's claims and had probative value. Blake v. Clein, 903 So. 2d 710, 2005 Miss. LEXIS 235 (Miss. 2005).

In an aggravated assault case, the victim and defendant's son's past drug use was not relevant and the trial court did not abuse its discretion in limiting cross-examination of the victim and the son regarding their past drug use. Additionally, the fact that the victim and the son might have done drugs some time in the distant past could not in any event have justified defendant's shooting at the victim and the son. Thornton v. State, 905 So. 2d 745, 2004 Miss. App. LEXIS 1079 (Miss. Ct. App. 2004) (Miss. Ct. App. – 2004).

In defendants' trial for possession of precursor chemicals with the intent to manufacture methamphetamines, the trial court's admission of numerous tupperware containers did not deprive defendants of any due process rights and, accordingly, did not prejudice their defense in any measure. That the containers were not found to have contained denatured alcohol and ethyl ether at the time of seizure was irrelevant because, as the trial court explained, the containers were not for proving the presence of the chemicals but, instead, "went to the intent issue." Pittman v. State, 904 So. 2d 1185, 2004 Miss. App. LEXIS 1043 (Miss. Ct. App. 2004).

In a breach of contract case, evidence that a television station employee performed well before and after her termination was relevant to show continuity in the high quality of her job performance, and it was not unduly prejudicial because its weight and credibility could be thoroughly attacked on cross-examination. Morris Newspaper Corp. v. Allen, 2004 Miss. App. LEXIS 981 (Miss. Ct. App. Oct. 12, 2004), op. withdrawn, sub. op., 932 So. 2d 810, 2005 Miss. App. LEXIS 765 (Miss. Ct. App. 2005).

In a breach of contract case, evidence of the employee's manager's sexual and romantic conduct was relevant where a fact question existed as to the manager's level of involvement in the termination decision, the evidence of his sexual and romantic conduct was relevant to show his possible wrongful motive for firing the employee. The evidence was probative because it tended to show the manager's motive for the wrongful termination, and the main thrust of the employee's case was that she was fired for reasons other than those stated by the employer. Morris Newspaper Corp. v. Allen, 2004 Miss. App. LEXIS 981 (Miss. Ct. App. Oct. 12, 2004), op. withdrawn, sub. op., 932 So. 2d 810, 2005 Miss. App. LEXIS 765 (Miss. Ct. App. 2005).

In a criminal trial for sexual battery, the court did not err in allowing a police officer to testify regarding his interview with the victim following the assault. The State had a legitimate interest in telling a rational and coherent story of what happened. Norris v. State, 893 So. 2d 1071, 2004 Miss. App. LEXIS 806 (Miss. Ct. App. 2004), cert. denied, 893 So. 2d 1061, 2005 Miss. LEXIS 122 (Miss. 2005).

Denial of the inmate's petition for post-conviction relief was proper where inmate was not denied any constitutional or fundamental rights when testimony of the victim's children was admitted since their testimony corroborated portions of the victim's husband's testimony, Miss. R. Evid. 403, 401; the inmate also offered no proof that defense counsel had been ineffective. Puckett v. State, 879 So. 2d 920, 2004 Miss. LEXIS 592 (Miss. 2004), cert. denied, 544 U.S. 924, 125 S. Ct. 1638, 161 L. Ed. 2d 483, 2005 U.S. LEXIS 2506 (U.S. 2005).

In a case where defendant was convicted of murdering his wife and her son, the trial court did not err in prohibiting defendant from examining the chief investigator concerning his possible motive for securing a conviction because whether the investigator was running for sheriff was irrelevant; simply because a notion was within "the realm of possibility" did not, in any way, mandate a finding of relevancy. Wortham v. State, 883 So. 2d 599, 2004 Miss. App. LEXIS 618 (Miss. Ct. App. 2004).

Where defendant was convicted of burglary of a dwelling (no threats or force toward persons were shown), his allegation of error concerned the introduction of a small kitchen knife that police found on him when he was arrested. However, as to relevancy and admissibility, the record did not indicate any abuse of discretion by the trial judge in admitting the evidence. Clayton v. State, 893 So. 2d 246, 2004 Miss. App. LEXIS 718 (Miss. Ct. App. 2004), cert. denied, 893 So. 2d 1061, 2005 Miss. LEXIS 101 (Miss. 2005).

Where a father did not show that a trial court abused its discretion in allowing a three-year-old child to testify of sexual abuse by the father and any error in permitting the child to testify was cured by the doctor's and social worker's testimonies, the adjudication of abuse was affirmed. In the Interest of E. A. J., 858 So. 2d 205, 2003 Miss. App. LEXIS 987 (Miss. Ct. App. 2003).

Driver successfully argued that the testimony of the injured person's proposed additional witnesses, all family members, would have been cumulative, that it was unbelievable that the injured person did not know the family members did not have discoverable knowledge until 17 days before trial, and that the injured person was allowed to testify to the injured person's alleged injuries and introduce medical evidence; reversal was not appropriate, as Miss. R. Evid. 401 and 403 were properly used by the trial court to determine that the proposed testimony was not relevant, and was cumulative. Busick v. St. John, 856 So. 2d 304, 2003 Miss. LEXIS 491 (Miss. 2003).

Evidence in a medical malpractice case that a doctor was admitted for inpatient alcohol treatment and of subsequent incidents involving his attempted treatment of patients while under the influence of alcohol was certainly relevant, as the evidence tended to show that the doctor was drinking during his treatment of the plaintiff, and, along with the other evidence, this created a jury question. Therefore, the trial court's contrary finding was error. Griffin v. McKenney, 877 So. 2d 425, 2003 Miss. App. LEXIS 942 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 867 (Miss. 2004).

Where a paternal grandmother sought temporary custody of her minor grandchild through an ex parte proceeding based on claims that the child had been sexually abused, the trial court properly admitted evidence of the schizophrenic mother's mental state, as it bore on the best interests of the child, and the allegations in the request for custody were of child abuse. E. J. M. v. A. J. M., 846 So. 2d 289, 2003 Miss. App. LEXIS 397 (Miss. Ct. App. 2003).

In a negligence suit against the Mississippi Department of Transportation (MDOT), the trial court properly allowed a witness who lived near the scene of the plaintiff's accident to testify as to other accidents on the highway, since he had personal knowledge of them, having either witnessed them or heard about them, and the testimony was admissible to show the existence of a defective or dangerous condition and MDOT's knowledge thereof. Miss. DOT v. Cargile, 847 So. 2d 258, 2003 Miss. LEXIS 255 (Miss. 2003), overruled in part, Miss. Transp. Comm'n v. Montgomery, 2011 Miss. LEXIS 609 (Miss. Oct. 20, 2011), overruled in part, Miss. Transp. Comm'n v. Montgomery, 80 So. 3d 789, 2012 Miss. LEXIS 96 (Miss. 2012), overruled, Little v. Miss. DOT, 129 So. 3d 132, 2013 Miss. LEXIS 551 (Miss. 2013).

Trial court's admission in an auto accident case of National Accident Sampling System (NASS) reports concerning accident data was within the trial court's discretion as any tendency of the NASS data to show that air bags were generally safe was relevant and permissible. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564, 2003 Miss. App. LEXIS 752 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 2005 Miss. LEXIS 21 (Miss. Jan. 13, 2005), aff'd in part and rev'd in part, 904 So. 2d 1077, 2005 Miss. LEXIS 247 (Miss. 2005).

Trial court was within its discretion in finding that the prior auto accidents offered by the plaintiffs were not substantially similar to the subject auto accident. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564, 2003 Miss. App. LEXIS 752 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 2005 Miss. LEXIS 21 (Miss. Jan. 13, 2005), aff'd in part and rev'd in part, 904 So. 2d 1077, 2005 Miss. LEXIS 247 (Miss. 2005).

In a strict products liability action, the evidence supported the manufacturer's theory, and established a causal connection, that the accidental firing of the rifle was a result of a full-cocked discharge, and not an accidental bump on the headrest as alleged; for the injured person was in the cab of a compact pick-up with a loaded deer rifle, admitted to having been illegally spotlighting deer, and the rifle's safety was disengaged. Such evidence, including that the injured person smelled of alcohol, was very relevant under Miss. R. Evid. 401, and its probative value was not outweighed by unfair prejudice. Abrams v. Marlin Firearms Co., 838 So. 2d 975, 2003 Miss. LEXIS 87 (Miss. 2003).

In a murder case, the trial court did not err in limiting defendant's cross-examination of a prosecution witness; the trial court did not altogether preclude defendant from asking the prosecution witness certain questions, but it asked defendant to establish a proper predicate for the questions. Morris v. State, 843 So. 2d 676, 2003 Miss. LEXIS 50 (Miss. 2003).

In a capital murder prosecution, evidence of the child victim's vaginal abrasions and unexplained bruising after defendant moved into her home was properly admitted to rebut his theory that the death was accidental. Kolberg v. State, 829 So. 2d 29, 2002 Miss. LEXIS 268 (Miss. 2002), cert. denied, 538 U.S. 981, 123 S. Ct. 1787, 155 L. Ed. 2d 672, 2003 U.S. LEXIS 3010 (U.S. 2003), overruled in part, Harrell v. State, 134 So. 3d 266, 2014 Miss. LEXIS 52 (Miss. 2014), overruled in part, Rowsey v. State, 188 So. 3d 486, 2015 Miss. LEXIS 573 (Miss. 2015).

Testimony and documents that show either embarrassment or humiliation for alleged malicious prosecution claims and recovery of damages are highly relevant and probative. Alpha Gulf Coast, Inc. v. Jackson, 801 So. 2d 709, 2001 Miss. LEXIS 319 (Miss. 2001).

Evidence of price that the property owner paid to purchase tract of land containing pine trees five months before fire destroyed some of them was relevant as the jury could consider it in deciding the value of the land and comparing the actual damages with the reasonableness of the damages sought. Redhead v. Entergy Miss., Inc., 828 So. 2d 801, 2001 Miss. App. LEXIS 421 (Miss. Ct. App. 2001), cert. dismissed, 2002 Miss. App. LEXIS 618 (Miss. Ct. App. Oct. 17, 2002).

In a murder prosecution in which the state alleged that the defendant and his brother raped and murdered the victim, the trial court did not err when it allowed the introduction of evidence that sperm found in the victim's vagina was identified as that of the defendant's brother since such evidence supported the state's theory of the case. Baldwin v. State, 784 So. 2d 148, 2001 Miss. LEXIS 90 (Miss. 2001).

In an action for, inter alia, assault and battery arising from an incident in which the defendant detained the plaintiffs after they attempted to cross his property, it was not error for the court to permit the introduction of evidence that the defendant, who was a municipal judge, told the plaintiffs that a "nigger judge" would not be able to help them; the statement was relevant and its probative value was not substantially outweighed by the danger of unfair prejudice. Whitten v. Cox, 799 So. 2d 1, 2000 Miss. LEXIS 185 (Miss. 2000).

Witness' testimony that defendant did not abuse other children he kept was not relevant as to what occurred between defendant and the victim, defendant's stepdaughter. Crawford v. State, 754 So. 2d 1211, 2000 Miss. LEXIS 8 (Miss. 2000).

In a prosecution for embezzlement, the court erred when it refused to allow the defendant to present evidence that a third person committed the crime; the defendant was entitled to present her theory of the case and have the jury determine whether someone else could have taken the money, and any fears of confusion the trial judge may have harbored could have been resolved by giving limiting instructions to the jury. Terry v. State, 718 So. 2d 1115, 1998 Miss. LEXIS 366 (Miss. 1998).

In a prosecution for a murder which occurred during an attempted armed robbery, the trial court properly allowed the introduction of evidence that the victim was known to have been planning to buy a shrimp boat and to have had a large amount of cash available since such evidence was relevant to demonstrate a motive for armed robbery. Pham v. State, 716 So. 2d 1100, 1998 Miss. LEXIS 326 (Miss. 1998).

Evidence that murder defendant subsequently purchased and used cocaine with proceeds of stolen guns did not make it any more likely that he committed murder, and thus this evidence was irrelevant should not have been admitted. Snelson v. State, 704 So. 2d 452, 1997 Miss. LEXIS 607 (La. 1997).

Trial court did not err in allowing defense counsel to refresh medical malpractice plaintiff's memory with references to plaintiff's social security disability records; prime issue before jury was credibility of witnesses, and therefore it was certainly relevant to question plaintiff regarding her mental status. Herrington v. Spell, 692 So. 2d 93, 1997 Miss. LEXIS 158 (Miss. 1997).

Trial court erroneously permitted witness to testify that he was offered money to kill victim for purpose of preventing victim from testifying against defendant's eventual co-conspirator; existence of conspiracy between defendant and his co-conspirator had not yet been established, and neither witness nor co-conspirator were on trial, and thus this blatantly irrelevant evidence served to unduly prejudice defendant and confuse issues put before the jury. Stewart v. State, 662 So. 2d 552, 1995 Miss. LEXIS 488 (Miss. 1995).

Admission of officer's testimony that reason he was first suspicious of defendant's car was that a car fitting that description had recently been stolen, and that shooting had taken place at residence where defendant's car was first observed, constituted reversible error; his testimony was unduly prejudicial, and there was no reason for him to explain his presence on public roads in a position to observe defendant's car, and his subsequent investigation after learning that the car had an improper tag. Sample v. State, 643 So. 2d 524, 1994 Miss. LEXIS 466 (Miss. 1994).

Whether or not children generally tell the truth about sexual abuse was not relevant to whether victim in case at bar told the truth about what happened to her, as this evidence did not make it more or less probable that victim was telling the truth. Jones v. State, 606 So. 2d 1051, 1992 Miss. LEXIS 442 (Miss. 1992).

Fact that former insureds thought agency was going out of business, and that they blamed agency for their policy cancellations, was relevant to agency's defamation claim against insurance carrier who sent cancellation notice to insureds. Eselin-Bullock & Assoc. Ins. Agency, Inc. v. National General Ins. Co., 604 So. 2d 236, 1992 Miss. LEXIS 324 (Miss. 1992).

Testimony of examining physician was relevant and admissible in that it tended to make more probable the proposition that ten-year-old girl in question had had sexual intercourse with an adult male on more than one occasion. Allman v. State, 571 So. 2d 244, 1990 Miss. LEXIS 705 (Miss. 1990).

Circuit court correctly allowed police officer to describe defendant's reenactment of murder for the jury's benefit, since reenactment was an admission and the proper predicate had been laid. Jackson v. State, 551 So. 2d 132, 1989 Miss. LEXIS 330 (Miss. 1989).

Evidence that decedent may have been "disfellowshipped" by Jehovah's Witness church was properly excluded as irrelevant, because it did not have any tendency to make existence of a material fact more probable or less probable than it would have been without the evidence. Parker v. Jones County Community Hospital, 549 So. 2d 443, 1989 Miss. LEXIS 429 (Miss. 1989).

## RESEARCH REFERENCES

**ALR.**

Construction and application of silent witness theory. 116 A.L.R.5th 373.

Admissibility and Effect of Evidence or Comment on Party's Military Service or Lack Thereof. 24 A.L.R. 6th 747.

## Rule 402. General admissibility of relevant evidence.

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- the Mississippi Constitution; or
- these rules.

Irrelevant evidence is not admissible.

**HISTORY: Restyled effective July 1, 2016.**

## ADVISORY COMMITTEE NOTE

The language of Rule 402 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. The Rule has been restructured, adding bullet points. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

This rule introduces no new practice to existing Mississippi law. Relevant evidence may be rendered inadmissible for constitutional reasons or for reasons specified in Articles V and VI of these rules. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

Evidence inadmissible.
– Accomplice acquittal.
– Controlled substances.
– Criminal history.
– Discrimination.
– Money.
– Photographs.
– Res gestae.
– State of mind.
– Tax preparations.
– Videotapes.
Illustrative cases.

**Evidence inadmissible.**

Although the prior domestic incident was mentioned in testimony, defendant was not tried for the alleged simple assault, nor was the jury asked to render a finding of innocence or guilt with regard to the prior unadjudicated incident, and, in fact, the trial court gave a limiting instruction; thus, no jeopardy attached with regard to the prior domestic incident for purposes of a constitutional right being violated, and the court did not violate the rule prohibiting the admissibility of relevant evidence when the constitutions provided otherwise. Chase v. State, — So. 3d —, 2020 Miss. App. LEXIS 47 (Miss. Ct. App. Feb. 18, 2020), cert. denied, — So. 3d —, 2020 Miss. LEXIS 432 (Miss. 2020).

Trial court did not abuse its discretion at defendant's trial for murder and desecration of a human corpse by admitting into evidence photographs showing parts of the victim's decomposed and dismembered corpse and the victim's dry bones from an autopsy because the photos were relevant to establish the desecration of the corpse, to explain the path of the fatal gunshot wound and the manner of dismemberment, and to corroborate an accomplice's testimony. The danger of unfair prejudice, if any, did not substantially outweigh the probative value. McCarty v. State, 262 So. 3d 553, 2018 Miss. App. LEXIS 294 (Miss. Ct. App. 2018), cert. denied, 260 So. 3d 798, 2019 Miss. LEXIS 43 (Miss. 2019).

Circuit court did not abuse its discretion in prohibiting defendant from cross-examining the victim about alleged prior instances of inappropriate touching because there was no evidence that the victim described sexual touching; the victim was six years old when he described sexual abuse, and that evidence would not have made it more or less probable that defendant was guilty. Dowden v. State, 203 So. 3d 743, 2016 Miss. App. LEXIS 717 (Miss. Ct. App. 2016).

Trial court committed no error by excluding any reference to the underinsured-motorist insurance carrier in the insured's automobile-accident lawsuit where the only issue was the amount of the insured's damages, and the carrier's role as the insured's underinsured motorist insurer would have been of no help in deciding the issues before the jury. Heflin v. Merrill, 154 So. 3d 857, 2014 Miss. LEXIS 558 (Miss. 2014).

Supreme Court of Mississippi holds as a matter of first impression that, in Mississippi, the proponent of evidence of the role of an uninsured-or underinsured-motorist carrier's role in litigation over benefits due under the policy as a result of a tortfeasor's negligence must demonstrate the relevance of the evidence and that it passes Miss. R. Evid. 403's balancing test. Heflin v. Merrill, 154 So. 3d 857, 2014 Miss. LEXIS 558 (Miss. 2014).

Trial judge's decision that a photograph's content was not too remote in time to be relevant was not an abuse of discretion because it was within the trial judge's discretion to determine that the photograph of handcuffs in defendant's car was relevant, even though it was taken more than two months after the alleged attempted kidnapping; the presence of the handcuffs in defendant's car was offered to show that on his trips to "look for women," defendant was not looking for consensual relationships, and the presence of handcuffs made it more probable that defendant grabbed the victim with the intent to kidnap her. Tucker v. State, 64 So. 3d 594, 2011 Miss. App. LEXIS 324 (Miss. Ct. App. 2011).

Defendant's manslaughter conviction was proper because, assuming for the sake of discussion that a witness's testimony was not irrelevant, it would have been confusing and misleading to the jury; the jury would have been led to believe that because the victim was verbally aggressive with the witness approximately four years earlier, he was more likely to have been the initial aggressor for the current series of events. Accordingly, the nonexistent probative value of the witness's testimony would have been outweighed by the massive prejudicial effect that would have stemmed from misleading the jury. Booker v. State, 64 So. 3d 988, 2010 Miss. App. LEXIS 329 (Miss. Ct. App. 2010), aff'd, 64 So. 3d 965, 2011 Miss. LEXIS 316 (Miss. 2011).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the trial court did not err in not excluding the testimony of the decedent's friend concerning the decedent's alleged making, using, or selling methamphetamine before the accident since the testimony was relevant and concerned the type of activity that the decedent was involved in prior to the accident and what impact that activity might have had on the decedent's alertness at the time of the accident. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450, 2010 Miss. LEXIS 200 (Miss. 2010).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the trial court did not err in allowing the decedent's sister and mother testify about the substance found in the decedent's pocket, which was identified as methamphetamine. In part, their testimony corroborated a friend's testimony to the extent that the drugs were divided at a house and placed into plastic bags and the testimony also helped refute the testimony of another friend that he did not see any drugs and no one had used drugs in his home on the day of the accident. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450, 2010 Miss. LEXIS 200 (Miss. 2010).

To the extent that Mississippi courts have held that evidence of collateral-source payments may not be introduced for the purpose of impeaching false or misleading testimony, those decisions are expressly overruled. Permitting evidence of collateral-source payments for the narrow purpose of impeaching false or misleading testimony is consistent with the Mississippi Rules of Evidence. Robinson Prop. Group, L.P. v. Mitchell, 7 So. 3d 240, 2009 Miss. LEXIS 195 (Miss. 2009).

In a vehicular homicide case, the court properly admitted evidence of defendant's arrest for driving with a suspended driver's license because that evidence relevant, not only in regard to why a field sobriety test was not performed, but also to explain the sequence of events leading up to defendant's blood test. Additionally, the trial judge did instruct the jurors that they could not consider evidence of defendant's arrest as an inference of guilt. Teston v. State, 44 So. 3d 977, 2008 Miss. App. LEXIS 681 (Miss. Ct. App. 2008), cert. dismissed, 44 So. 3d 969, 2010 Miss. LEXIS 520 (Miss. 2010).

Male suspect's testimony about shoplifting plan related to acts and conduct that occurred during the course and in furtherance of a conspiracy at a time when the defendant, based upon the evidence and reasonable inferences drawn from the evidence, could be deemed to be a co-conspirator, and was thus not hearsay under Miss. R. Evid. 801(a)(1) or (2) and was both relevant and admissible under Miss. R. Evid. 401, 402, and 403. Wilson v. State, 967 So. 2d 32, 2007 Miss. LEXIS 593 (Miss. 2007).

Denial of defendant's motion for a new trial after he had been convicted of aggravated assault and rape was appropriate because each of the prerequisites of Miss. R. Evid. 801(d)(1)(B) were satisfied so as to remove the witnesses' statements from the category of impermissible hearsay; because evidence of a prior consistent statement was not hearsay if the statement fit the definition of Miss. R. Evid. 801(d)(1)(B), such a statement was ordinarily relevant evidence and thus, the statement became admissible under Miss. R. Evid. 402 and the trial judge properly allowed the state to elicit witness statements in order to rebut defendant's defense of consensual sex. Moss v. State, 977 So. 2d 1201, 2007 Miss. App. LEXIS 632 (Miss. Ct. App. 2007), cert. denied, 977 So. 2d 1144, 2008 Miss. LEXIS 151 (Miss. 2008).

Expert was admitted as an expert in the field of molecular biology, forensic DNA analysis and DNA hair analysis, and she was allowed to testify as to the results of her DNA analysis without a specific objection from the defense, and the specific arguments made by defendant on appeal were not presented to the trial court; further, Miss. Code Ann. § 93-9-27, regarding the presumption of paternity genetic tests, did not provide the standard for admission of DNA evidence here, and the trial court did not abuse its discretion in allowing in the statistical results of the DNA tests. Rankin v. State, 963 So. 2d 1255, 2007 Miss. App. LEXIS 553 (Miss. Ct. App. 2007).

Admission of defendant's shirt and gun were relevant to the issue of identity and were not too remote in space nor time; the shirt and gun were similar to the description given by the victims and defendant admittedly wore the shirt and possessed the gun during the time in question. Jackson v. State, 969 So. 2d 124, 2007 Miss. App. LEXIS 472 (Miss. Ct. App. 2007).

Trial court did not err by admitting the photographs of the deceased; the crime scene photograph aided in describing the circumstances surrounding the crime and the location of the victims, and the autopsy photographs helped the jury understand the location of the wounds. Lewis v. State, 905 So. 2d 729, 2004 Miss. App. LEXIS 1188 (Miss. Ct. App. 2004).

Crime scene photograph was relevant within the meaning of Miss. R. Evid. 401, Miss. R. Evid. 402, and Miss. R. Evid. 403, as it was not prejudicial to defendant in any way. Bradley v. State, 948 So. 2d 506, 2007 Miss. App. LEXIS 33 (Miss. Ct. App. 2007).

Admission of photographs of the victim in a murder case was not an abuse of discretion because they were not overly gruesome and they were relevant to show that defendant killed the victim, as they depicted the circumstances of the shooting, the location of the body, and the cause of death, and they supplemented and clarified testimony regarding the location of the wounds, the trajectory of the bullets, the number of the bullets, and the cause and manner of death. Cotton v. State, 933 So. 2d 1048, 2006 Miss. App. LEXIS 520 (Miss. Ct. App. 2006).

In an aggravated assault case, a trial court did not err by failing to exclude a victim's identification of a gun under Miss. R. Evid. 401 and Miss. R. Evid. 402 because whether the victim was able to identify it was a question for the jury; the victim testified that she saw this particular gun earlier in the night and when she was shot with it. Parks v. State, 950 So. 2d 184, 2006 Miss. App. LEXIS 463 (Miss. Ct. App. 2006).

Defendants' conspiracy convictions were proper where the trial court did not err in admitting a letter to the first defendant, pursuant to Miss. R. Evid. 401 and 402, because the critical fact at issue was whether the first defendant was engaged in a conspiracy, and that letter was evidence that tended to make that fact more probable or less probable than without the evidence. Farris v. State, 906 So. 2d 113, 2004 Miss. App. LEXIS 1126 (Miss. Ct. App. 2004).

Under Miss. R. Evid. 402, all relevant evidence is generally admissible; where the investigating officer was asked about her investigation of the accident and the construction area where the accident had occurred, the information would definitely enable the jury to find the existence of more or less probable material facts, and was therefore relevant under Rule 402. Estate of Carter v. Phillips & Phillips Constr. Co., 860 So. 2d 332, 2003 Miss. App. LEXIS 1117 (Miss. Ct. App. 2003).

**– Accomplice acquittal.**

Trial court did not err in excluding evidence of defendant's accomplice's acquittal because, had defendant's accomplice been convicted, that information could not have been introduced by the State at defendant's trial; therefore, the reverse proposition also applied. Garner v. State, 856 So. 2d 729, 2003 Miss. App. LEXIS 936 (Miss. Ct. App. 2003).

**– Controlled substances.**

In defendant's trial for possession of cocaine, evidence that someone else drove the car in which the cocaine was found and was known to use drugs was not, without more, sufficient to show that defendant did not know about the presence of the cocaine. In the absence of other proof, the evidence was not relevant, and therefore, not admissible. Magee v. State, 912 So. 2d 1044, 2005 Miss. App. LEXIS 252 (Miss. Ct. App. 2005).

**– Criminal history.**

Appellant asserted that because the circuit court allowed the introduction of her possession of marijuana and her subsequent conviction which resulted from the previous trial, the circuit court opened the door to the introduction of evidence that the first trial resulted in a mistrial as to the cocaine charge; however, it was for the second jury to determine the credibility of all the evidence and testimony offered. Evidence that an earlier jury was unable to reach a decision was simply not relevant as it did not make it more or less likely that appellant knowingly possessed the drugs in question; instead, admission of this evidence would only frustrate or improperly influence the deliberations of the later jury. Field v. State, 28 So. 3d 697, 2010 Miss. App. LEXIS 101 (Miss. Ct. App. 2010).

Past criminal history, or drug use, of witness and her husband were not relevant, since witness and her husband were not on trial. Johnston v. State, 618 So. 2d 90, 1993 Miss. LEXIS 181 (Miss. 1993).

Trial court erred in preventing defendant, on relevance grounds, from questioning assailant and other witnesses about assailant's prior drug arrest, and specifically that assailant blamed his arrest on defendant, since these facts substantiated defendant's fear and the need for defendant to arm himself. Owens v. State, 605 So. 2d 817, 609 So. 2d 410, 1992 Miss. LEXIS 587 (Miss. 1992).

**– Discrimination.**

In an action for breach of contract and fraud arising from the purchase by the defendant of insurance for the plaintiff's car after she allowed her own policy to lapse, it was reversible error for the court to allow the plaintiff to introduce irrelevant evidence that the defendant's insurance program disproportionately impacted racial minorities. GMAC v. Baymon, 732 So. 2d 262, 1999 Miss. LEXIS 78 (Miss. 1999).

**– Money.**

Evidence of bank bag and its contents was relevant in that it had a great impact upon credibility of murder defendant's story that he had been robbed, and probative value of evidence substantially outweighed any legally cognizable prejudice. Jackson v. State, 551 So. 2d 132, 1989 Miss. LEXIS 330 (Miss. 1989).

**– Photographs.**

In an aggravated assault case under Miss. Code Ann. § 97-3-7(2), the trial court did not abuse its discretion by finding that the probative value of the photographs of the victim's injury outweighed any danger of unfair prejudice as they were relevant to prove that defendant used means likely to produce death or serious bodily harm, and they were small and blurry and not particularly gruesome. Ford v. State, 975 So. 2d 859, 2008 Miss. LEXIS 102 (Miss. 2008).

In a prosecution for murder, there was no error in the introduction into evidence of photographs of the murder victim where (1) there was nothing in the record to indicate that the admission of the photographs was simply a ploy on the part of the prosecutor to arouse the passion and prejudice of the jury, (2) the photographs established that the victim was dead as a result of a criminal act, and the extent, position, and nature of the wounds the victim sustained, and (3) the photographs assisted the jury in visualizing the crime scene and corroborated the testimony of the investigators of the crime scene. Humphrey v. State, 759 So. 2d 368, 2000 Miss. LEXIS 101 (Miss. 2000).

**– Res gestae.**

In defendant's capital murder case, defendant's right to a fair trial was not violated by the trial court's admission of testimony about the sexual assault of the victim, which defendant was not charged with, that occurred in the moments preceding her murder, where sexual molestation was integrally so related to her murder that one could not coherently present the facts of her demise without reference to it, and the testimony described part of the res gestae of the crime charged and helped shed light on defendant's motive. McGowen v. State, 859 So. 2d 320, 2003 Miss. LEXIS 413 (Miss. 2003).

**– State of mind.**

In a case in which defendant was convicted on two counts of capital murder, in violation of Miss. Code Ann. § 97-3-19(2)(e), the trial court did not erred when it excluded evidence that he attempted to commit suicide after he shot the two murder victims because evidence of his attempted suicide was not relevant. Defendant argued that his attempted suicide was relevant to his state of mind and bolstered his argument that he acted in the heat of passion; while his attempted suicide could arguably be viewed as evidence that he regretted his actions, under the circumstances, it did not tend to make it more probable that he acted in the heat of passion when he killed the two victims. Williams v. State, 29 So. 3d 53, 2009 Miss. App. LEXIS 532 (Miss. Ct. App. 2009), cert. denied, 29 So. 3d 774, 2010 Miss. LEXIS 116 (Miss. 2010).

**– Tax preparations.**

Trial court erred in admitting expert testimony on subject of tax preparations and calculations, and loss of use of income; chancellor did not need assistance understanding such evidence and testimony was instead offered to help chancellor determine amount of damages suffered, but this was not relevant since it was not a fact at issue, and therefore testimony should not have been admitted. Century 21 Deep South Properties, Ltd. v. Corson, 612 So. 2d 359, 1992 Miss. LEXIS 804 (Miss. 1992).

**– Videotapes.**

There was no abuse of discretion by admitting into evidence a video of the victim sleeping recorded on defendant's phone because the trial court heard testimony from both parties regarding the validity and veracity of the cell phone video recording and found that the video was more probative than prejudicial; defendant failed to show how the admission of the video adversely affected a substantial right. Marion v. State, 281 So. 3d 174, 2019 Miss. App. LEXIS 91 (Miss. Ct. App. 2019).

In a possession of marijuana case, the trial court did not abuse its discretion in sustaining the state's objection to defendants' cross-examination of the chief narcotics officer regarding whether he had been instructed not to videotape interviews, as the issue of videotaping the interviews was irrelevant under Miss. R. Evid. 401 and Miss. R. Evid. 402 to guilt or innocence where there was no dispute regarding the substance of either defendants' interviews or written statements. Juarez v. State, 965 So. 2d 1061, 2007 Miss. LEXIS 555 (Miss. 2007).

The judge did not abuse his discretion in permitting the introduction into evidence of a videotape of drug transactions where the defendant himself testified that he was the individual shown in the videotapes orchestrating the sales; to the extent that the videotapes were inaudible and obscure in places, that was only a factor for the jury to weigh in determining whether the state proved beyond a reasonable doubt that the defendant participated in the sales. Flowers v. State, 726 So. 2d 185, 1998 Miss. App. LEXIS 955 (Miss. Ct. App. 1998).

A trial court did not err in excluding collateral-source evidence and in refusing to allow a partnership to use evidence to impeach an injured party when the injured party's testimony about medical bills and nonmedical evidence was not unduly prejudicial. Robinson Prop. Group, L.P. v. Mitchell, 7 So. 3d 240, 2009 Miss. LEXIS 195 (Miss. 2009).

While a witness's use of a victim's bank card possessed a tendency to establish a motive or intent for his involvement in the crime, for purposes of Miss. R. Evid. 401, the exact number of withdrawals and/or the exact amount actually withdrawn by the witness was not a fact of consequence to the determination of the case, and even if determined relevant, the evidence would have been properly excluded under Miss. R. Evid. 403, and this evidence was properly excluded under Miss. R. Evid. 402. Williams v. State, 994 So. 2d 808, 2008 Miss. App. LEXIS 183 (Miss. Ct. App.), cert. denied, 998 So. 2d 1010, 2008 Miss. LEXIS 665 (Miss. 2008).

Former employee witness had no legitimate purpose in testifying about his alleged injury at the corporation's plant as this alleged injury was unrelated to the claims asserted by the resident at trial, and this testimony unfairly prejudiced the jury against the corporation. E.I. DuPont de Nemours & Co. v. Strong, 968 So. 2d 410, 2007 Miss. LEXIS 574 (Miss. 2007).

Exclusion of the mortgage company representative's deposition from evidence at trial was proper in the couple's fraud and misrepresentation claims because the testimony did not make any fact or consequence to the fraud claim more or less probable. Johnson v. Bay City South Mortg. Co., 928 So. 2d 888, 2005 Miss. App. LEXIS 732 (Miss. Ct. App. 2005), cert. denied, 929 So. 2d 923, 2006 Miss. LEXIS 272 (Miss. 2006).

Defendant's conviction for murdering her husband was proper where an informant's identity was not relevant to any issues regarding whether defendant had committed the crime charged. Thus, the trial court was correct in refusing to disclose the identity of the informant. Stephens v. State, 911 So. 2d 424, 2005 Miss. LEXIS 386 (Miss. 2005).

**Illustrative cases.**

In defendant's trial for sexual battery of minor victims, who were residents of a home for children, evidence of an alleged incident in which one of the alleged victims urinated in someone's orange juice and evidence of inappropriate text messages by the alleged victim were irrelevant because neither incident tended to prove that the alleged victim manipulated the other alleged victim into fabricating allegations about defendant, who was a house parent, in retaliation for being punished by defendant. Copes v. State, — So. 3d —, 2021 Miss. App. LEXIS 54 (Miss. Ct. App. Feb. 2, 2021), aff'd, 333 So. 3d 1, 2022 Miss. LEXIS 37 (Miss. 2022).

In a sexual battery case, the seven-year-old victim's mental health and medical records were properly excluded because the records briefly alluding to the facts that the victim's parents neglected her and her brother and abused drugs were irrelevant; notes from counseling sessions did not suggest that the victim fabricated her allegations against defendant in order to manipulate anyone; and the relevant statements were not made by the victim or her grandmother to the counselor for the purpose of diagnosis or treatment. McCammon v. State, 299 So. 3d 873, 2020 Miss. App. LEXIS 28 (Miss. Ct. App.), cert. denied, 299 So. 3d 794, 2020 Miss. LEXIS 297 (Miss. 2020).

Trial judge did not abuse their discretion by excluding an accident-reconstruction expert as an expert witness because, although the witness was qualified through training, certification, and experience, and the testimony was relevant, the judge did not find the testimony of the witness sufficiently reliable in that without laws governing private gas-station parking lots and without the parties' estimated speeds in a parking lot at the time of an accident the witness could not connect the dots between any factual basis and a finding of fault. Thompson v. Holliman, 283 So. 3d 718, 2019 Miss. LEXIS 389 (Miss. 2019).

Trial judge did not abuse the judge's discretion in defendant's criminal trial by excluding proffered recordings of 911 calls because, although it was relevant what law enforcement knew or believed about a shooting and who they identified as a suspect in the calls, the suspicions or statements of unidentified persons had no probative value as the calls were speculative and cumulative. Byrd v. State, — So. 3d —, 2019 Miss. App. LEXIS 146 (Miss. Ct. App. Apr. 9, 2019), cert. denied, 283 So. 3d 734, 2019 Miss. LEXIS 435 (Miss. 2019), cert. denied, — So. 3d —, 2019 Miss. LEXIS 473 (Miss. 2019).

Chancellor's evidentiary rulings on the parties' motion-in-limine requests in a will contest resulted in the admission of evidence that was relevant to the question of the will's validity as the deeds and bank records admitted were probative of the pattern of conduct that existed between the proponents of the will and the decedent and the confidential relationship that existed between the proponents and the decedent. Moreover, the evidence was not unfairly prejudicial, did not confuse the issues, and did not mislead the jury. Posey v. Pope, 269 So. 3d 1213, 2018 Miss. App. LEXIS 407 (Miss. Ct. App. 2018).

Chancellor's evidentiary rulings on the parties' motion-in-limine requests in a will contest resulted in the admission of evidence that was relevant to the question of the will's validity as the deeds and bank records admitted were probative of the pattern of conduct that existed between the proponents of the will and the decedent, the confidential relationship that existed between the proponents and the decedent, and the impeachment of one proponent's direct-examination testimony. Posey v. Pope, 269 So. 3d 1213, 2018 Miss. App. LEXIS 407 (Miss. Ct. App. 2018).

Admission of a detective's testimony was not plain error because the jury was not exposed to inadmissible hearsay, and defendant's rights under the Confrontation Clause were not implicated; the detective's testimony was relevant and related to his decisionmaking in his investigatory process. Smith v. State, 258 So. 3d 292, 2018 Miss. App. LEXIS 343 (Miss. Ct. App. 2018).

State's motions in limine were properly granted because the evidence of the shooting of defendant's mother months earlier was not relevant and allowing the evidence to be introduced certainly would have confused the jury. Wells v. State, 233

So. 3d 279, 2017 Miss. LEXIS 409 (Miss. 2017).

In a case in which plaintiff was sexually assaulted by an undocumented worker in the hotel-lobby bathroom of defendant's resort, and a jury returned a verdict in favor of defendant, the circuit court did not err in prohibiting plaintiff from referencing the attacker's status as an "illegal immigrant" or an "undocumented worker," as such evidence was irrelevant and potentially prejudicial. Magers v. Diamondhead Resort, LLC, 224 So. 3d 106, 2016 Miss. App. LEXIS 793 (Miss. Ct. App. 2016), cert. denied, 2017 Miss. LEXIS 337 (Miss. July 17, 2017), cert. denied, 222 So. 3d 311, 2017 Miss. LEXIS 284 (Miss. 2017).

In an inverse condemnation proceeding against the Mississippi Transportation Commission (Commission), it was not error to grant the Commission's motion in limine to bar evidence of the Commission's alleged abandonment of an easement, apart from the Commission's minutes, because (1) the Commission could not abandon the easement by nonuse, and (2) any determination releasing the easement had to be on the Commission's minutes, making such minutes the only relevant admissible evidence of such a release. Bay Point Props. v. Miss. Transp. Comm'n, 201 So. 3d 1046, 2016 Miss. LEXIS 282 (Miss. 2016), cert. denied, — U.S. —, 137 S. Ct. 2002, 198 L. Ed. 2d 750, 2017 U.S. LEXIS 4057 (U.S. 2017).

Trial court did not abuse its discretion in limiting a defense witness's testimony because defendant failed to prove the relevance of the testimony regarding the occasion he smoked marijuana with the victim; the evidence did not support defendant's theory that he fought with the victim over drug money because the testimony did not relate to any occurrences involving defendant, the victim, and the incident or show that either the victim or defendant was involved in buying or selling drugs. Scott v. State, 231 So. 3d 1024, 2016 Miss. App. LEXIS 404 (Miss. Ct. App. 2016), aff'd, 231 So. 3d 995, 2017 Miss. LEXIS 440 (Miss. 2017).

Trial court did not err by allowing the prosecution to cross-examine defendant at defendant's trial for sexual battery about defendant's previous paramours to discredit defendant's alibi witness because defendant's omission of the name of the alibi witness from defendant's list of previous paramours tended to make it more probable that the testimony of the alibi witness was not credible. Grant v. State, 198 So. 3d 400, 2016 Miss. App. LEXIS 139 (Miss. Ct. App. 2016).

Cell phone records did not have any tendency to make the existence of any fact that was of consequence to the determination of the action, which involved whether defendant was guilty, more or less likely than it would have been without the evidence; whether defendant actually made the phone calls and sent some text messages before the attack was not relevant and the trial court did not abuse its discretion in excluding the cell phone records. Burgess v. State, 210 So. 3d 569, 2016 Miss. App. LEXIS 314 (Miss. Ct. App. 2016), cert. denied, 209 So. 3d 431, 2017 Miss. LEXIS 59 (Miss. 2017).

Chancellors do not have discretion in admitting and/or considering relevant evidence in the context of the statute for determining the validity of bond issues; therefore, a chancellor erred by finding that the time had passed for the presentation of evidence as to the sufficiency of the signatures on the petition. Not only was it the correct time for presenting evidence of the sufficiency of the signatures on the petition, but it was the only time. Russell v. Humphreys Cnty. Bd. of Supervisors (In re Validation of Tax Anticipation Note), 187 So. 3d 1025, 2016 Miss. LEXIS 138 (Miss. 2016).

In a driving under the influence case, defendant's failure to submit to the Intoxilizyer 8000 was properly admitted into evidence where the State submitted sufficient evidence of intoxication. The evidence was relevant and admissible. Nolan v. State, 182 So. 3d 484, 2016 Miss. App. LEXIS 21 (Miss. Ct. App. 2016).

Witness's testimony that she believed defendant was responsible for the victim's death when she heard that the victim had been killed was not irrelevant and was admissible because it was based on her involvement in the events that preceded the victim's death including defendant following her and threatening the victim;

and because the prejudicial effect of the witness's testimony was substantially mitigated by the circuit court's instruction that it was the jurors' exclusive province to determine the facts in the case and to consider and weigh the evidence for that purpose. Ellis v. State, 196 So. 3d 1029, 2015 Miss. App. LEXIS 680 (Miss. Ct. App. 2015), cert. denied, 202 So. 3d 613, 2016 Miss. LEXIS 316 (Miss. 2016).

In a murder case, a knife, golf club, and brass knuckles were probative and admissible because the forensic pathologist testified that the victim had suffered blunt-force trauma and multiple cuts or stab wounds; the items, as well as the hair fibers, rubber strap, and mop, constituted a part of the surrounding scene of the crime and were probative; defendant did not show how he was prejudiced by the introduction of any of the items; and defendant had the opportunity to cross-examine the witnesses who testified regarding the evidence, and to emphasize to the jury his argument that the items were not used in the commission of the crime. Affleck v. State, 210 So. 3d 1067, 2015 Miss. App. LEXIS 675 (Miss. Ct. App. 2015), cert. denied, 203 So. 3d 598, 2016 Miss. LEXIS 388 (Miss. 2016), cert. denied, 2016 Miss. LEXIS 391 (Miss. Sept. 15, 2016), cert. denied, 580 U.S. 1128, 137 S. Ct. 1091, 197 L. Ed. 2d 201, 2017 U.S. LEXIS 1278 (U.S. 2017).

Trial court did not abuse its discretion by allowing a witness to testify at defendant's trial for domestic aggravated assault that the witness was a former paramour of defendant and that, a few months prior to the crime for which defendant was tried, the witness was the victim of an assault by defendant. The testimony was relevant to prove the knowledge, intent, lack of mistake, plan, and motive of defendant in committing the charged assault. Hoskins v. State, 186 So. 3d 898, 2015 Miss. App. LEXIS 424 (Miss. Ct. App. 2015), cert. denied, 186 So. 3d 854, 2016 Miss. LEXIS 120 (Miss. 2016).

Trial court abused its discretion in excluding a pre-negotiation appraisal report under Miss. R. Evid. 403 where it did not find that the probative value of the report was substantially outweighed by the danger of unfair prejudice, and since the landowners were allowed to impeach an expert witness appraiser with his prior appraisal under Miss. R. Evid. 607, it was relevant evidence in the eminent domain action. Redding v. Miss. Transp. Comm'n, 169 So. 3d 958, 2014 Miss. App. LEXIS 676 (Miss. Ct. App. 2014), cert. denied, 168 So. 3d 962, 2015 Miss. LEXIS 374 (Miss. 2015).

In an automobile collision case, a trial court erred by allowing the jury to consider the income of plaintiff's husband as a personal injury attorney. Even if there was some probative value that could have been derived from the husband's ability to pay more for plaintiff's services as his office manager, the evidence should have been excluded because it served to show that plaintiff did not need to be compensated due to her financial ability to cover her own injuries. Loyacono v. Travelers Ins. Co., 163 So. 3d 932, 2014 Miss. LEXIS 304 (Miss. 2014).

State of Mississippi was permitted to impeach defense witnesses, who testified at a sentencing hearing as to defendant's good character, by asking if the witnesses were aware that defendant had pleaded guilty to a felony charge of credit-card fraud. Batiste v. State, 121 So. 3d 808, 2013 Miss. LEXIS 295 (Miss. 2013), cert. denied, 572 U.S. 1117, 134 S. Ct. 2287, 189 L. Ed. 2d 178, 2014 U.S. LEXIS 3424 (U.S. 2014).

In defendant's trial on a charge of possession of cocaine with intent to distribute, a circuit court properly determined a defense witness's testimony was inadmissible, pursuant to Miss. R. Evid. 402, because the witness could neither verify nor deny that defendant had been transferring narcotics before he was arrested, and the witness had not seen whether defendant had discarded any narcotics while police attempted to apprehend him; thus, the witness's testimony was irrelevant. Hosey v. State, 77 So. 3d 507, 2011 Miss. App. LEXIS 348 (Miss. Ct. App. 2011), cert. denied, 78 So. 3d 906, 2012 Miss. LEXIS 19 (Miss. 2012).

Evidence was sufficient to support defendant's conviction for common law DUI under Miss. Code Ann. § 63-11-30(1)(a) (Rev. 2004) as it showed that defendant admitted to the officer who stopped his vehicle that he had drunk two beers while he was driving, that he also admitted that he had drunk liquor and beer earlier in the day, that the officer smelled a strong odor of alcohol coming from defendant and observed defendant's glassy eyes, and that defendant refused to field sobriety test and the chemical test. Evidence that defendant refused the chemical test was admissible pursuant to Miss. Code Ann. § 63-11-41 (Rev. 2004) and Miss. R. Evid. 402. Ellis v. State, 77 So. 3d 1119, 2011 Miss. App. LEXIS 223 (Miss. Ct. App. 2011), cert. denied, 78 So. 3d 906, 2012 Miss. LEXIS 25 (Miss. 2012).

Defendant's manslaughter conviction was proper because a witness's testimony that the victim had cursed the witness's father and that the victim had a bad temper and was overbearing was correctly deemed not admissible. The hearsay testimony was not only too remote in time to be admissible, it was also irrelevant, and its probative value was outweighed by its prejudicial effect. Booker v. State, 64 So. 3d 988, 2010 Miss. App. LEXIS 329 (Miss. Ct. App. 2010), aff'd, 64 So. 3d 965, 2011 Miss. LEXIS 316 (Miss. 2011).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the trial court did not err by excluding evidence of the trucking company's carrier rating; the carrier rating was not relevant to the litigation that arose from the decedent's death because the widow's main contention was that the tractor-trailer did not have any reflective tape on the back panel. The carrier rating at issue was for violations occurring after the date of the decedent's wreck, and none of the violations involved a violation for non-use of reflective tape. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450, 2010 Miss. LEXIS 200 (Miss. 2010).

During defendant's trial for DUI, the court did not err in considering defendant's refusal to submit to a breathalyzer test because the evidence was admissible and relevant. Knight v. State, 14 So. 3d 76, 2009 Miss. App. LEXIS 484 (Miss. Ct. App. 2009).

In defendant's murder trial for killing a man whom his ex-wife was dating, the trial court did not err in permitting defendant's ex-wife to testify that defendant threatened to kill her and any man with whom he caught her. According to the ex-wife's testimony, on the same day that someone killed the victim, defendant told his ex-wife, who had been dating the victim, that he would kill any man she dated; this testimony tended to reveal defendant's state of mind and his motive, and because this testimony tended to make it more probable that defendant killed the victim, the testimony was relevant and admissible. Parker v. State, 20 So. 3d 702, 2009 Miss. App. LEXIS 186 (Miss. Ct. App.), cert. denied, 20 So. 3d 680, 2009 Miss. LEXIS 544 (Miss. 2009).

Trial court did not abuse its discretion in sustaining State's relevancy objection because there was no relevancy connection between a jail assault of defendant and the aggravated assault of a defendant's victim. Because they were separate incidents, disconnected both temporally and by location, the evidence was irrelevant under Miss. R. Evid. 401 and thus, inadmissible under Miss. R. Evid. 402. Miller v. State, 996 So. 2d 752, 2008 Miss. LEXIS 605 (Miss. 2008).

In a dispute over insurance coverage, the trial court did not abuse its discretion by redacting a prior carpet cleaning receipt and disallowing evidence of flood insurance because the jury would have had to infer that the similarity in cleaning services in 2003 and 2004 was an indication that the damage in both years resulted from the same cause. Additionally, the jury would have had to infer from the fact that the insured made a successful flood insurance claim with a different company in 2004 that the damage in 2004 resulted entirely from a flood and not in part from sewer or drain backup. United States Fid. & Guar. Co. v. Martin, 998 So. 2d 956, 2008 Miss. LEXIS 555 (Miss. 2008).

Trial court did not violate defendant's Sixth Amendment right to confrontation by excluding testimony that his victims were smoking marijuana at the time he assaulted them by limiting his ability to cross-examine one victim regarding the intoxication; the evidence was properly excluded under Miss. R. Evid. 401 and 402 because defendant presented no evidence that smoking marijuana increased a person's propensity for violence generally or that smoking marijuana increased the victim's propensity for violence. Since defendant did not meet the threshold for establishing the probative value of the evidence, the testimony on whether the victim had been smoking marijuana the morning of the assault was irrelevant. Rouster v. State, 981 So. 2d 314, 2007 Miss. App. LEXIS 781 (Miss. Ct. App. 2007).

In defendant's murder case, the court did not err by not allowing defendant to introduce evidence of a witness's status as an informant because no impeaching material was concealed; moreover, the witness's status as a confidential informant to the Hinds County Sheriff's Department was irrelevant to the case because the department had no involvement with the case. Brown v. State, 965 So. 2d 1023, 2007 Miss. LEXIS 430 (Miss. 2007).

Evidence that a child victim had allegedly caused injuries to his own rectum by sticking objects there was properly excluded in a sexual battery case because it was irrelevant under Miss. R. Evid. 401 and highly prejudicial under Miss. R. Evid. 403, and it was also a collateral issue that was too remote in time to rebut the charges based on the fact that it was a year before the charges in an indictment; case law under Miss. R. Evid. 412 was helpful in making this determination, despite the fact that the victim's actions did not constitute clear sexual activity. Mason v. State, 971 So. 2d 618, 2007 Miss. App. LEXIS 327 (Miss. Ct. App.), cert. denied, 973 So. 2d 244, 2007 Miss. LEXIS 701 (Miss. 2007).

Where defendant was convicted for killing his former girlfriend, given his testimony that her male friend had previously threatened him with a gun, whether or not the male friend owned a gun at the time of the alleged threats was relevant because it tended to increase or decrease, however minimally, the probability of the truth of defendant's testimony supporting his defense of self-defense. Therefore, the trial court abused its discretion when it prohibited the question on the male friend's prior gun ownership, even though same was ultimately found to constitute harmless error in the case at bar. Raiford v. State, 907 So. 2d 998, 2005 Miss. App. LEXIS 279 (Miss. Ct. App. 2005).

In a murder case, the court properly admitted evidence of an ongoing family feud between defendant's family and the victim's family because whether or not defendant was directly involved in each individual altercation, the evidence was relevant and was not so prejudicial as to constitute reversible error because the testimony had the tendency of making the action more or less probable; defendant obviously knew of the ongoing feud and had participated in several altercations with members of the victim's family. Morris v. State, 963 So. 2d 1170, 2007 Miss. App. LEXIS 165 (Miss. Ct. App.), cert. denied, 964 So. 2d 508, 2007 Miss. LEXIS 502 (Miss. 2007).

In a business burglary case, defendant's motion in limine to preclude introduction of evidence regarding cartons of cigarettes found in defendant's vehicle was properly denied because the cartons were clearly relevant to defendant's burglary of the store, because the primary items taken were the dozens of cartons of cigarettes, and the evidence was highly probative of defendant's burglary of the store. Cridiso v. State, 956 So. 2d 281, 2006 Miss. App. LEXIS 745 (Miss. Ct. App. 2006), cert. denied, 957 So. 2d 1004, 2007 Miss. LEXIS 285 (Miss. 2007).

Finding in favor of the husband and wife in their action against the city for personal injuries and loss of consortium under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., was proper pursuant to Miss. R. Evid. 401 and Miss. R. Evid. 402 because an expert's testimony tended to make the fact that the city negligently repaired and maintained the grate and sidewalk more probable than that without his proffered evidence. City of Natchez v. Jackson, 941 So. 2d 865, 2006 Miss. App. LEXIS 686 (Miss. Ct. App. 2006).

In a case where the decedent was struck and killed by a train, the trial court clearly did not abuse its discretion in granting the order precluding evidence or testimony regarding the sufficiency of the warning device at the crossing because the evidence was not relevant to any of the administratrix's theories of recovery.

Clark v. Ill. Cent. R.R., 872 So. 2d 773, 2004 Miss. App. LEXIS 423 (Miss. Ct. App. 2004).

Trial court's ruling to exclude material depicting a small child in a rearward facing passenger seat from a wrongful death lawsuit following the death of a 10-year-old child when a car air bag deployed on the ground that the material was not similar enough to the subject case was an abuse of the trial court's discretion. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564, 2003 Miss. App. LEXIS 752 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 2005 Miss. LEXIS 21 (Miss. Jan. 13, 2005), aff'd in part and rev'd in part, 904 So. 2d 1077, 2005 Miss. LEXIS 247 (Miss. 2005).

Trial court's relevancy ruling in a wrongful death action, in which the court denied the admission into evidence of a letter from the National Transportation Safety Board (NTSB) to auto manufacturers that contained an opinion that efforts to inform and educate the public about the dangers of air bags were not reaching parents and recommending a media campaign, on the grounds that the NTSB lacked regulatory authority over automobile manufacturers, constituted an abuse of discretion. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564, 2003 Miss. App. LEXIS 752 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 2005 Miss. LEXIS 21 (Miss. Jan. 13, 2005), aff'd in part and rev'd in part, 904 So. 2d 1077, 2005 Miss. LEXIS 247 (Miss. 2005).

In a capital murder case where defendant was indicted separately for each of four murders, the trial court committed reversible error and denied defendant a fair trial because it admitted irrelevant evidence regarding the other three victims; throughout the trial, the prosecution referred continually to all four individuals who had been killed, through the testimony of its witnesses and the evidence it introduced. Flowers v. State, 842 So. 2d 531, 2003 Miss. LEXIS 149 (Miss. 2003).

Although the trial court abused its discretion when it denied submission of a defense witness's testimony regarding a murder defendant's state of mind, the error was harmless in light of the overwhelming evidence of defendant's guilt. Jefferson v. State, 818 So. 2d 1099, 2002 Miss. LEXIS 125 (Miss. 2002).

In a prosecution for aggravated assault, there was no violation of the rule where (1) the victim testified, in an uninvited and unresponsive manner, that she was one week pregnant at the time she was shot, and (2) the court then determined that the jury should be informed that the unborn child was not harmed by the gunshot so as to avoid any undue bias against the defendant. Williams v. State, 784 So. 2d 230, 2000 Miss. App. LEXIS 538 (Miss. Ct. App. 2000).

Evidence that murder defendant subsequently purchased and used cocaine with proceeds of stolen guns did not make it any more likely that he committed murder, and thus this evidence was irrelevant should not have been admitted. Snelson v. State, 704 So. 2d 452, 1997 Miss. LEXIS 607 (La. 1997).

Trial court erred in excluding witness's testimony as irrelevant, since issue was not the collateral matter of whether subject of her testimony had a character trait for being truthful, but the central issue of whether he, rather than defendant, was responsible for assault in question. Clark v. State, 514 So. 2d 1221, 1987 Miss. LEXIS 2866 (Miss. 1987).

## RESEARCH REFERENCES

**ALR.**

Admissibility of results of presumptive tests indicating presence of blood on object. 82 A.L.R.5th 67.

Admissibility of computer-generated animation. 111 A.L.R.5th 529.

Admissibility and Effect of Evidence or Comment on Party's Military Service or Lack Thereof. 24 A.L.R. 6th 747.

## Rule 403. Excluding relevant evidence for prejudice, confusion, waste of time, or other reasons.

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

**HISTORY: Restyled effective July 1, 2016.**

### ADVISORY COMMITTEE NOTE

The language of Rule 403 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Relevant evidence may be inadmissible when its probative value is outweighed by its tendency to mislead, to confuse, or to prejudice the jury. If the introduction of the evidence would waste more time than its probative value was worth, then a trial judge may rightly exclude such otherwise relevant evidence. By providing for the exclusion of evidence whose probativeness is outweighed by prejudice, Mississippi is following existing federal and state practice. *U.S. v. Renfro,* 620 F.2d 497 (5th Cir. 1980), cert. denied 449 U.S. 921, 101 S. Ct. 321, 66 L. Ed. 2d 149 (1980). Such a rule also keeps collateral issues from being injected into the case. *Hannah v. State,* 336 So. 2d 1317 (Miss. 1976), cert. denied, 429 U.S. 1101, 97 S. Ct. 1126, 51 L. Ed. 2d 551 (1977); *Coleman v. State,* 198 Miss. 519, 23 So. 2d 404 (1945). This rule also gives the trial judge the discretion to exclude evidence which is merely cumulative. *Carr v. State,* 208 So. 2d 886 (Miss. 1968). ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

### JUDICIAL DECISIONS

#### ANALYSIS

In general.
Audiotapes.
Autopsy photographs.
Ballistics evidence.
Cautionary instructions.
Collateral-source payments.
Complete story.
Confusion.
Course of conduct.
Cumulative evidence.
Depositions.
Discrimination.
DNA evidence.
Drug offenses.
Flight.
Gang activity.
Insurance.
Money.
Other crimes.
Other lawsuits.
Photographs.
Prejudice found.
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Preservation for review.
Prior accidents.
Prior charges.
Prior conviction.
Prior incarceration.
Prior indictments.
Prior sexual relations.
Prior violence.
Profane language.
Rebuttal evidence.
Relationship with Miss. R. Evid. 404(b).
Sanity.
Sexual orientation.
Social media.
Suspensions.
Tape recordings.
Testimony.
Videotapes.
Written documents.

Illustrative cases.

**In general.**

Circuit court did not weigh the probative value of the evidence versus its prejudicial effect on the record, but that is not always required; where, as here, a defendant fails to make a contemporaneous objection to prior act evidence, the circuit court cannot be faulted for failing to conduct an explicit on-the-record balancing test analysis. Wilson v. State, 149 So. 3d 544, 2014 Miss. App. LEXIS 354 (Miss. Ct. App. 2014).

While a trial judge did not make a lengthy analysis of the arguments presented, the judge held that the probative value of the evidence outweighed its prejudicial effect, and any error in the judge's failure to make a more detailed record of the analysis under Miss. R. Evid. 403 was harmless. Liddell v. State, 33 So. 3d 524, 2010 Miss. App. LEXIS 183 (Miss. Ct. App. 2010).

To the extent that Mississippi courts have held that evidence of collateral-source payments may not be introduced for the purpose of impeaching false or misleading testimony, those decisions are expressly overruled. Permitting evidence of collateral-source payments for the narrow purpose of impeaching false or misleading testimony is consistent with the Mississippi Rules of Evidence. Robinson Prop. Group, L.P. v. Mitchell, 7 So. 3d 240, 2009 Miss. LEXIS 195 (Miss. 2009).

In a former client's assault and mental anguish claim against his former attorney, his child support delinquency prior to the assault contradicted the client's claim for emotional distress damages and was admissible. Walker v. Benz, 914 So. 2d 1262, 2005 Miss. App. LEXIS 903 (Miss. Ct. App. 2005).

While a trial court certainly had to balance probative value and prejudice when evaluating evidence, a trial court's failure to articulate the balancing on the record did not require reversal. Jones v. State, 937 So. 2d 455, 2005 Miss. App. LEXIS 834 (Miss. Ct. App. 2005), cert. denied, 937 So. 2d 450, 2006 Miss. LEXIS 572 (Miss. 2006).

In a capital murder case, a trial court did not err by failing to determine whether or not prior bad acts evidence was admissible by conducting a balancing test to determine if the probative value was outweighed by the prejudicial effect because the State never sought to introduce the evidence at trial. Le v. State, 913 So. 2d 913, 2005 Miss. LEXIS 151 (Miss.), cert. denied, 546 U.S. 1004, 126 S. Ct. 622, 163 L. Ed. 2d 508, 2005 U.S. LEXIS 8254 (U.S. 2005).

Trial court did not err by admitting the photographs of the deceased; the crime scene photograph aided in describing the circumstances surrounding the crime and the location of the victims, and the autopsy photographs helped the jury understand the location of the wounds. Lewis v. State, 905 So. 2d 729, 2004 Miss. App. LEXIS 1188 (Miss. Ct. App. 2004).

Defendant was not entitled to a Miss. R. Evid. 403 hearing on whether evidence of a drug sale that took place the day before a cocaine transaction was admissible, as defense counsel had opened the door about how the officer knew defendant was the one who sold him the drugs, and the officer used the evidence of the prior drug sale as his basis for knowing defendant was the seller. McIntyre v. State, 900 So. 2d 380, 2004 Miss. App. LEXIS 1122 (Miss. Ct. App. 2004), cert. denied, 898 So. 2d 679, 2005 Miss. LEXIS 281 (Miss. 2005).

In defendant's trial on charges of violating Miss. Code Ann. § 97-11-53, inducement to influence a public official to approve a property owner's construction project, the trial court did not violate defendant's Sixth Amendment right to confront witnesses by limiting his cross-examination of the property owner because defendant sought to inquire about other lawsuits in which the property owner was involved and the trial court had determined that the property owner had not been convicted of any of the wrongdoings for which defense counsel wished to impeach his testimony, thus the trial court ruled that the testimony sought to be elicited from the property owner would not have been allowed by Miss. R. Evid. 609 and that it would have been unduly prejudicial, in violation of Miss. R. Evid. 403. Because the trial court's ruling was in accordance with the Mississippi

Rules of Evidence, no abuse of discretion was present. Edmonson v. State, 906 So. 2d 73, 2004 Miss. App. LEXIS 1124 (Miss. Ct. App. 2004).

In a capital murder case, the trial court did not err in allowing codefendant and witnesses to testify that defendant had stated he needed money to pay his probation officer, as any prejudice from admitting the testimony did not substantially outweigh the probative value of allowing the testimony to establish defendant's motive and intent for the murder. Howell v. State, 860 So. 2d 704, 2003 Miss. LEXIS 556 (Miss. 2003), cert. dismissed, 543 U.S. 440, 125 S. Ct. 856, 160 L. Ed. 2d 873, 2005 U.S. LEXIS 1371 (U.S. 2005).

When the defendant objects to the admission of character evidence, the trial court must balance its probative value against the danger of unfair prejudice, pursuant to Miss. R. Evid. 105, 403, 609(a), and the court finds that the rule envisions an objection contemporaneous with the admission of the testimony; as the prior bad acts evidence was introduced by one defendant, any objection thereto by that defendant was waived, and because none of defendants objected to the closing argument that referred to the prior bad acts evidence, which was not unduly prejudicial in the first place, the court found that error was not preserved on appeal and the issue had no merit. Harris v. State, 2003 Miss. LEXIS 80 (Miss. Feb. 20, 2003), op. withdrawn, sub. op., 861 So. 2d 1003, 2003 Miss. LEXIS 872 (Miss. 2003).

Trial court did not err in excluding evidence that the victim had been attacked by a person in a sport utility vehicle two years before the murder, as there was no evidence that the person had continued to stalk her and the event was too remote in time to the actual crime. Anthony v. State, 843 So. 2d 51, 2002 Miss. App. LEXIS 511 (Miss. Ct. App. 2002), cert. denied, 842 So. 2d 578, 2003 Miss. App. LEXIS 411 (Miss. Ct. App. 2003).

If an accused objects to Rule 404(b) evidence and the trial court, after conducting a Rule 403 analysis, finds that the probative value of the evidence outweighs the prejudicial effect, the trial court must treat the objection to the admissibility of Rule 404(b) evidence as a request for a limiting instruction. Webster v. State, 754 So. 2d 1232, 2000 Miss. LEXIS 19 (Miss. 2000).

Even when other-crimes evidence is admissible under Rule 404(b), it must pass through the ultimate filter of this rule. Jasper v. State, 759 So. 2d 1136, 1999 Miss. LEXIS 377 (Miss. 1999).

A trial court presented with a Rule 403 objection to relevant evidence must engage in a balancing process; the more probative the evidence is, the less likely it is that a Rule 403 factor will be of sufficient consequence to substantially outweigh the probative value; on the other hand, the less probative value the evidence has, the less significant the Rule 403 factor would have to be to justify exclusion. Brown v. State, 749 So. 2d 204, 1999 Miss. App. LEXIS 497 (Miss. Ct. App. 1999).

If one or more of the Rule 403 considerations slightly outweigh probative value, the evidence still must be admitted; the Rule 403 factors must substantially outweigh the probative value before the evidence may be excluded, and the trial court is afforded broad discretion in weighing these interests. Brown v. State, 749 So. 2d 204, 1999 Miss. App. LEXIS 497 (Miss. Ct. App. 1999).

The determination of "prior bad acts" testimony is a dual test encompassing both Rule 404(b) and the prejudice test of Rule 403. Kelly v. State, 735 So. 2d 1071, 1999 Miss. App. LEXIS 133 (Miss. Ct. App. 1999).

When a party seeks to cross-examine a witness about specific instances of past conduct probative of veracity under M.R.E. Rule 608 (b), trial judge should make specific findings of record under Rule 403. Brent v. State, 632 So. 2d 936, 1994 Miss. LEXIS 99 (Miss. 1994).

Even if exception under M.R.E. Rule 404(b) is invoked, trial court is still required to conduct balancing analysis under Rule 403, to determine whether probative value of evidence is substantially outweighed by the danger of unfair prejudice. Lockett v. State, 517 So. 2d 1317, 1987 Miss. LEXIS 2854 (Miss. 1987).

**Audiotapes.**

Trial judge did not abuse the judge's discretion in defendant's criminal trial by excluding proffered recordings of 911 calls because, although it was relevant what law enforcement knew or believed about a shooting and who they identified as a suspect in the calls, the suspicions or statements of unidentified persons had no probative value as the calls were speculative and cumulative. Byrd v. State, — So. 3d —, 2019 Miss. App. LEXIS 146 (Miss. Ct. App. Apr. 9, 2019), cert. denied, 283 So. 3d 734, 2019 Miss. LEXIS 435 (Miss. 2019), cert. denied, — So. 3d —, 2019 Miss. LEXIS 473 (Miss. 2019).

Trial court did not abuse its discretion in allowing the entire 911 call to be admitted because the probative value of the recorded 911 call was not outweighed by the danger of unfair prejudice; although the first two minutes contained much of the substance of the call, the remainder had probative value as well. Corrothers v. State, 148 So. 3d 278, 2014 Miss. LEXIS 311 (Miss. 2014), cert. denied, 576 U.S. 1023, 135 S. Ct. 2835, 192 L. Ed. 2d 877, 2015 U.S. LEXIS 3926 (U.S. 2015).

In defendant's trial for statutory rape, the trial court did not abuse its discretion in admitting taped conversations between defendant and his girlfriend's children; the audiotapes demonstrated that defendant had sexual contact with his girlfriend's daughter. Fisackerly v. State, 880 So. 2d 368, 2004 Miss. App. LEXIS 809 (Miss. Ct. App. 2004).

**Autopsy photographs.**

In a capital murder case, the trial court did not abuse its discretion in admitting autopsy photos. The photos aided a medical witness in describing the circumstances of the killing and clarified her testimony. Hutto v. State, 227 So. 3d 963, 2017 Miss. LEXIS 180 (Miss. 2017), cert. denied, — U.S. —, 138 S. Ct. 983, 200 L. Ed. 2d 262, 2018 U.S. LEXIS 1361 (U.S. 2018).

Trial court did not err by admitting into evidence pictures of the child victim that were taken after she died where there was no evidence that any of her injuries were caused after her death, they were helpful to the jury because they were able to see the victim's injuries, and they helped resolve contradictory testimony concerning the time the victim could have survived without medical intervention after receiving her fatal injuries. Gray v. State, 202 So. 3d 243, 2015 Miss. App. LEXIS 560 (Miss. Ct. App. 2015).

Trial court did not abuse its discretion in allowing an autopsy photograph of the murder victim to be admitted for identification purposes during the testimony of a doctor. The photograph depicted the head and neck area of the victim and was neither gruesome nor inflammatory. Moore v. State, 52 So. 3d 339, 2010 Miss. LEXIS 574 (Miss. 2010).

Defendant's convictions for murder and kidnapping were proper because autopsy photographs were admissible. The photographs either showed the crime scene and location of the bodies of the victims, or they were used by the State's expert witness to supplement and clarify his testimony; the photographs also had probative value because they aided in describing the circumstances of the killings, showed the location of the bodies and causes of death, and clarified testimony of the expert witness and other law enforcement officers. Lipsey v. State, 50 So. 3d 341, 2010 Miss. App. LEXIS 295 (Miss. Ct. App. 2010), cert. denied, 50 So. 3d 1003, 2011 Miss. LEXIS 13 (Miss. 2011).

During defendant's trial for capital murder, the trial court did not abuse its discretion by allowing the photographs of the victim's body into evidence to aid the testimony of the forensic pathologist; the body had been cleaned, the photographs showed the location of the body, and only close-up photographs of bruises and cuts were shown. The trial court asked defendant's family and friends to leave the courtroom before the photographs were shown so as not to elicit an emotional response which might prejudice defendant. Woods v. State, 14 So. 3d 767, 2009 Miss. App. LEXIS 233 (Miss. Ct. App. 2009).

In defendant's trial for capital murder of defendant's five-year-old child, autopsy photographs were properly admitted because the photographs were of significant probative value when the photographs showed the severity of the beatings, which defendant denied, and corroborating the testimony of defendant's daughter and the findings of the coroner. The photographs' probative value clearly outweighed their prejudicial effect, and the trial court did not err in admitting them. Broadhead v. State, 981 So. 2d 320, 2007 Miss. App. LEXIS 809 (Miss. Ct. App. 2007), cert. denied, 981 So. 2d 298, 2008 Miss. LEXIS 210 (Miss. 2008).

Autopsy photographs were properly admitted in defendant's capital murder trial under Miss. R. Evid. 403 because they aided in describing the circumstances of the killing and the cause of death, they were used to corroborate and aid the testimony of the expert. Further, the photographs were not overly gruesome, prejudicial or inflammatory, and they accurately depicted the nature of the victim's injuries and were probative to showing how he was murdered. Walker v. State, 913 So. 2d 198, 2005 Miss. LEXIS 216 (Miss.), cert. denied, 546 U.S. 1038, 126 S. Ct. 743, 163 L. Ed. 2d 581, 2005 U.S. LEXIS 8688 (U.S. 2005).

Autopsy photographs were properly admitted into evidence since (1) they were neither inordinately gruesome nor inflammatory because no medical instruments protruded from the victim's wounds, no blood surrounded the wounds, and there was no decomposition of the body, and (2) they illustrated the proximity of the entrance gunshot wounds, the size of the wounds according to the calibrated ruler, and the relation of the chest wound to the shoulder and the chest wall; the photos assisted the jurors in their comprehension of the locations and proportions of the wounds which were described in the testimony of a forensic pathologist. Skinner v. State, 751 So. 2d 1060, 1999 Miss. App. LEXIS 436 (Miss. Ct. App. 1999).

**Ballistics evidence.**

Where defendant admitted throughout his brief that he had a gun at the time of the shooting, and witnesses testified that defendant had a gun, the trial judge weighed the probative value of admitting a spent shell casing against its prejudicial effect and determined that indeed its probative value was greater than its prejudicial effect. Hope v. State, 840 So. 2d 747, 2003 Miss. App. LEXIS 208 (Miss. Ct. App. 2003).

Admission into evidence of .22 caliber handgun and testimony of State's ballistics expert relative to weapon was not prejudicial, where an eyewitness testified that gun was the same as used during robbery, and expert testified that three of the four projectiles taken from victim's body could have been fired in the gun, thus partially corroborating eyewitness's testimony. Brown v. State, 682 So. 2d 340, 1996 Miss. LEXIS 427 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348, 1997 U.S. LEXIS 1821 (U.S. 1997).

**Cautionary instructions.**

Defendant moved for a mistrial after the improper testimony of a police officer during defendant's trial for sale of cocaine; however, the trial court did not abuse its discretion in denying the mistrial because after defendant's counsel objected, the trial court quickly admonished the jury, and the prosecutor did not intentionally elicit the witness' testimony. Yarbrough v. State, 911 So. 2d 951, 2005 Miss. LEXIS 610 (Miss. 2005).

Trial court need not issue a sua sponte limiting instruction when other bad acts evidence is admitted under Miss. R. Evid. 404(b) and 403; Miss. R. Evid. 105 clearly places the burden of requesting a limiting instruction under Miss. R. Evid. 404(b) on the party objecting to the evidence. Brown v. State, 890 So. 2d 901, 2004 Miss. LEXIS 1104 (Miss. 2004), cert. denied, 544 U.S. 981, 125 S. Ct. 1842, 161 L. Ed. 2d 735, 2005 U.S. LEXIS 3424 (U.S. 2005).

Before a party may introduce for impeachment purposes an unsworn pretrial inconsistent statement of his own witness, he must show surprise or unexpected hostility, and such statement can never be used as substantive evidence; under provisions of M.R.E. Rule 403, trial judge should consider whether a cautionary instruction to jury will be sufficient to keep jury from treating the unsworn pretrial inconsistent statement as substantive evidence, and if not, the statement should not be introduced. Wilkins v. State, 603 So. 2d 309, 1992 Miss. LEXIS 282 (Miss. 1992), overruled in part, Carothers v. State, 152 So. 3d 277, 2014 Miss. LEXIS 592 (Miss. 2014).

**Collateral-source payments.**

In an automobile collision case, a trial court erred by allowing the jury to consider the income of plaintiff's husband as a personal injury attorney. Even if there was some probative value that could have been derived from the husband's ability to pay more for plaintiff's services as his office manager, the evidence should have been excluded because it served to show that plaintiff did not need to be compensated due to her financial ability to cover her own injuries. Loyacono v. Travelers Ins. Co., 163 So. 3d 932, 2014 Miss. LEXIS 304 (Miss. 2014).

A trial court did not err in excluding collateral-source evidence and in refusing to allow a partnership to use evidence to impeach an injured party when the injured party's testimony about medical bills and nonmedical evidence was not unduly prejudicial. Robinson Prop. Group, L.P. v. Mitchell, 7 So. 3d 240, 2009 Miss. LEXIS 195 (Miss. 2009).

**Complete story.**

Defendant's conversation with his brother, as relayed by a detective at trial, was not hearsay within hearsay because defendant's conversation with his brother was excepted from the hearsay rule as a statement against interest; and the brother's conversation with the detective was admissible under the excited-utterance exception to the hearsay rule as defendant's early-morning phone call awakened and startled his brother, and the brother spoke to the detective within a relatively short time of his conversation with defendant. Further, there was no evidence that the testimony was unduly prejudicial as the testimony was probative to present the jury with a complete account of the facts of the case. Affleck v. State, 210 So. 3d 1067, 2015 Miss. App. LEXIS 675 (Miss. Ct. App. 2015), cert. denied, 203 So. 3d 598, 2016 Miss. LEXIS 388 (Miss. 2016), cert. denied, 2016 Miss. LEXIS 391 (Miss. Sept. 15, 2016), cert. denied, 580 U.S. 1128, 137 S. Ct. 1091, 197 L. Ed. 2d 201, 2017 U.S. LEXIS 1278 (U.S. 2017).

Evidence that defendant locked the victim in a dog crate and bound her with a chain was admissible as it was part of the series of occurrences forming the assault and it was relevant and probative to the assault itself because the State introduced photographs of the victim that showed yellow, rust-colored marks on her legs, consistent with being wrapped with a chain, and the victim's testimony was relevant to show how those marks got there; evidence that defendant caged the victim in a crate with dog feces was admissible as the victim testified that defendant hit her with a can of disinfectant after releasing her from the dog crate and claiming that she smelled bad; and the evidence passed the more probative than prejudicial test. Casey v. State, 179 So. 3d 74, 2015 Miss. App. LEXIS 578 (Miss. Ct. App. 2015).

Recording of a 911 call was admissible as the trial judge had discretion to allow the State to tell the complete story of defendant's arrest, and it had the probative value of communicating to the jury the report of the violent situation. Edwards v. State, 124 So. 3d 105, 2013 Miss. App. LEXIS 700 (Miss. Ct. App. 2013).

**Confusion.**

Defendant's cross-examination of an officer was not improperly limited because (1) defendant sought to examine the officer about an unrelated traffic stop, and (2) such inquiry would have elicited irrelevant evidence that would have confused the jury. Johnson v. State, 194 So. 3d 191, 2016 Miss. App. LEXIS 384 (Miss. Ct. App. 2016).

In an action arising from a motor vehicle accident, exclusion of statements made by the driver to the motorist's husband immediately following the accident was proper; although they were not hearsay because they qualified as admissions by a party-opponent, the driver was not available for cross-examination and liability was not an issue, such that there was no need to confuse the jury. Heflin v. Merrill, 154 So. 3d 887, 2013 Miss. App. LEXIS 688 (Miss. Ct. App. 2013), aff'd, 154 So. 3d 857, 2014 Miss. LEXIS 558 (Miss. 2014).

Trial court did not abuse its discretion in excluding testimony regarding an incident defendant had at a gas station on the morning of the shooting at issue because the incident occurred seven hours before the shooting, was unrelated to the shooting, and could mislead the jury. Wansley v. State, 114 So. 3d 793, 2013 Miss. App. LEXIS 316 (Miss. Ct. App.), cert. denied,

127 So. 3d 1115, 2013 Miss. LEXIS 655 (Miss. 2013).

Defendant's manslaughter conviction was proper because, assuming for the sake of discussion that a witness's testimony was not irrelevant, it would have been confusing and misleading to the jury; the jury would have been led to believe that because the victim was verbally aggressive with the witness approximately four years earlier, he was more likely to have been the initial aggressor for the current series of events. Accordingly, the nonexistent probative value of the witness's testimony would have been outweighed by the massive prejudicial effect that would have stemmed from misleading the jury. Booker v. State, 64 So. 3d 988, 2010 Miss. App. LEXIS 329 (Miss. Ct. App. 2010), aff'd, 64 So. 3d 965, 2011 Miss. LEXIS 316 (Miss. 2011).

Trial court did not err in disallowing testimony of defendant's bad childhood and relationship with her mother, as her defense of entrapment was whether she was predisposed to commit the crime and was induced by law enforcement to do so; defendant testified to everything that she claimed her mother would have testified, and the jury was able to hear the effect of the mother's illness on defendant, plus other testimony concerning an alleged grudge by one agent would have been irrelevant and confusing and misleading to the jury, plus that agent turned over the information to another agent, who made the decision to proceed with the buy. Pittman v. State, 987 So. 2d 1010, 2007 Miss. App. LEXIS 747 (Miss. Ct. App. 2007), cert. dismissed, 2008 Miss. LEXIS 368 (Miss. July 31, 2008).

In a premises liability case in which a customer used a stepladder present in a retailer's store to retrieve an item from a top shelf and fell, evidence that it was the retailer's practice to leave defective stepladders returned by customers on the sales floor was not admissible under Miss. R. Evid. 403 because it would have left the jury to speculate that the ladder from which the customer fell was such a defective ladder. Gaines v. K-Mart Corp., 860 So. 2d 1214, 2003 Miss. LEXIS 821 (Miss. 2003).

In a prosecution for simple assault, the trial court did not err when it refused to allow the introduction into evidence of a complaint for divorce filed by the victim, notwithstanding the defendant's assertion that such complaint alleged cruel and inhumane treatment and showed a motive for the victim to lie about the assault, since the actual divorce complaint would have unnecessarily confused the jury as the victim denied having claimed cruel and inhumane treatment as the grounds for his divorce complaint, there were problems with his attorney, and the information regarding the alleged grounds for divorce was already before the jury. Gribble v. State, 760 So. 2d 790, 2000 Miss. App. LEXIS 83 (Miss. Ct. App. 2000).

**Course of conduct.**

Trial court erred when it found that evidence of mere drinking, without sufficient proof of intoxication, was so prejudicial as to outweigh its probative value, rendering the evidence inadmissible under Miss. R. Evid. 403. This analysis incorrectly evaluated a prior inconsistent statement for the truth of the matter it asserted rather than evaluating the probative value of a prior inconsistent statement used to impeach the credibility of the accuser pursuant to Miss. R. Evid. 613. Mendenhall v. State, 18 So. 3d 915, 2009 Miss. App. LEXIS 670 (Miss. Ct. App. 2009).

In defendant's capital murder case, defendant's right to a fair trial was not violated by the trial court's admission of testimony about the sexual assault of the victim, which defendant was not charged with, that occurred in the moments preceding her murder, where sexual molestation was integrally so related to her murder that one could not coherently present the facts of her demise without reference to it, and the testimony described part of the res gestae of the crime charged and helped shed light on defendant's motive. McGowen v. State, 859 So. 2d 320, 2003 Miss. LEXIS 413 (Miss. 2003).

Course of conduct evidence introduced by plaintiff was relevant and was not substantially more prejudicial than probative; as defendants were sued for punitive damages based on an allegedly bad faith failure to pay, evidence which tended to prove defendants had a routine practice of bad faith dealings with other companies became important and relevant. Hans Constr. Co. v. Drummond, 653 So. 2d 253, 1995 Miss. LEXIS 144 (Miss. 1995).

**Cumulative evidence.**

Because documents were cumulative to the files defendant had already presented, the trial court did not abuse its discretion in excluding the documents. Donaldson v. State, 262 So. 3d 1135, 2018 Miss. App. LEXIS 303 (Miss. Ct. App. 2018), cert. denied, 260 So. 3d 800, 2019 Miss. LEXIS 59 (Miss. 2019).

Trial court did not err by failing to conduct the balancing test of Miss. R. Evid. 403 because defendant never asked the trial court to consider the cumulative nature of the testimony since he made no Rule 403 objection at trial; the fact that the corroborative witnesses' testimony was cumulative to the victim's testimony actually contributed to the harmlessness of its admission. Webb v. State, 113 So. 3d 592, 2012 Miss. App. LEXIS 818 (Miss. Ct. App. 2012), cert. denied, 121 So. 3d 918, 2013 Miss. LEXIS 494 (Miss. 2013).

In a prosecution for fondling a minor child, the trial court did not err in admitting testimony consistent with the victim's statements through three additional witnesses, as those statements were necessary to tell a rational and coherent story of what happened, and the trial court conducted a proper Miss. R. Evid. 403 balancing test. Perilloux v. State, 113 So. 3d 603, 2012 Miss. App. LEXIS 812 (Miss. Ct. App. 2012), cert. dismissed, 202 So. 3d 616, 2016 Miss. LEXIS 312 (Miss. 2016).

In a suit brought against a water park for injuries a patron sustained while on a water slide, while testimony by the patron's mother regarding the condition of the slides the day after the patron's accident was improperly excluded under Miss. R. Evid. 403 on the basis that it was unfairly prejudicial, the circuit court did not err in excluding the mother's testimony because, not only was it irrelevant, it was also cumulative and could have been excluded under Rule 403 on that basis. Boyd v. Magic Golf, 52 So. 3d 455, 2011 Miss. App. LEXIS 36 (Miss. Ct. App. 2011).

In a medical malpractice case, plaintiff's theory behind his assignment of error was that because the physician testified, as an expert witness, that he was not negligent, the physician's expert's testimony to the same effect should have been excluded as cumulative. However, the fact that the physician was able to testify as an occurrence witness did not change the fact that he was also qualified to testify as an expert witness; moreover, the fact that a defendant who was able to testify as an expert offered the same testimony as his separate expert witness did not render the testimonial evidence needlessly cumulative. Brumfield v. Langston, 906 So. 2d 48, 2004 Miss. App. LEXIS 1106 (Miss. Ct. App. 2004).

Only things provided to the State were the proposed witness's name (defendant's husband), address and telephone number. Defendant chose not to provide anything else to the State and thus violated the discovery process by not disclosing what the witness would have testified about at trial; in any event, the record showed the proffered testimony was cumulative of other testimony on defendant's character, and the trial judge did not abuse his discretion in excluding same. Montgomery v. State, 891 So. 2d 179, 2004 Miss. LEXIS 1374 (Miss. 2004).

In defendant's case, evidence of his prior drug activity was admissible under Miss. R. Evid. 404(b) because defendant presented an entrapment defense, but the trial court erred in not conducting a Miss. R. Evid. 403 inquiry before admitting the convictions into evidence. However, the trial court's error was harmless because (1) the trial court gave a limiting instruction to the jury regarding the purpose for which those convictions could be considered, and specifically instructed the jury it could not consider the convictions in determining whether defendant was guilty of the crime for which he was on trial; and (2) overwhelming evidence of defendant's guilt was presented at trial. Tate v. State, 912 So. 2d 919, 2005 Miss. LEXIS 194 (Miss. 2005).

In a robbery and assault case, the trial court did not err in refusing to permit defendant to elicit from the victim testimony concerning complaints she made at a hospital regarding hallucinations she suffered due to narcotics abuse, as the issues of the victim's extensive drug abuse history was fully developed for the jury, and further development of that aspect of the victim's character would not have assisted the jury. Woods v. State, 883 So. 2d 583, 2004 Miss. App. LEXIS 371 (Miss. Ct. App. 2004).

Ruling by the trial court to exclude from evidence diagrams of an adult person with arrows drawn to show the parts of the body where the decedent was injured on the ground that the diagrams would not assist the jury because of a doctor's thorough description of the decedent's injuries in the autopsy report was within the trial court's discretion. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564, 2003 Miss. App. LEXIS 752 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 2005 Miss. LEXIS 21 (Miss. Jan. 13, 2005), aff'd in part and rev'd in part, 904 So. 2d 1077, 2005 Miss. LEXIS 247 (Miss. 2005).

Trial court was within its discretion in excluding an accident reconstructionist's testimony from evidence because it was cumulative and the reconstructionist's conclusions were the same as those in another expert's earlier testimony. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564, 2003 Miss. App. LEXIS 752 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 2005 Miss. LEXIS 21 (Miss. Jan. 13, 2005), aff'd in part and rev'd in part, 904 So. 2d 1077, 2005 Miss. LEXIS 247 (Miss. 2005).

Cumulative evidence of photographs, the autopsy diagrams, and the testimony regarding the other individual victims were neither relevant nor necessary to the case sub judice, and were, therefore, highly prejudicial to defendant. The State's pattern of continuously referring to the killing of the other three victims throughout the entire guilt phase denied defendant his fundamental right to a fair trial. Flowers v. State, 2003 Miss. LEXIS 67 (Miss. Feb. 20, 2003), op. withdrawn, sub. op., 842 So. 2d 531, 2003 Miss. LEXIS 149 (Miss. 2003).

Reversal of defendant's capital murder conviction was required in a case where defendant was indicted separately for each of four murders, because cumulative evidence of photographs, autopsy diagrams, and testimony regarding the other individual victims was neither relevant nor necessary to the case being tried, and was, therefore, highly prejudicial to defendant. Flowers v. State, 842 So. 2d 531, 2003 Miss. LEXIS 149 (Miss. 2003).

Where defendant argued that failure to admit documentary evidence of a murder indictment against the codefendant, who testified against defendant, was improper, defendant's claim failed; although evidence tending to show bias was admissible pursuant to Miss. R. Evid. 616, the evidence was needlessly cumulative under Miss. R. Evid. 403, as this evidence was already admitted by defense counsel, who read from the plea hearing transcript related to the codefendant's murder charge and ably cross-examined the codefendant about the codefendant's motive to lie. Smith v. State, 848 So. 2d 195, 2003 Miss. App. LEXIS 350 (Miss. Ct. App. 2003).

Where defense counsel voiced his intention to call victim's mother as an adverse witness, questioning of mother's friend regarding mother's arrest was clearly cumulative and was properly excluded by trial court. Evans v. State, 725 So. 2d 613, 1997 Miss. LEXIS 389 (Miss. 1997), cert. denied, 525 U.S. 1133, 119 S. Ct. 1097, 143 L. Ed. 2d 34, 1999 U.S. LEXIS 1510 (U.S. 1999).

Videotape depicting site where murder defendant buried victim, as well as exhumation of victim's body, should have been excluded on grounds of repetition, redundancy and cumulativeness; due to lack of prejudicial effect, however, video's erroneous admission did not warrant reversal. Holland v. State, 587 So. 2d 848, 1991 Miss. LEXIS 648 (Miss. 1991).

Any error from admission of photographs of murder victim due to cumulativeness or repetitiveness was harmless error, and did not requiring reversal, because photographs were not particularly gory and did not have a highly inflammatory effect on the jury. Willie v. State, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

Court at murder trial erroneously excluded evidence that same color paint was used on all General Motors cars; trial judge made no finding that evidence was cumulative, and evidence was not in fact cumulative. Edlin v. State, 533 So. 2d 403, 1988 Miss. LEXIS 420 (Miss. 1988), cert. denied, 489 U.S. 1086, 109 S. Ct. 1547, 103 L. Ed. 2d 851, 1989 U.S. LEXIS 1410 (U.S. 1989).

**Depositions.**

It was not error for the court to allow the introduction into evidence of a portion of a videotaped deposition of a physician in which the attorney for a defendant, which was dismissed prior to trial, questioned the physician where the trial court redacted the portion of the deposition that identified the defendant as well as the name of its attorney. Hageney v. Jackson Furniture, Inc., 746 So. 2d 912, 1999 Miss. App. LEXIS 98 (Miss. Ct. App. 1999).

**Discrimination.**

In an action for breach of contract and fraud arising from the purchase by the defendant of insurance for the plaintiff's car after she allowed her own policy to lapse, it was reversible error for the court to allow the plaintiff to introduce prejudicial evidence that the defendant's insurance program disproportionately impacted racial minorities. GMAC v. Baymon, 732 So. 2d 262, 1999 Miss. LEXIS 78 (Miss. 1999).

**DNA evidence.**

Expert was admitted as an expert in the field of molecular biology, forensic DNA analysis and DNA hair analysis, and she was allowed to testify as to the results of her DNA analysis without a specific objection from the defense, and the specific arguments made by defendant on appeal were not presented to the trial court; further, Miss. Code Ann. § 93-9-27, regarding the presumption of paternity genetic tests, did not provide the standard for admission of DNA evidence here, and the trial court did not abuse its discretion in allowing in the statistical results of the DNA tests. Rankin v. State, 963 So. 2d 1255, 2007 Miss. App. LEXIS 553 (Miss. Ct. App. 2007).

**Drug offenses.**

Defendant was not entitled to a mistrial when a witness who, when questioned by defendant about the identification, or misidentification, of defendant by the witness, stated that defendant was the person who gave the witness cocaine and that the witness recognized defendant because the witness had gotten cocaine from defendant in the past. The State of Mississippi did not elicit the improper statement, the testimony was more expansive than the question asked, and the trial judge instructed the jury to disregard the reference to prior bad acts. Straight v. State, 205 So. 3d 1089, 2016 Miss. App. LEXIS 763 (Miss. Ct. App. 2016).

Defendant's trial counsel was not constitutionally ineffective for not objecting to the admission of defendant's prior felony drug-related conviction because the prosecution offered evidence of defendant's prior conviction for the purpose of proving intent to distribute; the trial court found that the probative value was not substantially outweighed by the danger of unfair prejudice; and the trial court gave a limiting instruction. Anderson v. State, 195 So. 3d 835, 2016 Miss. App. LEXIS 20 (Miss. Ct. App.), cert. denied, 209 So. 3d 433, 2016 Miss. LEXIS 301 (Miss. 2016).

In a prosecution for the sale of drugs, evidence of defendant's prior drug convictions was improperly admitted, as the evidence was prejudicial and the jury heard continual references to defendant's prior convictions before defendant had any opportunity to present a defense. Hargett v. State, 62 So. 3d 950, 2011 Miss. LEXIS 268 (Miss. 2011).

Testimony of defendant's prior cocaine sales was properly admitted as the trial court did a Miss. R. Evid. 403 balancing test and gave the jury a limiting instruction. Long v. State, 33 So. 3d 1122, 2010 Miss. LEXIS 224 (Miss. 2010).

In convictions including the possession of, and conspiracy to possess illegal amounts of pseudoephedrine intending to use them in an unlawful manner, an officer's testimony regarding the purchase of cold medicine from pharmacies in a certain area, and his reference to that area as "crystal alley" was not highly prejudicial under Miss. R. Evid. 403. Gales v. State, 29 So. 3d 65, 2009 Miss. App. LEXIS 629 (Miss. Ct. App. 2009).

In defendant's trial on charges of felony possession of cocaine with the intent to sell, transfer, or deliver and possession of a firearm by a convicted felon, the trial court did not err in permitting the State to introduce evidence that a bag containing 6.7 grams of cocaine was retrieved from the backseat of defendant's car at the time of his arrest because the evidence painted a complete picture of the events surrounding defendant's arrest and was relevant to show defendant's motive, intent, and plan. Williams v. State, 20 So. 3d 722, 2009 Miss. App. LEXIS 375 (Miss. Ct. App. 2009), cert. denied, 27 So. 3d 404, 2010 Miss. LEXIS 86 (Miss. 2010).

In defendant's sale of cocaine case, the court properly admitted a buyer's testimony concerning her prior transactions with defendant for the limited purpose of showing intent to distribute because the trial court conducted a balancing test and the court gave a proper limiting instruction to the jury; defendant's intent was a necessary element of his conviction. Phinizee v. State, 983 So. 2d 322, 2007 Miss. App. LEXIS 631 (Miss. Ct. App. 2007).

Officer's testimony about tools of the drug trade found at defendant's residence during the execution of a search warrant was properly admitted because the record showed that a trial court conducted a balancing test to determine if the probative value was substantially outweighed by the prejudicial effect. Stubbs v. State, 878 So. 2d 130, 2004 Miss. App. LEXIS 31 (Miss. Ct. App.), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 936 (Miss. 2004).

In a case involving the manufacturing of methamphetamine, defendant's motion in limine was properly denied because nothing in the record indicated that the admission of photographs, items, and testimony regarding methamphetamine and methamphetamine residue prejudiced the defense or substantially affected defendant's rights; rather, the evidence was properly used to show intent. Halderman v. State, 964 So. 2d 1163, 2007 Miss. App. LEXIS 14 (Miss. Ct. App.), cert. denied, 964 So. 2d 508, 2007 Miss. LEXIS 527 (Miss. 2007).

Defendant's convictions for two counts of the sale of methadone and one count of the sale of morphine were appropriate under Miss. R. Evid. 404(b) and Miss. R. Evid. 403 because testimony from a witness about his prior narcotics dealings with defendant was admissible for purposes of proving intent, motive, and in completing the story of the charged crime. Palmer v. State, 939 So. 2d 792, 2006 Miss. LEXIS 549 (Miss. 2006).

In a case involving possession of cocaine with intent to distribute, defendants did not receive ineffective assistance of counsel based on a failure to object to testimony regarding the value and packaging of cocaine and the failure to request a balancing under Miss. R. Evid. 403 regarding evidence of an undercover drug sale; a different result would not have likely resulted based upon the evidence against defendants. Dixon v. State, 953 So. 2d 1117, 2006 Miss. App. LEXIS 434 (Miss. Ct. App. 2006), aff'd, 953 So. 2d 1108, 2007 Miss. LEXIS 210 (Miss. 2007).

Defendant's conviction for possession with intent to distribute marijuana was upheld, because the trial court did not err in admitting defendant's prior conviction for sale of cocaine as proof of an intent to distribute under Miss. R. Evid. 404(b), and the trial court correctly gave a limiting instruction in an effort to minimize any prejudice. Clarke v. State, 859 So. 2d 1021, 2003 Miss. App. LEXIS 841 (Miss. Ct. App. 2003).

Pursuant to Miss. R. Evid. 404(b), 403, the trial court did not err in admitting the passenger's testimony that the passenger had known defendant for a long time, that defendant regularly dealt drugs, that passenger knew defendant would sell the drugs that the trooper found in the truck, and that the passenger testified about prior drug sales. Smith v. State, 839 So. 2d 489, 2003 Miss. LEXIS 65 (Miss. 2003).

In light of the overwhelming weight of evidence in support of the verdict finding defendant guilty of selling cocaine, any error which occurred as a result of an officer's statement about defendant's past criminal history, possibly in violation of Miss. R. Evid. 403, was harmless; also, defendant voluntarily referred to defendant's own past convictions for selling cocaine. Green v. State, 856 So. 2d 396, 2003 Miss. App. LEXIS 233 (Miss. Ct. App. 2003), rev'd in part, 884 So. 2d 733, 2004 Miss. LEXIS 714 (Miss. 2004).

Previous involvement with drugs can be admitted on the issue of intent to distribute; thus, the trial court did not err in denying defendant's motion in limine regarding the exclusion of statements discussing prior bad acts and it properly instructed the jury as to the limits on its consideration of such acts. White v. State, 2002 Miss. LEXIS 311 (Miss. Oct. 24, 2002), op. withdrawn, sub. op., 2003 Miss. LEXIS 208 (Miss. Apr. 10, 2003), op. withdrawn, sub. op., 842 So. 2d 565, 2003 Miss. LEXIS 166 (Miss. 2003).

The introduction into evidence of a photocopy of money used to buy cocaine was not more prejudicial than probative, notwithstanding the assertion that there was nothing that connected the defendant to the money because it was not found on him when he was arrested, where the state admitted that the money was not on the defendant's person when he was taken into custody and defense counsel more than adequately emphasized this fact in closing argument. Gilley v. State, 748 So. 2d 123, 1999 Miss. LEXIS 307 (Miss. 1999).

In a prosecution for possession of marijuana arising from the discovery of marijuana in the defendant's vehicle after a traffic stop in which the defendant asserted that an employee at a car wash that he owned sometimes used his car and might have placed the marijuana there, the trial court did not err in ruling that the probative value of the employee's prior possession of cocaine with intent to distribute was outweighed by its potential for prejudice since, given the toll that cocaine has taken upon society, it was possible that the jury might have been prejudiced to blame a great many crimes upon anyone who profited from this drug. Collins v. State, 734 So. 2d 247, 1999 Miss. App. LEXIS 44 (Miss. Ct. App. 1999).

Evidence of prior sales of drugs, offered to show intent to distribute, is properly admissible if trial court finds its probative value outweighs its prejudicial effect, and if evidence is accompanied by a proper limiting instruction. Smith v. State, 656 So. 2d 95, 1995 Miss. LEXIS 260 (Miss. 1995), overruled in part, Brown v. State, 890 So. 2d 901, 2004 Miss. LEXIS 1104 (Miss. 2004).

**Flight.**

Trial court erred in admitting evidence of defendant's flight while on bond and in instructing the jury to consider this flight as consciousness of guilt because the flight occurred over a year after defendant's arrest and defendant alleged that defendant fled because defendant did not want to return to a detention center where defendant had previously been beaten. However, the error was harmless because the trial court's error did not contribute to the verdict. Kuebler v. State, 205 So. 3d 623, 2015 Miss. App. LEXIS 461 (Miss. Ct. App. 2015), rev'd, 204 So. 3d 1220, 2016 Miss. LEXIS 462 (Miss. 2016).

Trial court did not err by giving a flight instruction because there was no independent reason or basis for defendant's flight and the evidence that defendant flipped a car and then fled on foot before law enforcement arrived was probative of both whether defendant was purposefully evading pursuing officers and whether, in doing so, defendant was driving recklessly. Because of the probative value of this evidence, neither the evidence, nor the related instruction violated Miss. R. Evid. 403. Williams v. State, 126 So. 3d 85, 2013 Miss. App. LEXIS 749 (Miss. Ct. App. 2013).

Given the record in the case, a circuit court did not abuse its discretion by admitting testimony regarding defendant's out-of-state flight because defendant jumped bond in Mississippi and fled to Florida; when authorities in Mississippi learned of defendant's location through, they contacted authorities in Florida only to learn that defendant had posted a cash bond and been released, and defendant was subsequently arrested again in Texas. Dison v. State, 61 So. 3d 975, 2011 Miss. App. LEXIS 268 (Miss. Ct. App. 2011), cert. dismissed, 131 So. 3d 578, 2014 Miss. LEXIS 40 (Miss. 2014).

Defendant's objection to the admission of evidence that he had jumped bond after being arrested on the ground that it was irrelevant and prejudicial was insufficient to preserve the issue for appeal because defendant's counsel never articulated in his objection that any probative value of the flight evidence was substantially outweighed by its prejudicial effect; while defendant's attorney objected to an officer's testimony as irrelevant, the attorney failed to make any objection regarding

Miss. R. Evid. 403 at trial. Dison v. State, 61 So. 3d 975, 2011 Miss. App. LEXIS 268 (Miss. Ct. App. 2011), cert. dismissed, 131 So. 3d 578, 2014 Miss. LEXIS 40 (Miss. 2014).

Defendant's convictions for aggravated assault and murder were appropriate because the trial court did not err in giving a flight instruction. Defendant's proffered reasons were illogical and contradicted by the evidence and the circumstances surrounding defendant's flight had considerable probative value. Jackson v. State, 28 So. 3d 638, 2009 Miss. App. LEXIS 476 (Miss. Ct. App. 2009), cert. denied, 27 So. 3d 404, 2010 Miss. LEXIS 85 (Miss. 2010).

Trial court erred in admitting evidence of defendant's escape into defendant's trial for murder; however, this error was harmless because the evidence of flight paled in comparison to more direct evidence of guilt. Shaw v. State, 915 So. 2d 442, 2005 Miss. LEXIS 465 (Miss. 2005).

**Gang activity.**

Defendant's conviction for aggravated assault was appropriate because, although there was no evidence that the incident in the case was gang related, the issue of the admissibility of gang-affiliation evidence to show bias was presented and it was on that basis that the trial judge admitted the evidence of defendant's gang affiliation; that type of evidence was clearly permitted. Additionally, although the trial judge never said that he found the evidence more probative than prejudicial, his implicit determination was sufficient. Dao v. State, 984 So. 2d 352, 2007 Miss. App. LEXIS 816 (Miss. Ct. App. 2007), cert. denied, 984 So. 2d 277, 2008 Miss. LEXIS 281 (Miss. 2008).

In a murder case, the trial court did not abuse its discretion in allowing the State to present evidence of defendant's involvement in gang activity. In view of the descriptions of behavior and activity by known gang members, it was not too attenuated to believe that there was a connection between the weapon of choice used to kill the victim, here a two-pronged meat fork, and the gang symbol, a pitchfork. Brooks v. State, 905 So. 2d 678, 2004 Miss. App. LEXIS 616 (Miss. Ct. App. 2004), rev'd, 903 So. 2d 691, 2005 Miss. LEXIS 191 (Miss. 2005).

In a capital murder case, the trial judge allowed the statement from the lookout regarding gang membership into evidence after hearing arguments from the parties on the admissibility of the statement; although the trial judge did not state on the record that the testimony would be more probative than prejudicial, both parties were given the opportunity to argue their position. Hudson v. State, 977 So. 2d 344, 2007 Miss. App. LEXIS 229 (Miss. Ct. App. 2007), cert. denied, 977 So. 2d 1144, 2008 Miss. LEXIS 139 (Miss. 2008).

**Insurance.**

Trial court committed no error by excluding any reference to the underinsured-motorist insurance carrier in the insured's automobile-accident lawsuit where the only issue was the amount of the insured's damages, and the carrier's role as the insured's underinsured motorist insurer would have been of no help in deciding the issues before the jury. Heflin v. Merrill, 154 So. 3d 857, 2014 Miss. LEXIS 558 (Miss. 2014).

Supreme Court of Mississippi holds as a matter of first impression that, in Mississippi, the proponent of evidence of the role of an uninsured-or underinsured-motorist carrier's role in litigation over benefits due under the policy as a result of a tortfeasor's negligence must demonstrate the relevance of the evidence and that it passes Miss. R. Evid. 403's balancing test. Heflin v. Merrill, 154 So. 3d 857, 2014 Miss. LEXIS 558 (Miss. 2014).

In a dispute over insurance coverage, the trial court did not abuse its discretion by redacting a prior carpet cleaning receipt and disallowing evidence of flood insurance because the jury would have had to infer that the similarity in cleaning services in 2003 and 2004 was an indication that the damage in both years resulted from the same cause. Additionally, the jury would have had to infer from the fact that the insured made a successful flood insurance claim with a different company in 2004 that the damage in 2004 resulted entirely from a flood and not in part from sewer or drain backup. United States Fid. & Guar. Co. v. Martin, 998 So. 2d 956, 2008 Miss. LEXIS 555 (Miss. 2008).

In a medical malpractice action, evidence that a doctor's experts were all members of the same insurer was properly not admitted because the probative value of the evidence that the doctor's experts could incur a financial penalty of $ 136 if the patient was successful on her claim was substantially outweighed by the danger of unfair prejudice resulting from the admission of evidence concerning the existence of a liability insurance policy. Wells v. Tucker, 997 So. 2d 908, 2008 Miss. LEXIS 480 (Miss. 2008).

Finding against the life insurance company in the beneficiary's action after her claim was denied was proper in part because the training of agents who solicited answers from prospective insureds that might result in material misrepresentations was pertinent to the resolution of the issues of the case; thus, the trial judge did not abuse his discretion by allowing the testimony. United Am. Ins. Co. v. Merrill, 978 So. 2d 613, 2007 Miss. LEXIS 510 (Miss. 2007), cert. denied, 552 U.S. 1185, 128 S. Ct. 1257, 170 L. Ed. 2d 68, 2008 U.S. LEXIS 1280 (U.S. 2008).

Circuit court abused its discretion when it applied the Miss. R. Evid. 403 balancing test where, if the circuit court believed that the jury knew about the presence of insurance for the physician, then there could be no prejudicial effect in placing it before the jury; the evidence that the physician and his experts all belonged to the same mutual insurance company had some probative value and there would have been no prejudice in allowing the jury to hear that the physician had insurance. Wells v. Tucker, 997 So. 2d 925, 2007 Miss. App. LEXIS 594 (Miss. Ct. App. 2007), rev'd, 997 So. 2d 908, 2008 Miss. LEXIS 480 (Miss. 2008).

Defendant's capital murder convictions were proper where testimony admitted by one of the decedent's sister involving an insurance scam with defendant was correctly admitted pursuant to Miss. R. Evid. 403, 404(b), and 804(b)(5) because the declarant was unavailable and because the trial court analyzed the five requirements for admission of the hearsay pursuant to Miss. R. Evid. 803(24) and determined that it was trustworthy and material to the case. Rubenstein v. State, 2005 Miss. LEXIS 789 (Miss. Dec. 1, 2005), op. withdrawn, 2006 Miss. LEXIS 424 (Miss. Aug. 10, 2006), sub. op., 941 So. 2d 735, 2006 Miss. LEXIS 411 (Miss. 2006).

In a medical malpractice action, the plaintiff was properly precluded, on the basis of undue prejudice, from eliciting during cross-examination that two defense experts both had their medical malpractice insurance coverage through the same company as the defendant and that the company operated as a mutual insurance company. Toche v. Killebrew, 734 So. 2d 276, 1999 Miss. App. LEXIS 40 (Miss. Ct. App. 1999).

**Money.**

In a case in which defendant was convicted of the illegal transfer of a controlled substance, the trial court did not err by admitting evidence that $21,000 cash was in the trunk of his car pursuant to a search warrant because the admission of the detective's testimony concerning the amount of cash found in defendant's trunk was not more prejudicial than probative; and, even if the admission of the specific amount of cash had been error, such error was harmless as the overwhelming weight of the evidence against defendant was sufficient to outweigh the harm done by allowing admission of the evidence. Magee v. State, 248 So. 3d 917, 2018 Miss. App. LEXIS 270 (Miss. Ct. App. 2018).

Sum of $2,700 in cash found at scene of arrest made it more likely that defendants were involved in drug-dealing, and evidence was therefore relevant; the evidence was not prejudicial, as defendants were not convicted of intent to transfer but only of possession. Haddox v. State, 636 So. 2d 1229, 1994 Miss. LEXIS 182 (Miss. 1994), modified, 1994 Miss. LEXIS 323 (Miss. June 16, 1994).

In a criminal trial for burglary and larceny of a dwelling, the complainant testified that currency was stolen from her house, including bills from the 1950's that once belonged to her grandmother; the trial court did not err by admitting photocopies of pre-1959 currency that defendant exchanged at the travel agency, and the evidence was more probative than prejudicial. Sandefer v. State, 952 So. 2d

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281, 2007 Miss. App. LEXIS 105 (Miss. Ct. App. 2007).

Evidence of bank bag and its contents was relevant in that it had a great impact upon credibility of murder defendant's story that he had been robbed, and probative value of evidence substantially outweighed any legally cognizable prejudice. Jackson v. State, 551 So. 2d 132, 1989 Miss. LEXIS 330 (Miss. 1989).

**Other crimes.**

Detective's testimony of his investigation of a later robbery was given the prove a key fact, that the man shown in the videos was the perpetrator, and without victims testifying to this fact, the detective's assertion amounted to testimonial hearsay, and defendant's right to confront witnesses was violated; even if the evidence qualified as a Miss. R. Evid. 404(b)(2) exception, it failed to pass the balancing test, as defendant had not been charged with the later robbery and that testimony was not needed. Jones v. State, 287 So. 3d 995, 2019 Miss. App. LEXIS 617 (Miss. Ct. App. 2019).

Trial court did not abuse its discretion in permitting a witness to testify about defendant's prior crimes because the evidence was admissible for a permissible purpose since it was relevant to the circumstances of the disclosure of the crime immediately after it happened; the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice because the testimony was relevant and probative, and any prejudice was limited by its limited nature and its limited use. Young v. State, 194 So. 3d 904, 2016 Miss. App. LEXIS 438 (Miss. Ct. App. 2016).

Trial court did not err by admitting evidence of defendant's past drug use under Miss. R. Evid. 404(b) where the record showed that it heard each side's arguments regarding the admissibility of the evidence and its possible prejudicial effect before making a decision, and that its implicit balancing test was sufficient. Jones v. State, 154 So. 3d 872, 2014 Miss. LEXIS 563 (Miss. 2014).

Because the probative value of giving the jury a complete account of defendant's arrest outweighed any unfair prejudice, the testimony regarding other crimes was properly admitted. Barber v. State, 143 So. 3d 586, 2013 Miss. App. LEXIS 701 (Miss. Ct. App. 2013), cert. denied, 139 So. 3d 74, 2014 Miss. LEXIS 350 (Miss. 2014).

State of Mississippi was permitted to impeach defense witnesses, who testified at a sentencing hearing as to defendant's good character, by asking if the witnesses were aware that defendant had pleaded guilty to a felony charge of credit-card fraud. Batiste v. State, 121 So. 3d 808, 2013 Miss. LEXIS 295 (Miss. 2013), cert. denied, 572 U.S. 1117, 134 S. Ct. 2287, 189 L. Ed. 2d 178, 2014 U.S. LEXIS 3424 (U.S. 2014).

Miss. R. Evid. 404(b) exceptions are, indeed, subject to a Miss. R. Evid. 403 balancing test. Pitchford v. State, 45 So. 3d 216, 2010 Miss. LEXIS 328 (Miss. 2010), cert. denied, 563 U.S. 939, 131 S. Ct. 2098, 179 L. Ed. 2d 897, 2011 U.S. LEXIS 3058 (U.S. 2011).

Defendant's conviction for burglary was inappropriate because the prosecutor impermissibly used defendant's prior conviction for attempted grand larceny as evidence of defendant's predisposition to steal to prove the element of intent of the indicted offense. Although the circuit court cited Miss. R. Evid. 609 as the basis for admitting evidence of the prior conviction, the record reflected no findings reflecting any consideration of the Peterson factors and without those findings, the appellate court was unable to discern that the circuit court found that the probative value of the prior conviction outweighed the R. 609 presumed prejudicial effect to defendant. Robinson v. State, 42 So. 3d 598, 2010 Miss. App. LEXIS 86 (Miss. Ct. App. 2010).

Defendant's murder convictions were proper because testimony regarding his prior threats against one of the victim, his former girlfriend, and his previous arrest for domestic violence were properly admitted into evidence. The evidence was relevant for the impeachment of a prior statement made by defendant, as well as relevant evidence of defendant's motive, intent, knowledge, and preparation. Madden v. State, 42 So. 3d 566, 2010 Miss. App. LEXIS 10 (Miss. Ct. App.), cert. dismissed, 49 So. 3d 106, 2010 Miss. LEXIS 460 (Miss. 2010).

Testimony by a narcotics agent and a confidential informant (CI) explained why petitioner state inmate was being investigated and how the state came to use the CI (one of her narcotics customers) against her; it was admissible under Miss. R. Evid. 403, 404(b), thus, counsel was not ineffective for objecting and habeas relief had been inappropriate. Brooks v. Kelly, 579 F.3d 521, 2009 U.S. App. LEXIS 18393 (5th Cir. Miss. 2009).

In defendant's trial on charges of armed robbery, kidnapping, and possession of a firearm as a convicted felon, evidence that defendant was in a stolen vehicle when arrested was properly introduced to explain why he was arrested, how his picture came to be part of the photograph lineup, and how he ultimately was linked with the crimes charged. Furthermore, this evidence was essential to provide the jury with a complete story of the events that led to the identification of defendant as the person who perpetrated the crimes charged. Williams v. State, 991 So. 2d 593, 2008 Miss. LEXIS 399 (Miss. 2008).

While a witness's use of a victim's bank card possessed a tendency to establish a motive or intent for his involvement in the crime, for purposes of Miss. R. Evid. 401, the exact number of withdrawals and/or the exact amount actually withdrawn by the witness was not a fact of consequence to the determination of the case, and even if determined relevant, the evidence would have been properly excluded under Miss. R. Evid. 403, and this evidence was properly excluded under Miss. R. Evid. 402. Williams v. State, 994 So. 2d 808, 2008 Miss. App. LEXIS 183 (Miss. Ct. App.), cert. denied, 998 So. 2d 1010, 2008 Miss. LEXIS 665 (Miss. 2008).

In defendant's aggravated assault case, a court properly allowed evidence of defendant's assault on the victim, which occurred the day before the charged incident, because his actions were relevant to his motive for tracking the victim down and assaulting her again the following day, they pertained to the continuing act of violence to the extent that defendant ultimately accomplished a series of interrelated criminal acts, and the evidence was not offered to show defendant's character, but was offered as part of the very actions for which he was indicted. In addition, the evidence of the prior incident was properly admitted as its probative value was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Jones v. State, 920 So. 2d 465, 2006 Miss. LEXIS 65 (Miss. 2006).

Where proof of other crimes or acts of a defendant is offered into evidence pursuant to Miss. R. Evid. 404(b), it is still subject to the requirement that its probative value substantially outweigh the danger of unfair prejudice under Miss. R. Evid. 403. Jones v. State, 913 So. 2d 436, 2005 Miss. App. LEXIS 304 (Miss. Ct. App. 2005).

**Other lawsuits.**

Tire manufacturer, in attacking the credibility of the plaintiff's tire expert in a products liability suit by referring to his testimony in previous defective tire cases, opened the door to testimony by the expert in other cases where the tire manufacturer had been sued for the manufacture of defective tires, from which testimony the jurors could draw inferences as to the tire manufacturer's fault in those cases. Cooper Tire & Rubber Co. v. Tuckier, 826 So. 2d 679, 2002 Miss. LEXIS 9 (Miss.), cert. denied, 537 U.S. 820, 123 S. Ct. 97, 154 L. Ed. 2d 27, 2002 U.S. LEXIS 5585 (U.S. 2002).

Trial court in action arising from automobile accident did not err in permitting defendant to show that plaintiff had made the same claims against another driver with whom she was involved in an accident six months after collision with defendant. Brake v. Speed, 605 So. 2d 28, 1992 Miss. LEXIS 418 (Miss. 1992).

**Photographs.**

Trial court did not err by allowing the State to introduce closeup pictures of the victim's vagina that were taken by a sexual assault nurse examiner because even though the pictures were blurry, they still would have been helpful to the jury, particularly given the nurse's testimony that the blue dye gathered in the areas that she discovered lacerations. Knight v. State, 281 So. 3d 898, 2019 Miss. App. LEXIS 67 (Miss. Ct. App.), cert. denied,

279 So. 3d 1086, 2019 Miss. LEXIS 413 (Miss. 2019).

Trial court did not abuse its discretion at defendant's trial for murder and desecration of a human corpse by admitting into evidence photographs showing parts of the victim's decomposed and dismembered corpse and the victim's dry bones from an autopsy because the photos were relevant to establish the desecration of the corpse, to explain the path of the fatal gunshot wound and the manner of dismemberment, and to corroborate an accomplice's testimony. The danger of unfair prejudice, if any, did not substantially outweigh the probative value. McCarty v. State, 262 So. 3d 553, 2018 Miss. App. LEXIS 294 (Miss. Ct. App. 2018), cert. denied, 260 So. 3d 798, 2019 Miss. LEXIS 43 (Miss. 2019).

Photograph of the murder victim was admissible into evidence because the photograph was not overly gruesome as the photograph was taken from a distance and was not a close-up of the victim's head that showed the victim's head wound. Moreover, the photograph aided and clarified the testimony of many witnesses, thereby having probative value, which outweighed any prejudicial effect, to show how defendant murdered the victim. Harris v. State, 188 So. 3d 601, 2016 Miss. App. LEXIS 165 (Miss. Ct. App. 2016).

Trial court did not err by allowing photographs of the victim's injuries despite the fact that they were cumulative, as they were more probative than prejudicial and showed the severity of the victim's wounds and location of the wounds. Hoskins v. State, 172 So. 3d 1242, 2015 Miss. App. LEXIS 37 (Miss. Ct. App. 2015), cert. denied, 2015 Miss. LEXIS 449 (Miss. Aug. 27, 2015).

In a manslaughter case, the record reflected no abuse of discretion by the circuit court judge in evaluating the probative value and prejudicial effect of photographs of defendant's family before excluding them. Applying Miss. R. Evid. 403, the circuit court judge found that the photographs' prejudicial effect outweighed their probative value since they tended to invoke sympathy from the jury without any relevant or probative evidentiary purpose. Howell v. State, 144 So. 3d 211, 2014 Miss. App. LEXIS 424 (Miss. Ct. App. 2014).

Photos of the victim post mortem were properly admitted into evidence they served the proper purposes of describing the circumstances of the killing, showing the location of the body and cause of death, and supplementing or clarify witness testimony. Keller v. State, 138 So. 3d 817, 2014 Miss. LEXIS 89 (Miss. 2014), cert. denied, 574 U.S. 1159, 135 S. Ct. 1397, 191 L. Ed. 2d 371, 2015 U.S. LEXIS 1353 (U.S. 2015).

Trial court did not err in admitting three photographs depicting the prior abuse of the victim by defendant because the evidence was relevant to show motive, opportunity, intent, and absence of mistake; and the trial court found that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice to defendant, did not confuse the issues, and did not mislead the jury. Clark v. State, 122 So. 3d 129, 2013 Miss. App. LEXIS 533 (Miss. Ct. App. 2013).

It was within the trial judge's discretion to determine that a photograph of handcuffs in defendant's car was relevant, and the trial judge did not abuse his discretion when he decided that the danger of unfair prejudice did not substantially outweigh that probative value because the photograph had probative value; the presence of the handcuffs in defendant's car was offered to show that on his trips to "look for women," defendant was not looking for consensual relationships, and the presence of handcuffs made it more probable that defendant grabbed the victim with the intent to kidnap her. Tucker v. State, 64 So. 3d 594, 2011 Miss. App. LEXIS 324 (Miss. Ct. App. 2011).

Defendant's convictions for capital murder during the commission of a robbery were proper because the admission of autopsy photographs was not erroneous. A few of the photographs were introduced to show the initial state of the victims' bodies as received by the doctor, and the remainder depicted different parts of the victims' bodies to illustrate the various injuries they suffered; the photographs were not repetitive since each depicted different injuries and the probative value was substantially outweighed by the danger of unfair prejudice. Gillett v. State, 56 So. 3d 469, 2010 Miss. LEXIS 337 (Miss. 2010), cert. denied, 565 U.S. 1095, 132 S. Ct. 844, 181 L. Ed. 2d 552, 2011 U.S. LEXIS 8944 (U.S. 2011).

Photographs of victim's shooting wounds, which were used to help the jury better understand the testimony of the doctor and the circumstances and cause of the shooting, were relevant pursuant to Miss. R. Evid. 403, as their probative value was not substantially outweighed by the danger of unfair prejudice, and regardless, defendant failed to raise a contemporaneous objection and therefore couuld not raise his objection on appeal. Barfield v. State, 22 So. 3d 1175, 2009 Miss. LEXIS 583 (Miss. 2009).

Defendant's convictions for capital murder, aggravated assault, and conspiracy to commit aggravated assault were appropriate because the victim's autopsy photographs were admissible since their probative value was not outweighed by any danger of undue prejudice and since there was a meaningful evidentiary purpose. Williams v. State, 3 So. 3d 105, 2009 Miss. LEXIS 68 (Miss. 2009).

Trial court did not err in admitting photographs of the murder victims into evidence because (1) the photographs had probative value; (2) they aided in describing the circumstances of the killing, in describing the location of the body and cause of death, or in supplementing or clarifying the testimony of a witness; and (3) their probative value was not substantially outweighed by the danger of unfair prejudice. Chamberlin v. State, 989 So. 2d 320, 2008 Miss. LEXIS 352 (Miss. 2008), cert. denied, 555 U.S. 1106, 129 S. Ct. 908, 173 L. Ed. 2d 122, 2009 U.S. LEXIS 495 (U.S. 2009).

To convict a defendant of trafficking in stolen firearms, the State did not need to enter the actual firearms into evidence as (1) there was no best evidence rule with regard to physical evidence that was not writings, recordings, or photographs; (2) requiring the State to offer actual firearms into evidence would impose a high burden on prosecutors and the courts in cases where there were large quantities of physical evidence; and (3) the State satisfied the relevancy and authentication requirements permitting the photographs of the firearms to be introduced into evidence. Riley v. State, 1 So. 3d 877, 2008 Miss. App. LEXIS 378 (Miss. Ct. App. 2008), cert. denied, 999 So. 2d 1280, 2009 Miss. LEXIS 18 (Miss. 2009).

In an aggravated assault case under Miss. Code Ann. § 97-3-7(2), the trial court did not abuse its discretion by finding that the probative value of the photographs of the victim's injury outweighed any danger of unfair prejudice as they were relevant to prove that defendant used means likely to produce death or serious bodily harm, and they were small and blurry and not particularly gruesome. Ford v. State, 975 So. 2d 859, 2008 Miss. LEXIS 102 (Miss. 2008).

At defendant's trial for capital murder during the commission of a robbery, the circuit court did not abuse its discretion in admitting pictures of the crime scene. Applying the Miss. R. Evid. 403 test, the court found that the probative value of the photographs was not substantially outweighed by their prejudicial effect; each photograph had a meaningful evidentiary purpose. Dampier v. State, 973 So. 2d 221, 2008 Miss. LEXIS 57 (Miss. 2008).

Allowing a photograph taken of the sixth-month old victim while she was alive into evidence was not an error; the photograph was not intended to inflame the jury, but rather to identify the victim, and the purpose of identity fell under the categories of admissible photographs. Also, any error by the trial judge in failing to perform a Miss. R. Evid. 403 balancing test to determine if the evidence was admissible was harmless beyond a reasonable doubt because the probative value of the relevant evidence of the photograph was not substantially outweighed by the danger of unfair prejudice. Havard v. State, 928 So. 2d 771, 2006 Miss. LEXIS 90 (Miss. 2006), cert. denied, 549 U.S. 1119, 127 S. Ct. 931, 166 L. Ed. 2d 716, 2007 U.S. LEXIS 153 (U.S. 2007).

Crime scene photograph was relevant within the meaning of Miss. R. Evid. 401, Miss. R. Evid. 402, and Miss. R. Evid. 403, as it was not prejudicial to defendant in any way. Bradley v. State, 948 So. 2d 506, 2007 Miss. App. LEXIS 33 (Miss. Ct. App. 2007).

In a capital murder case, autopsy photographs of a victim who was shot multiple times in the head, neck, and shoulder were admissible because their probative value outweighed the prejudice; they were used to corroborate the testimony of an officer who found the body and to support the theory that the victim had been thrown from a vehicle after the shooting. Ramsey v. State, 959 So. 2d 15, 2006 Miss. App. LEXIS 764 (Miss. Ct. App. 2006), cert. denied, 958 So. 2d 1232, 2007 Miss. LEXIS 588 (Miss. 2007).

In a murder case, photographs of the victim lying in a doorway and closeups of the victim's head were properly admitted under Miss. R. Evid. 403; they were not cumulative, nor did the potential for prejudice outweigh the probative value where the pictures were at different angles, and it was not possible to get all the information in a single picture. Jones v. State, 938 So. 2d 312, 2006 Miss. App. LEXIS 673 (Miss. Ct. App. 2006).

Admission of photographs of the victim in a murder case was not an abuse of discretion because they were not overly gruesome and they were relevant to show that defendant killed the victim, as they depicted the circumstances of the shooting, the location of the body, and the cause of death, and they supplemented and clarified testimony regarding the location of the wounds, the trajectory of the bullets, the number of the bullets, and the cause and manner of death. Cotton v. State, 933 So. 2d 1048, 2006 Miss. App. LEXIS 520 (Miss. Ct. App. 2006).

In defendant's trial for the sale of cocaine and marijuana to an undercover officer, the trial court did not abuse its discretion under Miss. R. Evid. 401 and 403 in excluding photographs that showed defendant with long braided hair because the photographs were untimely in relation to the drug sale. Defendant's mother testified that defendant could have changed his hairstyle between the months when the photographs were taken and the drug transaction. Johnson v. State, 908 So. 2d 100, 2005 Miss. LEXIS 363 (Miss. 2005).

In a capital murder case, a trial court did not abuse its discretion by allowing the admission of photographs depicting victims of a homicide by beating because they were used by an expert to demonstrate what was found at the crime scene, the types of injuries involved, and to explain a diagram; moreover, defendant failed to show that any prejudice resulted therefrom. Le v. State, 913 So. 2d 913, 2005 Miss. LEXIS 151 (Miss.), cert. denied, 546 U.S. 1004, 126 S. Ct. 622, 163 L. Ed. 2d 508, 2005 U.S. LEXIS 8254 (U.S. 2005).

In defendant's criminal prosecution for murdering his wife's ex-boyfriend, the trial court did not err in admitting photographs of the victim and crime scene, regardless of their gruesome nature. The photographs were probative and relevant, because they revealed the position and location of the victim's body. Roland v. State, 882 So. 2d 262, 2004 Miss. App. LEXIS 911 (Miss. Ct. App. 2004).

Defendant's conviction for capital murder was proper where the trial court properly balanced the probative value and prejudice of photographs of the victim's body and the crime-scene videotape as required by Miss. R. Evid. 403. Brink v. State, 888 So. 2d 437, 2004 Miss. App. LEXIS 559 (Miss. Ct. App. 2004), cert. denied, 888 So. 2d 1177, 2004 Miss. LEXIS 1475 (Miss. 2004), cert. denied, 544 U.S. 986, 125 S. Ct. 1858, 161 L. Ed. 2d 744, 2005 U.S. LEXIS 3129 (U.S. 2005).

Defense counsel's failure to object to the admission of autopsy photographs did not constitute ineffective assistance of counsel; the evidence showed that the pictures were not particularly gruesome, and their probative value outweighed any prejudicial effect that they might have had. Johnson v. State, 876 So. 2d 387, 2003 Miss. App. LEXIS 943 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66, 2004 Miss. LEXIS 881 (Miss. 2004).

Because the photographs of the crime scene objected to at trial concerned the angle of the projectile, a crucial element of the State's proof regarding who had shot the victims, the prejudicial value or prejudicial effect of the photographs was outweighed by their probative value as evidence. Anderson v. State, 856 So. 2d 650, 2003 Miss. App. LEXIS 585 (Miss. Ct. App. 2003).

Trial court did not err in admitting into evidence a gruesome photograph of the crime scene because it was admitted to corroborate the testimony of the State's witnesses and it depicted the criminal agency used to effect the death of the decedent; the prejudicial effect did not outweigh the probative nature of the photograph. Martin v. State, 854 So. 2d 1004, 2003 Miss. LEXIS 335 (Miss. 2003).

Photograph of the victim's exhumed body was properly admitted where the trial court conducted a Miss. R. Evid. 403 balancing on the record, and did not abuse its discretion in finding that the photograph possessed probative value, and that such value outweighed any potential prejudice; defendant's argument that the admission of the photograph through the victim's girlfriend was intended to arouse the passions and sympathies of the jury was rejected as the State had attempted to introduce the photograph through a police investigator, to which defendant had objected, and the girlfriend was a proper witness to identify the distinguishing tattoos depicted in the photograph. Roy v. State, 878 So. 2d 84, 2003 Miss. App. LEXIS 729 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 911 (Miss. 2004).

In admitting photographs of the victim's injuries which, although unpleasant, were not gruesome, and demonstrated the severity of the victim's injuries on the night of the assault, trial judge did not abuse his discretion. Smith v. State, 792 So. 2d 343, 2001 Miss. App. LEXIS 326 (Miss. Ct. App. 2001).

Photographs of a murder victim were properly introduced into evidence, notwithstanding the contention that they were gruesome and that their prejudicial effect outweighed their probative value, since (1) the photographs were unpleasant, but not so gruesome, and (2) the photographs had considerable probative value. Jackson v. State, 784 So. 2d 180, 2001 Miss. LEXIS 124 (Miss. 2001), cert. denied, 534 U.S. 1139, 122 S. Ct. 1088, 151 L. Ed. 2d 987, 2002 U.S. LEXIS 807 (U.S. 2002).

In a prosecution for armed robbery and possession of a concealed weapon by a convicted felon, it was not error for the court to permit the introduction of a photograph of the defendant holding a gun similar to the gun wielded in the robbery where (1) the defendant did not possess the gun when the police apprehended him, (2) the gun that the police recovered in close proximity to the place where they apprehended him did not bear his fingerprints, and (3) the court cut from the photographs two other individuals, one of whom was making a gesture associated with a certain gang. Grant v. State, 762 So. 2d 800, 2000 Miss. App. LEXIS 311 (Miss. Ct. App. 2000).

In a prosecution for the sale of cocaine in which the core of the defense was the issue of mistaken identity, the court erred when it refused to allow the introduction into evidence of two photographs of the defendant taken about 16 months after the crime and 3 ½ months before trial; the photographs were straight-forward chest-up photographs clearly depicting the defendant's facial characteristics at close range in a well-lighted setting, and the photographs could not have any tendency to confuse the jury as it deliberated the central issue of the case. Bennett v. State, 757 So. 2d 1074, 2000 Miss. App. LEXIS 158 (Miss. Ct. App. 2000).

In a prosecution for murder, there was no error in the introduction into evidence of photographs of the murder victim where (1) there was nothing in the record to indicate that the admission of the photographs was simply a ploy on the part of the prosecutor to arouse the passion and prejudice of the jury, (2) the photographs established that the victim was dead as a result of a criminal act, and the extent, position, and nature of the wounds the victim sustained, and (3) the photographs assisted the jury in visualizing the crime scene and corroborated the testimony of the investigators of the crime scene. Humphrey v. State, 759 So. 2d 368, 2000 Miss. LEXIS 101 (Miss. 2000).

Two photographs of a murder victim taken at the scene of the crime were properly admitted into evidence, notwithstanding the contention that their probative value was substantially outweighed by the danger of unfair prejudice, where the pathologist who performed the autopsy used both of the pictures to describe the victim's injuries to the jury and to explain the position of the victim's body at the time the shots were fired and since this was a perfectly acceptable method of presenting evidence to the jury concerning the manner in which the victim met her death and was entirely pertinent to the issues of fact that the jury was expected to resolve. Williams v. State, 738 So. 2d 308, 1999 Miss. App. LEXIS 156 (Miss. Ct. App. 1999).

Photographs of a murder victim's body formed the sequence in which the police recovery team uncovered her body, and as such, formed a progressive view of the crime scene and the investigation into the cause and circumstance of her death; thus, taking these photos as a whole, it was clear that they were not so gruesome and devoid of probative value as to demonstrate an abuse of discretion on the part of the trial court judge in admitting them. Hughes v. State, 735 So. 2d 238, 1999 Miss. LEXIS 131 (Miss. 1999), cert. denied, 528 U.S. 1083, 120 S. Ct. 807, 145 L. Ed. 2d 680, 2000 U.S. LEXIS 242 (U.S. 2000).

In a prosecution for murder, it was not error for the court to permit the introduction of photographs of the victim, including autopsy pictures, since (1) while there was nothing pleasant about the pictures, they were neither gruesome nor inflammatory, nor were they overdramatized by their enlargement, and (2) all of the photographs complained of had significant evidentiary value, whose probative value was increased by enlargement. Watts v. State, 733 So. 2d 214, 1999 Miss. LEXIS 45 (Miss. 1999), overruled in part, Rubenstein v. State, 2005 Miss. LEXIS 789 (Miss. Dec. 1, 2005), cert. denied, — U.S. —, 142 S. Ct. 308, 211 L. Ed. 2d 144, 2021 U.S. LEXIS 4284 (U.S. 2021).

Photographs of the two murder victims were properly admitted into evidence, despite the contention that they were unduly prejudicial, where (1) the trial judge closely reviewed the evidence and carefully weighed the probative value of the evidence against its potential of prejudicing the defendant by inflaming minds of the jury, and (2) the photographs were deemed necessary evidence to corroborate the testimony of the witnesses and were not offered as a "ploy" on the part of the prosecutor to arouse the passion and prejudice of the jury. Jordan v. State, 728 So. 2d 1088, 1998 Miss. LEXIS 566 (Miss. 1998), cert. denied, 527 U.S. 1026, 119 S. Ct. 2375, 144 L. Ed. 2d 778, 1999 U.S. LEXIS 4276 (U.S. 1999).

Based on numerous prior cases permitting introduction of photographs, and almost unlimited discretion afforded trial judge in Mississippi, judge did not abuse his discretion in admitting photographs of murder victim. Doss v. State, 709 So. 2d 369, 1996 Miss. LEXIS 267 (Miss. 1996), cert. denied, 523 U.S. 1111, 118 S. Ct. 1684, 140 L. Ed. 2d 821, 1998 U.S. LEXIS 3048 (U.S. 1998).

The court did not abuse its discretion when it permitted the admission of several photographs of the murder victim since the photographs were necessary to illustrate the position of the body, wounds, and the relation to other fixtures at the scene where evidence was found. Doss v. State, 709 So. 2d 369, 1996 Miss. LEXIS 267 (Miss. 1996), cert. denied, 523 U.S. 1111, 118 S. Ct. 1684, 140 L. Ed. 2d 821, 1998 U.S. LEXIS 3048 (U.S. 1998).

It was not error for the court in a murder prosecution to permit the introduction of photographs of the victim since the pictures were not particularly gruesome or inflammatory so as to shock or prejudice the jury and since the photographs were all relevant to show the victim's injuries and to help the jury visualize the crime and crime scene, corroborating the testimony of the investigators and partially corroborating the defendant's confession. Underwood v. State, 708 So. 2d 18, 1998 Miss. LEXIS 45 (Miss. 1998).

Trial court did not abuse its discretion in admitting six 4″ x 6″ color photographs depicting fatal stab wounds to murder victims; photographs were neither gruesome nor inflammatory, and showed only immediate areas of wounds. Jackson v. State, 684 So. 2d 1213, 1996 Miss. LEXIS 7 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828, 1997 U.S. LEXIS 2937 (U.S. 1997).

Defendant's murder conviction was proper where the admission of photographs of the victim served both to show the location of the remains and to supplement witness testimony concerning the location of the remains; the photographs were not so repetitive as to lose their probative value and the trial judge clearly considered the potential danger of prejudice but found that it was outweighed by the probative value of the photographs. Savell v. State, 928 So. 2d 961, 2006 Miss. App. LEXIS 367 (Miss. Ct. App. 2006).

**Prejudice found.**

Because the record lacked any evidence that defendants intentionally or recklessly discarded the missing information regarding the accident report prepared at the accident site, the trial court was within its discretion to partially grant defendants' motion in limine as any evidence suggesting that defendants lost or misplaced the information – because it was unfavorable to them – was more prejudicial than probative. Harris v. Michael, 211 So. 3d 732, 2016 Miss. App. LEXIS 366 (Miss. Ct. App. 2016), cert. denied, 209 So. 3d 430, 2017 Miss. LEXIS 46 (Miss. 2017).

Trial judge did not abuse his discretion in excluding a deceased driver's statement about being sorry for causing an accident where although the statement was not hearsay under Miss. R. Evid. Evidence 801(d)(2) because it was a statement offered against a party opponent, the only issue at trial was the injured individual's damages, and thus, the statement was properly viewed as unduly prejudicial. Heflin v. Merrill, 154 So. 3d 857, 2014 Miss. LEXIS 558 (Miss. 2014).

It was improper to allow testimony lumping the corporation, based on its size, into a hypothetical with other large companies that may have a history of intimidating and deceiving regulatory agencies; from the expert's line of testimony, the jury easily could have been misled into believing that the corporation was guilty of covering up alleged regulatory violations, and under a Miss. R. Evid. 403 balancing test, the expert's testimony was more prejudicial to the corporation than probative; there existed a real danger that the testimony would unfairly prejudice the corporation and mislead the jury with the accusations of hypothetical regulatory violations by the corporation. E.I. DuPont de Nemours & Co. v. Strong, 968 So. 2d 410, 2007 Miss. LEXIS 574 (Miss. 2007).

Evidence that a child victim had allegedly caused injuries to his own rectum by sticking objects there was properly excluded in a sexual battery case because it was irrelevant under Miss. R. Evid. 401 and highly prejudicial under Miss. R. Evid. 403, and it was also a collateral issue that was too remote in time to rebut the charges based on the fact that it was a year before the charges in an indictment; case law under Miss. R. Evid. 412 was helpful in making this determination, despite the fact that the victim's actions did not constitute clear sexual activity. Mason v. State, 971 So. 2d 618, 2007 Miss. App. LEXIS 327 (Miss. Ct. App.), cert. denied, 973 So. 2d 244, 2007 Miss. LEXIS 701 (Miss. 2007).

Defendant's sole reason for attempting to present to the jury evidence of a witness's mental condition – schizophrenia and bipolar illness – was for impeachment purposes; however, the facts of the case supported a finding that, if the trial court had allowed defendant's attorney to cross-examine the witness before the jury about the witness's mental condition, the evidence would not have supported defendant's theory that the witness hallucinated. Thus, the trial court was within its discretion to exclude the evidence because the prejudicial value of the evidence outweighed the probative value. Jackson v. State, 924 So. 2d 531, 2005 Miss. App. LEXIS 451 (Miss. Ct. App. 2005), cert. denied, 927 So. 2d 750, 2006 Miss. LEXIS 175 (Miss. 2006).

Trial court erred in ruling that defendant's prior aggravated assault conviction could be admitted in his trial for aggravated assault if he testified; the evidence was more prejudicial than probative, but defendant never proffered what he would testify to if he testified, and as a result, the error was harmless in light of the overwhelming weight of the evidence against defendant. Walker v. State, 936 So. 2d 424, 2006 Miss. App. LEXIS 550 (Miss. Ct. App. 2006).

Admission of a towel allegedly stained with defendant's semen was improper in a statutory rape case because, although the evidence was admissible under Miss. R. Evid. 404(b), it was not authenticated or conclusively linked to defendant through biological testing. Walker v. State, 878 So. 2d 913, 2004 Miss. LEXIS 589 (Miss. 2004).

While trial court erred in admitting evidence of defendant's prior convictions due to the similarity of those offenses to the crime for which he was being tried and the prejudice that would likely make the jury infer present guilt from past convictions for a similar offense, the error was harmless given other evidence including defendant's confession to the crime. Triplett v. State, 881 So. 2d 303, 2004 Miss. App. LEXIS 478 (Miss. Ct. App. 2004).

Defendant's conviction for burglary was reversed, and the matter was remanded for a new trial; while evidence of defendant's other convictions of burglary and burglary-related crimes could be admissible to show his intent, simply allowing the circuit clerk to read the convictions was improper as the jury could rely on the evidence to determine that defendant should be convicted because he had a character trait or propensity to commit burglary. Jones v. State, 905 So. 2d 644, 2004 Miss. App. LEXIS 481 (Miss. Ct. App. 2004), rev'd, 904 So. 2d 149, 2005 Miss. LEXIS 221 (Miss. 2005).

In a prosecution for murder in which there was evidence of three confessions made by the defendant around the time of the crime, evidence of other later confessions made to police in another state was more prejudicial than probative and should have been excluded as such later confessions would permit the jury to believe that the defendant was at some time in another state under circumstances requiring his arrest. Odom v. State, 769 So. 2d 189, 2000 Miss. App. LEXIS 160 (Miss. Ct. App. 2000).

Trial court erroneously permitted witness to testify that he was offered money to kill victim for purpose of preventing victim from testifying against defendant's eventual co-conspirator; existence of conspiracy between defendant and his co-conspirator had not yet been established, and neither witness nor co-conspirator were on trial, and thus this blatantly irrelevant evidence served to unduly prejudice defendant and confuse issues put before the jury. Stewart v. State, 662 So. 2d 552, 1995 Miss. LEXIS 488 (Miss. 1995).

Amount plaintiff received in settlement for injury in prior automobile accident was totally unconnected with injury sustained in accident being tried, and trial court erroneously admitted testimony regarding other settlement, since such evidence was substantially outweighed by danger of unfair prejudice. Jones v. Wiese, 652 So. 2d 175, 1995 Miss. LEXIS 147 (Miss. 1995).

Admission of officer's testimony that reason he was first suspicious of defendant's car was that a car fitting that description had recently been stolen, and that shooting had taken place at residence where defendant's car was first observed, constituted reversible error; his testimony was unduly prejudicial, and there was no reason for him to explain his presence on public roads in a position to observe defendant's car, and his subsequent investigation after learning that the car had an improper tag. Sample v. State, 643 So. 2d 524, 1994 Miss. LEXIS 466 (Miss. 1994).

Officer's testimony that description on radio dispatch alerted him to look for defendant and his truck had substantial probative value, and risk of undue prejudice– that jury would assume officer suspected defendant because of his involvement in other crimes– was purely speculative. Ellis v. State, 667 So. 2d 599, 1995 Miss. LEXIS 596 (Miss. 1995).

Detailed testimony of State's pathologist, on condition of victim's body at the time of autopsy and on the cause of death, was relevant to several aspects of State's case, and was not more prejudicial than probative. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Defendant's statement that victim would have to be killed and her house burned was probative to show defendant was involved in robbery and she feared discovery, and prejudicial effect of this testimony did not outweigh its probative value. Ballenger v. State, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

**Prejudice not found.**

Considering the law and the facts, the

admission of testimony regarding defendant's prior bad acts without objection did not warrant a plain error review. Defendant made no showing that the admission of the testimony prejudiced the jury against him. Giles v. State, 282 So. 3d 519, 2019 Miss. App. LEXIS 294 (Miss. Ct. App. 2019).

Cross-examination of defendant was not improper because (1) the cross-examination went directly to defendant's credibility, and (2) any prejudicial effect was substantially outweighed by probative value. Griffin v. State, 269 So. 3d 337, 2018 Miss. App. LEXIS 187 (Miss. Ct. App. 2018), cert. denied, 260 So. 3d 796, 2019 Miss. LEXIS 6 (Miss. 2019).

Circuit court considered the evidence's admissibility and then filtered the evidence through the balancing test and thus did not abuse its discretion by admitting the bad act evidence; the evidence showed defendant's motive, intent, and modus operandi, the facts were substantially similar in each incident, and the evidence's probative value substantially outweighed the danger of unfair prejudice. Parks v. State, 228 So. 3d 853, 2017 Miss. App. LEXIS 58 (Miss. Ct. App.), cert. denied, 220 So. 3d 977, 2017 Miss. LEXIS 262 (Miss. 2017).

In a murder case, a knife, golf club, and brass knuckles were probative and admissible because the forensic pathologist testified that the victim had suffered blunt-force trauma and multiple cuts or stab wounds; the items, as well as the hair fibers, rubber strap, and mop, constituted a part of the surrounding scene of the crime and were probative; defendant did not show how he was prejudiced by the introduction of any of the items; and defendant had the opportunity to cross-examine the witnesses who testified regarding the evidence, and to emphasize to the jury his argument that the items were not used in the commission of the crime. Affleck v. State, 210 So. 3d 1067, 2015 Miss. App. LEXIS 675 (Miss. Ct. App. 2015), cert. denied, 203 So. 3d 598, 2016 Miss. LEXIS 388 (Miss. 2016), cert. denied, 2016 Miss. LEXIS 391 (Miss. Sept. 15, 2016), cert. denied, 580 U.S. 1128, 137 S. Ct. 1091, 197 L. Ed. 2d 201, 2017 U.S. LEXIS 1278 (U.S. 2017).

Admission of pills prescribed to defendant's wife on the theory that they were part of a common scheme and that the alleged number of pills missing from both individuals' prescriptions was evidence that defendant did not hold his for personal use was not overly prejudicial. Knight v. State, 188 So. 3d 1235, 2015 Miss. App. LEXIS 458 (Miss. Ct. App. 2015), cert. denied, 188 So. 3d 575, 2016 Miss. LEXIS 169 (Miss. 2016).

Trial court did not abuse its discretion in finding that defendant's voice message was relevant to the State's prosecution for manslaughter and admissible evidence because the message tended to support the State's theory that defendant acted with malice toward the victim since he thought the victim was one of his wife's lovers; the probative value of the evidence was not substantially outweighed by any prejudicial effect it could possess. Newell v. State, 175 So. 3d 1260, 2015 Miss. LEXIS 505 (Miss. 2015).

In a case in which defendant was convicted as a habitual offender for the possession of cocaine with intent to distribute, the trial court did not err in admitting prior-bad-acts evidence. No hearsay evidence was introduced, defendant's confrontation rights were not violated, and the trial court conducted proper balancing tests under Miss. R. Evid. 403(b). Hopkins v. State, 141 So. 3d 384, 2014 Miss. LEXIS 224 (Miss. 2014).

Because a witness's testimony about defendant's statement that his father had "turned State on him" was vague and did not implicate defendant's guilt in the murder, the statement was not so unfairly prejudicial that a mistrial was warranted. Thomas v. State, 134 So. 3d 357, 2013 Miss. App. LEXIS 717 (Miss. Ct. App. 2013).

Because defendant opened the door to evidence regarding his immigration status, he could not complain of prejudice on appeal. Gonzalez v. State, 134 So. 3d 350, 2013 Miss. App. LEXIS 556 (Miss. Ct. App. 2013), cert. denied, 133 So. 3d 818, 2014 Miss. LEXIS 167 (Miss. 2014).

Defendant's conviction for robbery by use of a deadly weapon was appropriate because the sparse reference by the State to defendant's possible gang membership was not part of the State's case-in-chief; the evidence had some probative weight; its probative value substantially outweighed the danger of unfair prejudice; and limited statements about gang membership went to show possible motive, opportunity, intent, or preparation. Pritchett v. State, 32 So. 3d 545, 2010 Miss. App. LEXIS 155 (Miss. Ct. App. 2010).

In a case in which defendant appealed his conviction for violating Miss. Code Ann. § 97-3-7(2)(a), he unsuccessfully argued that the trial court erred in allowing the victim's wife to testify about an encounter she and defendant had months after the incident. Defendant contended that the wife's testimony was not relevant, and its prejudicial effect outweighed its probative value in violation of Miss. R. Evid. 403, but the evidence was offered to show defendant's state of mind on the day of the assault; the trial court weighed the probative value of the evidence against the potential for undue prejudice. David v. State, 29 So. 3d 129, 2010 Miss. App. LEXIS 112 (Miss. Ct. App. 2010).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the trial court did not err in not excluding the testimony of the decedent's friend concerning the decedent's alleged making, using, or selling methamphetamine before the accident since the testimony was relevant and concerned the type of activity that the decedent was involved in prior to the accident and what impact that activity might have had on the decedent's alertness at the time of the accident. The probative value outweighed the prejudicial effect because it concerned the issue of proximate cause and potential fault. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450, 2010 Miss. LEXIS 200 (Miss. 2010).

In defendant's trial for false pretenses, the introduction into evidence of bank statements properly fell under Miss. R. Evid. 404(b) exceptions of knowledge and intent, and under Miss. R. Evid. 403, the evidence was not overly prejudicial as the bank record did not include any information regarding other indictments, it was accompanied by a limiting instruction and the prosecutor did not emphasize any other bounced checks. Lyles v. State, 12 So. 3d 532, 2009 Miss. App. LEXIS 263 (Miss. Ct. App. 2009).

During defendant's trial for possession of cocaine, a defense witness testified that she did not see defendant throw any drugs on the ground; during cross-examination, the prosecutor questioned the witness about her son's murder conviction, eliciting testimony that he himself had been the prosecutor at her son's murder trial. The trial court correctly permitted the State's cross-examination because it was relevant to show the defense witness's possible bias against the State; admission of the testimony did not violate Miss. R. Evid. 403, because the jury was given a limiting instruction. Butler v. State, 19 So. 3d 111, 2009 Miss. App. LEXIS 154 (Miss. Ct. App.), cert. denied, 19 So. 3d 82, 2009 Miss. LEXIS 490 (Miss. 2009).

In a prosecution for selling cocaine to an undercover informant, defendant's prior conviction for possessing cocaine within 1,500 feet of a school was admissible in accordance with Miss. R. Evid. 404(b) with respect to intent as well as Miss. R. Evid. 609 to impeach defendant's claim of a set-up and law enforcement conspiracy. The trial judge conducted a Peterson analysis and a Miss. R. Evid. 403 balancing test on the record. Young v. State, 13 So. 3d 339, 2009 Miss. App. LEXIS 129 (Miss. Ct. App. 2009).

Trial court properly employed the two-part analysis for admissibility under Miss. R. Evid. 404(b) and the balancing test required by Miss. R. Evid. 403 in admitting evidence of defendant's acts prior to the murder; the challenged testimony was relevant and probative, establishing that defendant and the victim were together less than half an hour before the victim's body was discovered and placing the murder weapon in defendant's hands shortly before the shooting. Welde v. State, 3 So. 3d 113, 2009 Miss. LEXIS 70 (Miss. 2009).

In a capital murder trial, the trial court did not err in admitting the expert testimony of a forensic pathologist because his opinion testimony was based upon his observations of the victim's body, facts made known to him, and his observations of anatomical drawings and photographs at trial. Because the pathologist testified that he had reviewed the victim's medical records and was able to reach an opinion with a reasonable degree of medical certainty as to the cause and manner of the victim's death, his testimony was relevant and was not unfairly prejudicial or confusing. Dixon v. State, 17 So. 3d 1099, 2009 Miss. App. LEXIS 88 (Miss. Ct. App.), cert. denied, 17 So. 3d 99, 2009 Miss. LEXIS 451 (Miss. 2009).

Evidence offered against defendant made the State's case more probable than it would have been without the evidence, and the probative value of the evidence outweighed any prejudice to defendant; the semen evidence corroborated the victim's testimony that she had sex with defendant the day before being taken to the hospital, and that same testimony of the victim connected the semen recovered to defendant, and as such, the trial judge did not abuse his discretion in allowing the State to present the semen evidence. Stevenson v. State, 13 So. 3d 314, 2008 Miss. App. LEXIS 778 (Miss. Ct. App. 2008), cert. denied, 14 So. 3d 731, 2009 Miss. LEXIS 360 (Miss. 2009), dismissed, — So. 3d —, 2019 Miss. LEXIS 146 (Miss. 2019).

In an embezzlement case, the trial court did not err in allowing the testimonies of three witnesses who testified that they gave defendant money with the understanding that defendant would procure a vehicle for them; the testimonies regarding defendant's prior bad acts were not so prejudicial as to outweigh the probative value. Wilson v. State, 12 So. 3d 8, 2008 Miss. App. LEXIS 746 (Miss. Ct. App. 2008), cert. denied, 14 So. 3d 731, 2009 Miss. LEXIS 306 (Miss. 2009).

At a trial for burglary of a dwelling and attempted rape, testimony that defendant was seen masturbating in a public place two to three hours before the incident in question was admissible because the evidence: (1) went to establish defendant's motive, state of mind, intent, and plan; and (2) was not unduly prejudicial in light of all the evidence produced at trial. Johnson v. State, 994 So. 2d 831, 2008 Miss. App. LEXIS 305 (Miss. Ct. App.), cert. denied, 998 So. 2d 1010, 2008 Miss. LEXIS 632 (Miss. 2008).

Trial court did not abuse its discretion by allowing the prosecution to display the injured child to the jury because: (1) under Miss. Const. Art. 3, § 26A and Miss. Code Ann. § 99-43-21 (Rev. 2007), the victim had the right to be present and be heard during the criminal proceedings; (2) the State was required to offer proof of serious bodily injury in order to convict defendant of aggravated assault; and (3) the probative value of the jury's viewing the child's injuries was not substantially outweighed by unfair prejudice to defendant. Harris v. State, 979 So. 2d 721, 2008 Miss. App. LEXIS 197 (Miss. Ct. App. 2008).

When considering "other crime" evidence concerning drug activity and drugs being found in the possession of defendant, as well as the fact that the police were familiar with defendant because of past juvenile matters, the probative value of this relevant evidence was not substantially outweighed by danger of unfair prejudice, and thus the trial judge did not abuse her discretion in allowing it. Givens v. State, 967 So. 2d 1, 2007 Miss. LEXIS 494 (Miss. 2007).

When the state introduced evidence of a struggle between defendant and police officers in a pool hall, where a bag of marijuana fell out of defendant's sleeve, the evidence was admissible under Miss. R. Evid. 404(b) because the evidence showed intent, motive, preparation, plan, knowledge, identity, absence of mistake or accident, or opportunity, and the evidence was not more prejudicial than probative, under Miss. R. Evid. 403. Williams v. State, 962 So. 2d 129, 2007 Miss. App. LEXIS 498 (Miss. Ct. App. 2007).

Admission of defendant's shirt and gun were relevant to the issue of identity and were not too remote in space nor time; the shirt and gun were similar to the description given by the victims and defendant admittedly wore the shirt and possessed the gun during the time in question. Jackson v. State, 969 So. 2d 124, 2007 Miss. App. LEXIS 472 (Miss. Ct. App. 2007).

Information regarding the decedent's condition prior to the alleged negligence by the nursing home would certainly be relevant to determine whether or not the decedent had indeed suffered new and distinct injuries at the hand of either of the owners; thus, it was proper for defense counsel to question the similarities of these damages to determine whether or not they were actually caused by a third party. Beverly Enters. v. Reed, 961 So. 2d 40, 2007 Miss. LEXIS 409 (Miss. 2007).

Theft evidence, though not linked to any specific materials and, therefore insufficient to defeat the seller's proof of delivery, was probative of whether the seller had over-billed the seller for materials purchases. Given the broad discretion afforded to the trial court in conducting a Miss. R. Evid. 403 balancing test, the appellate court found that the trial court did not abuse its discretion in finding that the theft evidence was not substantially prejudicial to warrant its exclusion. Natchez Elec. & Supply Co. v. Johnson, 968 So. 2d 444, 2006 Miss. App. LEXIS 118 (Miss. Ct. App. 2006), rev'd, 2007 Miss. LEXIS 20 (Miss. Jan. 18, 2007).

In trying appellant for attempted burglary, a trial court did not err in instructing the jury that it could consider appellant's prior felony convictions as motive when they had not been introduced for that purpose, as the instruction that was given was a correct statement of law, and pursuant to Miss. R. Evid. 404(b), evidence of appellant's prior felony convictions, while not admissible to prove his character, was admissible to show his intent or motive; moreover, as the trial court had already made a Miss. R. Evid. 403 analysis and admitted the evidence, it could not be fairly argued that appellant was prejudiced by the trial court's silence to support the additional exception granted by the very same evidentiary rule, and thus any perceived error was harmless. Carter v. State, 953 So. 2d 224, 2007 Miss. LEXIS 203 (Miss. 2007).

In a trial for statutory rape, evidence that defendant had asked the victim to don a white t-shirt, and nothing else, on other occasions was inadmissible to prove defendant guilty of the charge; however, the trial court properly ruled that the evidence was more probative than prejudicial. Miley v. State, 935 So. 2d 998, 2006 Miss. LEXIS 410 (Miss. 2006).

In a capital murder case, a court properly admitted photographs of defendant's tattooed body where part of the defense was that he killed the victim in self-defense; however, had defendant been engaged in self-defense, it would likely have resulted in injuries greater than the bruise he suffered on his hand, and therefore, the photographs were relevant. Further, they were not prejudicial because they did not depict gruesome images that would inflame the mind of the jury. Spicer v. State, 921 So. 2d 292, 2006 Miss. LEXIS 20 (Miss.), cert. denied, 549 U.S. 993, 127 S. Ct. 493, 166 L. Ed. 2d 364, 2006 U.S. LEXIS 8022 (U.S. 2006).

As to evidence of proof of another crime under Miss. R. Evid. 404(b),the trial court was not required to issue a limiting instruction sua sponte.Further, where the evidence against defendant was overwhelming in the subject assault case, the trial court's failure to have conducted an on the record balancing test was harmless error. Richardson v. State, 911 So. 2d 1026, 2005 Miss. App. LEXIS 692 (Miss. Ct. App. 2005).

Trial court did not abuse its discretion in admitting a witness's testimony that defendant was present at a drug transaction in which the witness pawned her car to and purchased crack cocaine from a person who then asked defendant to drive the witness home, which he did, but instead of returning with the car, defendant kept it for himself. The evidence was necessary to establish defendant's dominion and control over the car and counter his testimony that he had just borrowed the car and had no knowledge of what was in it, and was admissible under Miss. R. Evid. 403 because its probative value outweighed any potential for prejudice. Nelson v. State, 914 So. 2d 265, 2005 Miss. App. LEXIS 739 (Miss. Ct. App. 2005).

In an appeal of a manslaughter conviction, the judgment was affirmed because the trial judge did not commit reversible error in admitting photographs into evidence without first conducting an on-the-record balancing test under Miss. R. Evid. 403 as a trial court's failure to perform a Rule 403 balancing test on the record was harmless error. Sheppard v. State, 910 So. 2d 1182, 2005 Miss. App. LEXIS 606 (Miss. Ct. App. 2005).

Admission of the evidence of the anchorperson's subsequent job performance was appropriate in her breach of contract claim pursuant to Miss. R. Evid. 401 and 403 because that evidence was relevant to disprove the corporation's contention that the anchorperson was fired for cause. Morris Newspaper Corp. v. Allen, 2004 Miss. App. LEXIS 981 (Miss. Ct. App. Oct. 12, 2004), op. withdrawn, sub. op., 932 So. 2d 810, 2005 Miss. App. LEXIS 765 (Miss. Ct. App. 2005).

State credibly presented the evidence regarding race to show defendant's intent to commit the crime of embezzlement and the testimony was critical to establishing the witness's credibility, and for showing how defendant induced that witness into conducting business outside the car dealership where he worked. There were no loathsome, inflammatory racial slurs and in reviewing the complete testimony in context, the probative value of the evidence outweighed any potential prejudice, and did not exhibit a tendency to move the jury to decide the case on an improper basis; the testimony was properly admitted as relevant as it showed the existence of a plan, helped to present the complete picture of defendant's conduct to the jury, and did not unduly prejudice defendant. Bell v. State, 910 So. 2d 640, 2005 Miss. App. LEXIS 159 (Miss. Ct. App. 2005).

Finding in favor of the patient in his medical malpractice action was improper where the trial court erred in preventing the words "curse" and "witchcraft" from being used at trial because the probative value of exploring the origin and/or source, cause, and extent of his emotional distress, mental anguish, and psychological injury, outweighed the danger of unfair prejudice. Blake v. Clein, 903 So. 2d 710, 2005 Miss. LEXIS 235 (Miss. 2005).

Trial court did not err in allowing the limited possession evidence into evidence at defendant's trial for charges of distribution of cocaine, as the trial court balanced the weight of the evidence under Miss. R. Evid. 403 and found that it was relevant to show the existence of a plan, and the jury was given a limiting instruction to minimize any prejudice to defendant. Nobles v. State, 879 So. 2d 1067, 2004 Miss. App. LEXIS 746 (Miss. Ct. App. 2004).

Trial court did not abuse its discretion in admitting a statement that defendant had used the money from the robbery to buy crack cocaine as the testimony went to motive and it was not prejudicial. Mayo v. State, 886 So. 2d 734, 2004 Miss. App. LEXIS 430 (Miss. Ct. App.), cert. denied, 887 So. 2d 183, 2004 Miss. LEXIS 1383 (Miss. 2004).

Trial court did not err in admitting evidence that defendant planned an attempted robbery at another restaurant; the trial judge properly followed the required procedure, found that the evidence was more probative than prejudicial, and instructed the jury not to consider the testimony as a substitute for proof that defendant committed the robbery. Powell v. State, 878 So. 2d 144, 2004 Miss. App. LEXIS 37 (Miss. Ct. App.), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 962 (Miss. 2004).

In a prosecution for aggravated assault under Miss. Code Ann. § 97-3-7, the trial court did not err in allowing evidence regarding an altercation between defendant and the victim prior to the assault; the altercation, allegedly a prior bad act, was properly admitted to establish motive pursuant to Miss. R. Evid. 404(b), and the probative value of the evidence outweighed the prejudice caused under Miss. R. Evid. 403. Brown v. State, 864 So. 2d 1009, 2004 Miss. App. LEXIS 55 (Miss. Ct. App. 2004).

Trial court, in order to make a well-informed decision regarding defendant's guilt, had to let the jury understand the circumstances surrounding the search that discovered the cocaine, and information regarding the existing warrant was necessary to achieve this end; the jury was made aware of a warrant for defendant's arrest, but jurors were not informed of the specific reason for the warrant, which was an appropriate balancing of the probative value of the information and the unfair prejudice that could result from it. Burnett v. State, 876 So. 2d 409, 2003 Miss. App. LEXIS 1184 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66, 2004 Miss. LEXIS 853 (Miss. 2004).

In a burglary case, the trial court did not abuse its discretion in admitting gloves that the victim found in a closet, because the victim's testimony that she found the gloves in her closet a week after the burglary and the gloves did not belong to her, while not connecting the gloves to defendant, was sufficient to suggest it was more probable than not that a burglary had occurred. Cortez v. State, 876 So. 2d 1026, 2003 Miss. App. LEXIS 1140 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66, 2004 Miss. LEXIS 859 (Miss. 2004), dismissed, 9 So. 3d 445, 2009 Miss. App. LEXIS 209 (Miss. Ct. App. 2009).

Circuit court did not abuse its discretion in allowing a witness to testify concerning an incident with the victim where the incident was just one more incident fitting the pattern of defendant's behavior, was not unduly prejudicial to defendant, and did not confuse the issues. Cox v. State, 849 So. 2d 1257, 2003 Miss. LEXIS 337 (Miss. 2003).

Shortly after defendant's arrest, and while sitting in the back of the patrol car, defendant was heard by one of the investigating officers to loudly remark something to the effect that defendant had shot the (expletive), and would shoot the victim again. It was certainly not reversible error to let the jury know of defendant's spontaneous statements, and defendant's alleged intoxication bore only on the probative value of the evidence. Moore v. State, 837 So. 2d 794, 2003 Miss. App. LEXIS 81 (Miss. Ct. App. 2003).

Trial court did not abuse its discretion in holding that prior bad acts evidence was admissible in order to show motive, intent, preparation, plan, knowledge and absence of mistake or accident, because the trial court made a finding that the probative value of the evidence outweighed any possible unfair prejudice to defendant and gave an instruction to the jury on the limited purpose for which the evidence was being allowed. Adams v. State, 851 So. 2d 366, 2002 Miss. App. LEXIS 696 (Miss. Ct. App. 2002), cert. denied, 849 So. 2d 899, 2003 Miss. App. LEXIS 699 (Miss. Ct. App. 2003).

Evidence that defendant charged with raping a 104-year-old victim had been at the victim's home on prior occasions was not impermissible "bad act" evidence under Miss. R. Evid. 403b. Ward v. State, 821 So. 2d 894, 2002 Miss. App. LEXIS 406 (Miss. Ct. App. 2002).

Trial court did not abuse its discretion in admitting evidence regarding defendant's filing of a false police report showing that the gun used in the murder had previously been stolen as admission of that evidence was not unfairly prejudicial because it was not used to show defendant's character, but rather, admitted to show defendant's knowledge and the absence of mistake or accident. Montana v. State, 822 So. 2d 954, 2002 Miss. LEXIS 220 (Miss. 2002).

Trial court did not abuse its discretion in allowing the State to use the testimony of a defense witness in defendant's trial for armed robbery and taking a motor vehicle, given in a related federal case, to impeach the witness; probative value of the witness's statements outweighed the prejudice to defendant. Edwards v. State, 838 So. 2d 990, 2002 Miss. App. LEXIS 430 (Miss. Ct. App. 2002), cert. denied, 837 So. 2d 771, 2003 Miss. LEXIS 124 (Miss. 2003).

Trial court did not abuse its discretion in allowing testimony from a forensic scientist about gunpowder residue testing to be admitted into evidence; the appellate court rejected defendant's claims that the test results were inconclusive, speculative and unfairly prejudicial to the defense in violation of Miss. Rule Evid. 403 where the expert never testified that the test established that defendant had fired a weapon. Simmons v. State, 813 So. 2d 710, 2002 Miss. LEXIS 132 (Miss. 2002).

Testimony of the murder victim's mother about a prior altercation between defendant and the victim was properly admitted as probative as to defendant's state of mind and motive; the probative value of the evidence was found to outweigh the prejudicial effect of admitting the evidence. The prejudicial effect of this testimony did not outweigh its probative value. Therefore, the evidence was properly admitted. Simmons v. State, 813 So. 2d 710, 2002 Miss. LEXIS 132 (Miss. 2002).

Evidence of the purchase price the property owner had paid for a tract of land containing pine trees that were partially destroyed by fire was admissible as the evidence was relevant to show the actual damages compared to the reasonableness of the damages sought; moreover, the property-owner failed to show how he was unfairly prejudiced by the admission of such evidence. Redhead v. Entergy Miss., Inc., 828 So. 2d 801, 2001 Miss. App. LEXIS 421 (Miss. Ct. App. 2001), cert. dismissed, 2002 Miss. App. LEXIS 618 (Miss. Ct. App. Oct. 17, 2002).

In a murder prosecution, it was not error for the court to permit the introduction into evidence of the contents of the victim's wallet, notwithstanding the contention that the probative value was substantially outweighed by the danger of unfair prejudice, since (1) a police officer testified that it was the defendant who informed him of the location of the contents and actually took him to that location and, therefore, the proper foundation for admitting the evidence was laid, and (2) the contents of the wallet were probative in proving that the wallet did in fact belong to the victim. Fair v. State, 766 So. 2d 787, 2000 Miss. App. LEXIS 400 (Miss. Ct. App. 2000).

In an action for, inter alia, assault and battery arising from an incident in which the defendant detained the plaintiffs after they attempted to cross his property, it was not error for the court to permit the introduction of evidence that the defendant, who was a municipal judge, told the plaintiffs that a "nigger judge" would not be able to help them; the statement was relevant and its probative value was not substantially outweighed by the danger of unfair prejudice. Whitten v. Cox, 799 So. 2d 1, 2000 Miss. LEXIS 185 (Miss. 2000).

In a prosecution for murder in which there was evidence of three confessions made by the defendant around the time of the crime, evidence of other later confessions made to police in another state was more prejudicial than probative and should have been excluded as such later confessions would permit the jury to believe that the defendant was at some time in another state under circumstances requiring his arrest. Odom v. State, 769 So. 2d 189, 2000 Miss. App. LEXIS 160 (Miss. Ct. App. 2000).

Trial judge did not abuse his discretion in admitting color photographs taken prior to autopsy and showing wounds on body of deceased; although not pleasant to look at, photographs were not comparable to those described in precedent relied upon by defendant, and they served to clarify and supplement testimony and to describe the cause of victim's death. Brown v. State, 682 So. 2d 340, 1996 Miss. LEXIS 427 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348, 1997 U.S. LEXIS 1821 (U.S. 1997).

Trial court did not err in admitting photograph of burned body of murder victim for use in sentencing; photograph illustrated extent of defendant's efforts to cover his tracks, and was therefore probative on the avoidance-of-arrest aggravator. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

There was no error in admission of photographs depicting defendant on night of murder, where photographs were used simply to support testimony of witness, and were descriptive of events that happened as testified to by witnesses. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

There was no merit to defendant's argument that photograph of murder victim, taken while she was alive, was used to evoke sympathy. Walker v. State, 671 So. 2d 581, 1995 Miss. LEXIS 494 (Miss. 1995), cert. denied, 519 U.S. 1011, 117 S. Ct. 518, 136 L. Ed. 2d 406, 1996 U.S. LEXIS 7236 (U.S. 1996).

Trial judge did not abuse his discretion in admitting three 4″ x 6″ color photographs of murder victim; although not pleasant to look at, photographs were not comparable to those described in case upon which defendant relied, and they served to clarify and supplement coroner's testimony and to describe the cause of victim's death. Holly v. State, 671 So. 2d 32, 1996 Miss. LEXIS 15 (Miss. 1996), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4179 (U.S. 1996).

Photographs contain probative value when they supplement or add clarity to a witness's testimony, and when they document the cause of death and location of a victim. Gossett v. State, 660 So. 2d 1285, 1995 Miss. LEXIS 393 (Miss. 1995).

Color photographs of murder victim taken during pathologist's postmortem examination had probative value to show location, angulation, and trajectory of gunshot wounds, and probative value was not outweighed by any prejudicial effect. Hart v. State, 637 So. 2d 1329, 1994 Miss. LEXIS 115 (Miss. 1994).

Autopsy photograph of murder victim's head with the skin pulled back and the skull cap removed was properly submitted to the jury as probative of cause of death. Hurns v. State, 616 So. 2d 313, 1993 Miss. LEXIS 121 (Miss. 1993).

Although defendant did not deny victim's death, cause of death was part of the State's case-in-chief, and autopsy photograph of victim's opened skull was more probative than prejudicial, where it depicted bruising to the brain and established cause of death as a severe beating about the head, temple and ear with a blunt instrument. Alexander v. State, 610 So. 2d 320, 1992 Miss. LEXIS 580 (Miss. 1992).

Photographs of victims' charred bodies depicted them as they were upon being viewed at scene of accident by medical examiner, and thus photographs supplemented and clarified his testimony, and they were not so gruesome, hideous, and nauseating as to be inflammatory and appeal to passion and prejudice of jury. Hewlett v. State, 607 So. 2d 1097, 1992 Miss. LEXIS 451 (Miss. 1992).

Photograph of defendant taken after his arrest for vehicular manslaughter did not indicate any prior criminal activity, and therefore did not implicate rationale behind inadmissibility of mug-shot photographs. Hewlett v. State, 607 So. 2d 1097, 1992 Miss. LEXIS 451 (Miss. 1992).

Personal photographs showing 85-year-old decedent well, healthy and interacting with family shortly before his death were directly relevant to the issue of wrongful death damages, and were not unduly prejudicial. Motorola Communications & Electronics, Inc. v. Wilkerson, 555 So. 2d 713, 1989 Miss. LEXIS 517 (Miss. 1989).

Trial court erred in allowing introduction of photographs of murder victim which were so graphic and gruesome as to arouse passion and prejudice of jury; State could have shown angle and entry of bullet wound without full-color, close-up view of decomposed, maggot-infested skull, and photographs were therefore not needed in order to prove corpus delicti. McNeal v. State, 551 So. 2d 151, 1989 Miss. LEXIS 333 (Miss. 1989).

Photographs of murder victim showing fragments of her skull and brain on floor and on wall were not unduly prejudicial, and were probative of exact nature of injury and of force and violence a shotgun would cause, as opposed to a handgun. Stringer v. State, 548 So. 2d 125, 1989 Miss. LEXIS 354 (Miss. 1989).

**Preservation for review.**

When defendant introduced his record of prior convictions on his own initiative during direct examination, he effectively denied the trial court the opportunity to perform the appropriate balancing test under Miss. R. Evid. 609(a)(1)(B) and 403 so that it could determine whether the prior convictions constituted admissible evidence, plus when the State cross-examined defendant about his prior convictions, defense counsel failed to object; the trial judge did not abuse his discretion by allowing the State to question defendant about his prior convictions. Butler v. State, 16 So. 3d 751, 2009 Miss. App. LEXIS 485 (Miss. Ct. App. 2009).

Defendant's conviction for burglary of a dwelling was proper where he argued that evidence of his drug use was inadmissible under Miss. R. Evid. 404(b) or more prejudicial than probative under Miss. R. Evid. 403, but never objected to the admission of the evidence as required by Miss. R. Evid. 103. Therefore, the issue was not preserved for appellate review. Busick v. State, 906 So. 2d 846, 2005 Miss. App. LEXIS 57 (Miss. Ct. App. 2005), cert. denied, 2005 Miss. LEXIS 396 (Miss. June 23, 2005).

**Prior accidents.**

Plaintiff did not submit sufficient evidence of his own fall to enable the trial court to find that the proffered evidence of prior accidents was substantially similar under the provisions of Miss. R. Evid. 403, thus the trial court did not abuse its discretion in excluding the evidence of prior accidents. Yoste v. Wal-Mart Stores, Inc., 2002 Miss. LEXIS 145 (Miss. Apr. 18, 2002), op. withdrawn, sub. op., 822 So. 2d 935, 2002 Miss. LEXIS 219 (Miss. 2002).

**Prior charges.**

Circuit court did not err in excluding evidence of a victim's pending solicitation charges under Miss. R. Evid. 609 and 403 because defendant did not claim that the victim was an aggressor and that he killed the victim in self-defense or in defense or another; therefore, there was no basis for allowing the victim's pending criminal charges admitted into evidence, especially where the crimes did not reflect on the victim's character for truthfulness, dishonesty, violence, or peacefulness. Reith v. State, 135 So. 3d 892, 2013 Miss. App. LEXIS 126 (Miss. Ct. App. 2013), rev'd, 135 So. 3d 862, 2014 Miss. LEXIS 194 (Miss. 2014).

Trial court did not abuse its discretion in refusing to allow a defendant on trial for capital murder to attempt to impeach a former police detective, who had been arrested for but not convicted of bribery, with evidence of the arrest, because the arrest was irrelevant to the credibility of the detective and the acts were too far removed to be of probative value; trial court's action did not deprive defendant of his right to confront the witness. Ellis v. State, 856 So. 2d 561, 2003 Miss. App. LEXIS 456 (Miss. Ct. App.), cert. denied, 860 So. 2d 1223, 2003 Miss. LEXIS 892 (Miss. 2003).

Trial court did not abuse its discretion by allowing the prosecutor to introduce into evidence four separate instances in which the girlfriend had filed domestic violence charges against defendant because the evidence was admitted to rebut defendant's allegation that the incident was an accident and as evidence of motive; the evidence was highly relevant to show motive and absence of accident. Taylor v. State, 954 So. 2d 944, 2007 Miss. LEXIS 183 (Miss. 2007).

It was not an error for the trial court to refuse to allow defendant to cross-examine the victim's estranged husband on his arrest record during defendant's murder trial because it contained only assault charges filed by the victim that had been dismissed and therefore would have been more prejudicial than probative. Brown v. State, 936 So. 2d 447, 2006 Miss. App. LEXIS 597 (Miss. Ct. App. 2006).

It was reversible error for a district attorney to offer impeachment evidence regarding a previous charge for which the defendant had been acquitted. McFarland v. State, 735 So. 2d 1007, 1999 Miss. LEXIS 103 (Miss. 1999).

**Prior conviction.**

Trial judge did not abuse the judge's discretion by admitting certified records of defendant's prior convictions and by overruling defendant's request for extensive redactions of the certified records because defendant would not stipulate that defendant was a prior convicted felon and the records were used to prove the charge against defendant of illegal possession of a firearm by a convicted felon. Page v. State, 269 So. 3d 440, 2018 Miss. App. LEXIS 305 (Miss. Ct. App. 2018), cert. dismissed, 2018 Miss. LEXIS 524 (Miss. Dec. 13, 2018).

Trial court did not abuse its discretion in admitting defendant's prior drug convictions into evidence to show defendant's intent to sell the marijuana found during a traffic stop in the rented car defendant was driving as it was within the trial court's discretion to find that the evidence of defendant's prior drug convictions was not overly prejudicial compared to its probative value. Moreover, the court gave the jury a limiting instruction stating that the jury could only use the evidence of the prior convictions to show the intent element. Johnson v. State, 252 So. 3d 50, 2018 Miss. App. LEXIS 143 (Miss. Ct. App. 2018).

In a case in which defendant was convicted of burglary of a dwelling, the trial court did not abuse its discretion in admitting defendant's prior felony convictions for burglary into evidence because the evidence of defendant's prior convictions was offered to prove that defendant's intent was to burglarize the house, not to offer aid to someone; given defendant's vigorous assertion of a lack of intent to steal, the admission of the prior burglary convictions was extremely relevant and appropriate in the State's effort to rebut defendant's assertion that he did not intend to burglarize the home; and the evidence of the prior convictions was not overly prejudicial compared to its probative value. Chism v. State, 253 So. 3d 343, 2018 Miss. App. LEXIS 72 (Miss. Ct. App.), cert. denied, 252 So. 3d 595, 2018 Miss. LEXIS 388 (Miss. 2018).

Evidence of defendant's prior conviction for simple battery was erroneously admitted since: (1) it was not introduced to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but was introduced in part as character evidence; (2) insofar as the evidence was introduced to impeach defendant about whether he was a violent person, defendant's credibility in that regard was not a material issue; (3) it was impermissible for the State to first put defendant's character at issue; and (4) the prejudicial effect of the testimony far outweighed its probative value. Gilmore v. State, 119 So. 3d 278, 2013 Miss. LEXIS 361 (Miss. 2013).

Circuit court did not err in admitting defendant's prior drug-sale convictions into evidence because the prior drug convictions were properly admitted under Miss. R. Evid. 404(b) to show defendant's intent to sell; the circuit court conducted a proper Miss. R. Evid. 403 balancing test. Campbell v. State, 118 So. 3d 598, 2012 Miss. App. LEXIS 608 (Miss. Ct. App. 2012), cert. denied, 117 So. 3d 330, 2013 Miss. LEXIS 377 (Miss. 2013).

In convictions including the possession of, and conspiracy to possess illegal amounts of pseudoephedrine intending to use them in an unlawful manner, evidence of defendant's prior drug-related conviction was not prejudicial under Miss. R. Evid. 403, but was properly admitted to show knowledge, intent, and motive under Miss. R. Evid. 404(b). Gales v. State, 29 So. 3d 65, 2009 Miss. App. LEXIS 629 (Miss. Ct. App. 2009).

Where a co-indictee testified against defendant at his capital murder trial, the trial court violated Miss. R. Evid. 609(b) by excluding the co-indictee's prior felony convictions that were more than ten years old without conducting the balancing test under Miss. R. Evid. 403; however, this was harmless error. The trial judge allowed the co-indictee's most recent conviction for burglary and larceny to be introduced into evidence, which had more probative value than the older convictions. Spurlock v. State, 13 So. 3d 301, 2008 Miss. App. LEXIS 674 (Miss. Ct. App. 2008), cert. denied, 14 So. 3d 731, 2009 Miss. LEXIS 343 (Miss. 2009).

Defendant's conviction for the possession of cocaine, more then 10 grams, but less than 30 grams, was proper because the trial court correctly concluded that defendant had opened the door on his prior convictions. It was within the trial judge's discretion to allow the cross-examination regarding the prior convictions because defendant sufficiently opened the door by claiming that he did not smoke drugs. Williams v. State, 5 So. 3d 496, 2008 Miss. App. LEXIS 639 (Miss. Ct. App. 2008), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 135 (Miss. 2009).

Trial court abused its discretion in not allowing defendant to stipulate to prior convictions for armed robbery after defendant was charged with armed robbery and possession of a firearm by a convicted felon because the probative value of the prior convictions was substantially outweighed by the danger of unfair prejudice; the jury would use the prior convictions as evidence in considering Count I. Sawyer v. State, 2 So. 3d 655, 2008 Miss. App. LEXIS 398 (Miss. Ct. App. 2008), cert. denied, 999 So. 2d 1280, 2009 Miss. LEXIS 92 (Miss. 2009).

In an aggravated assault case, a court erred by admitting evidence of defendant's prior aggravated assault conviction because the State's argument was that defendant did not act in self-defense in the current instance because his prior conviction for assault evidenced a lack of intent to act in self-defense. That line of logic represented precisely the sort of unfair prejudice prohibited by Miss. R. Evid. 404 and Miss. R. Evid. 609. Walker v. State, 2005 Miss. App. LEXIS 728 (Miss. Ct. App. Oct. 11, 2005), op. withdrawn, sub. op., 936 So. 2d 424, 2006 Miss. App. LEXIS 550 (Miss. Ct. App. 2006).

While prior convictions which have been found relevant under Miss. R. Evid. 401, and which satisfy Miss. R. Evid. 404(b) may be potentially admissible to prove disposition, they may be allowed into evidence only after passing a Miss. R. Evid. 403 balancing test, which must be conducted on the record. Tate v. State, 912 So. 2d 919, 2005 Miss. LEXIS 194 (Miss. 2005).

Defendant argued that the only reason he was at the victim's house was to obtain help after his vehicle broke down; however, defendant's prior convictions for burglary and attempted burglary tended to prove, along with other facts, that defendant's intent was to burglarize the house, not to obtain help. But, the underlying facts of the six prior convictions were irrelevant to the issue of intent, and the trial court would have erred if it had admitted such evidence; thus, under Miss. R. Evid. 403 and 404, the trial court did not err in admitting defendant's prior convictions to show intent and in not introducing the particulars of each prior conviction into evidence. Jones v. State, 904 So. 2d 149, 2005 Miss. LEXIS 221 (Miss. 2005).

Trial court did not abuse its discretion in admitting the evidence of prior convictions for domestic abuse and evidence of other prior bad acts because the evidence was not introduced to prove the character of defendant, but to show a continuing pattern of violence against the victim which resulted in her death, going towards defendant's motive and intent. Additionally, although the evidence of prior domestic abuse convictions and other bad acts was prejudicial, the trial court did not abuse its discretion in finding that the probative value of the evidence outweighed the possible prejudicial effect. Moses v. State, 893 So. 2d 258, 2004 Miss. App. LEXIS 1066 (Miss. Ct. App. 2004).

In a depraved-heart murder case, as the prior bad acts evidence was introduced by defendant himself through his direct examination, any objection he may have had concerning its entry into evidence was waived. Further, defendant did not object to the admissibility of this conviction until the State cross-examined him and there was nothing unduly prejudicial with the way the prosecutor cross-examined defendant . Harris v. State, 861 So. 2d 1003, 2003 Miss. LEXIS 872 (Miss. 2003).

In a prosecution for driving under the influence (DUI) in which the jury was fully aware that the defendant was being tried for his third DUI offense, testimony as to specific incidents involving his past arrests for DUI was not substantially prejudicial to the defendant. Strickland v. State, 784 So. 2d 957, 2001 Miss. LEXIS 139 (Miss. 2001).

The admission of defendant's prior felony conviction and the trial court's failure to instruct the jury sua sponte were reversible error in violation of M.R.E. 403 and 404 and the holding in Smith v. State, 656 So. 2d 95, 99 (Miss. 1995). Jasper v. State, 759 So. 2d 1136, 1999 Miss. LEXIS 377 (Miss. 1999).

In a prosecution for aggravated assault and kidnapping arising from an incident in which the defendant went to the victim's apartment, found his fiancee there with the victim, engaged in a fight with the victim, seriously injured him, and then dumped him in a wooded area, and in which the defendant testified on direct that he did not take the victim to the hospital because he panicked when he realized that he had a felony conviction, the state was properly permitted to question the defendant as to whether he had a felony conviction and how long he was in jail for the conviction. Brown v. State, 749 So. 2d 204, 1999 Miss. App. LEXIS 497 (Miss. Ct. App. 1999).

**Prior incarceration.**

In a prosecution for aggravated assault and kidnapping arising from an incident in which the defendant went to the victim's apartment, found his fiancee there with the victim, engaged in a fight with the victim, seriously injured him, and then dumped him in a wooded area, and in which the defendant testified on direct, as an explanation for why he acted as he did, that he had experienced only two women in his life, the state was properly permitted to question the defendant as to when he went to prison, when he got out, and how long he stayed in jail in order to determine the facts surrounding his claim of inexperience with women. Brown v. State, 749 So. 2d 204, 1999 Miss. App. LEXIS 497 (Miss. Ct. App. 1999).

**Prior indictments.**

Trial judge did not abuse his discretion in finding that probative value of aggravated assault indictment outweighed any prejudicial effect, where judge reasoned it was the only way jury could understand defendant's previously admitted guilty plea to aggravated assault charge. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 19 (Miss.), op. withdrawn, sub. op., 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss. 1996).

**Prior sexual relations.**

During defendant's trial on charges of touching a child for lustful purposes, the trial court did not err by allowing a witness to testify that defendant had touched him inappropriately approximately 20 years earlier because the defense theory was to cast doubt on the victim's credibility, the witness's testimony tended to prove that the victim was not mistaken about his allegations and that defendant had a common plan to take advantage of his proximity to a young developing boy and gratify his lust by touching the victim's penis and buttocks. It was within the trial court's discretion to find that the witness's testimony was admissible for those purposes, and that its probative value outweighed its prejudicial effect. Blackwell v. State, 273 So. 3d 801, 2019 Miss. App. LEXIS 224 (Miss. Ct. App. 2019).

Circuit court did not abuse its discretion in admitting evidence relating to incidents with other children because the very occurrence of the prior incidents was disputed, and the victims were of tender years and had difficulty relating the incidents; thus the introduction of hearsay evidence relating to the other incidents was not unnecessary. Alford v. State, 238 So. 3d 11, 2018 Miss. App. LEXIS 51 (Miss. Ct. App. 2018).

It was error to deny defendant's motion in limine and trial objections regarding evidence of a highly prejudicial and minimally probative nine-year old uncharged statutory rape, and evidence of defendant making sexual advances on an adult woman was completely devoid of any relevance or probative value to defendant's charges of illegal sexual conduct with an underage female. Moreover, it was error to admit evidence relating to an indictment in another county because it was not necessary to tell a full story, nor was it integrally related in time, place, or fact. White v. State, 228 So. 3d 893, 2017 Miss. App. LEXIS 81 (Miss. Ct. App.), cert. denied, 229 So. 3d 118, 2017 Miss. LEXIS 389 (Miss. 2017).

Circuit court did not abuse its discretion in prohibiting defendant from cross-examining the victim about alleged prior instances of inappropriate touching because there was no evidence that the victim described sexual touching; the victim was six years old when he described sexual abuse, and that evidence would not have made it more or less probable that defendant was guilty. Dowden v. State, 203 So. 3d 743, 2016 Miss. App. LEXIS 717 (Miss. Ct. App. 2016).

Defendant's conviction for capital murder and arson was proper, since the trial court's exclusion of the evidence of prior sexual relations between defendant and the victim was not an abuse of discretion. Even if the instances of prior sex had been relevant, the trial court could have excluded the evidence as overly prejudicial under Miss. R. Evid. 403. Fuqua v. State, 938 So. 2d 277, 2006 Miss. App. LEXIS 164 (Miss. Ct. App. 2006), cert. denied, 937 So. 2d 450, 2006 Miss. LEXIS 541 (Miss. 2006), cert. denied, 549 U.S. 1344, 127 S. Ct. 2037, 167 L. Ed. 2d 774, 2007 U.S. LEXIS 4043 (U.S. 2007).

**Prior violence.**

Trial court did not abuse its discretion in admitting prior-assault evidence as proof of defendant's intent because it found the testimony and exhibits showing his wife's bruises from that prior assault were probative to prove defendant intent, a necessary element of attempted murder; after filtering the evidence, the trial court found it was more probative than prejudicial. Bowman v. State, 283 So. 3d 154, 2019 Miss. LEXIS 359 (Miss. 2019).

Reversible error resulted when the circuit court admitted into evidence four offense reports of defendant's prior bad acts without first determining whether the State offered all the evidence for a permissible purpose and without first scrutinizing the additional allegations contained within the reports for undue prejudice; since the circuit court admitted the entire contents of the offense reports without determining whether the additional details contained within met the criteria set forth in the Mississippi Rules of Evidence, the circuit court abused its discretion by admitting the evidence. Johnson v. State, 204 So. 3d 817, 2015 Miss. App. LEXIS 665 (Miss. Ct. App. 2015), rev'd, 204 So. 3d 763, 2016 Miss. LEXIS 487 (Miss. 2016).

Trial court did not abuse its discretion by allowing a witness to testify at defendant's trial for domestic aggravated assault that the witness was a former paramour of defendant and that, a few months prior to the crime for which defendant was tried, the witness was the victim of an assault by defendant. The probative value of the testimony did not outweigh the prejudicial effect on defendant. Hoskins v. State, 186 So. 3d 898, 2015 Miss. App. LEXIS 424 (Miss. Ct. App. 2015), cert. denied, 186 So. 3d 854, 2016 Miss. LEXIS 120 (Miss. 2016).

Evidence was admissible to show state of mind, plan, and motive, as defendant's past violence toward men was probative in this regard, and there was no violation of the rule, plus the probative value far outweighed any danger of unfair prejudice. Wilson v. State, 149 So. 3d 544, 2014 Miss. App. LEXIS 354 (Miss. Ct. App. 2014).

**Profane language.**

In a prosecution for assault on a police officer, the court properly permitted the introduction of an audio tape made in the vehicle in which the defendant was driven to jail, in which the defendant was belligerent and uttered a stream of profanities, notwithstanding the contention that its probative value was substantially outweighed by its prejudicial effect, since it was probative, as it illustrated the defendant's continuing conduct and established his mental state from the time he was stopped by police up until the assault on the police officer. Oatis v. State, 726 So. 2d 1230, 1998 Miss. App. LEXIS 1105 (Miss. Ct. App. 1998).

**Rebuttal evidence.**

In a case where defendant father and defendant adopted son were convicted of conspiracy to commit sexual battery, sexual battery, and contributing to the delinquency of a minor, because defendant son testified that he had never engaged in any sexual act with defendant father, pursuant to Miss. R. Evid. 403 and 404(b), the testimony from a correctional nurse regarding a sexual act was probative and a proper subject for rebuttal. King v. State, 857 So. 2d 702, 2003 Miss. LEXIS 450 (Miss. 2003).

Defendant adopted son testified that he had never engaged in any kind of homosexual conduct with defendant father; thus, pursuant to Miss. R. Evid. 404(b), evidence that he and and defendant father engaged in homosexual activities while incarcerated was admissible to impeach his testimony and the probative value of this testimony was not substantially outweighed by the dangers espoused in Miss. R. Evid. 403. Moreover, the jury was specifically instructed that it could consider the witness's testimony for the limited purpose of determining the truth and veracity of the defendant son's testimony. King v. State, 857 So. 2d 702, 2003 Miss. LEXIS 450 (Miss. 2003).

In a capital murder prosecution, evidence of the child victim's vaginal abrasions and unexplained bruising after defendant moved into her home was properly admitted to rebut his theory that the death was accidental. Kolberg v. State, 829 So. 2d 29, 2002 Miss. LEXIS 268 (Miss. 2002), cert. denied, 538 U.S. 981, 123 S. Ct. 1787, 155 L. Ed. 2d 672, 2003 U.S. LEXIS 3010 (U.S. 2003), overruled in part, Harrell v. State, 134 So. 3d 266, 2014 Miss. LEXIS 52 (Miss. 2014), overruled in part, Rowsey v. State, 188 So. 3d 486, 2015 Miss. LEXIS 573 (Miss. 2015).

Where the defendant in a murder prosecution testified that he was a peaceful, law-abiding citizen and that he was scared of the victim and his gang, the prosecution was properly permitted to introduce evidence of the defendant's prior acts to rebut such testimony. Riddley v. State, 1999 Miss. App. LEXIS 541 (Miss. Ct. App. Aug. 24, 1999), aff'd, 777 So. 2d 31, 2000 Miss. LEXIS 167 (Miss. 2000).

**Relationship with Miss. R. Evid. 404(b).**

Circuit court did not abuse its discretion in the admission of defendant's prior acts of domestic violence against the victim because there was no error in its failure to conduct an on-the-record balancing test since the evidence was not "patently prejudicial"; the circuit court reviewed both cases the State provided and arguments of counsel prior to making its ruling. Carter v. State, 288 So. 3d 397, 2019 Miss. App. LEXIS 477 (Miss. Ct. App. 2019).

Trial court did not err in finding that the prior conviction and a police officer's testimony were admissible to show defendant's intent and a common scheme or plan because defendant was eligible for enhanced sentencing as a subsequent drug offender, the trial court addressed the prior-conviction evidence, conducted the proper balancing test, and gave the jury a limiting instruction, the evidence of defendant's guilt was extensive, and the officer did not go into detail about her prior encounter with defendant, but simply stated that she knew him because she previously encountered him at the home where the transaction took place. Pritchett v. State, 201 So. 3d 1095, 2016 Miss. App. LEXIS 620 (Miss. Ct. App. 2016).

Trial court properly allowed evidence of defendant's prior disciplinary violations and the prosecutor's closing arguments because defendant's direct examination opened the door to cross-examination about his prior disciplinary violations where they were relevant and probative with respect to his claim that he acted in self-defense and out of fear, and any "unfair prejudice" was minimal, even assuming that the trial judge erred by not offering a limiting instruction, the error was harmless and did not deprive defendant of a fair trial, the prosecutor's comments during closing were within the bounds of legitimate argument and in response to defense counsel's arguments, and defendant failed to show that his counsel was ineffective. Curry v. State, 202 So. 3d 294, 2016 Miss. App. LEXIS 635 (Miss. Ct. App. 2016).

Trial court properly convicted and sentenced defendant for gratification of lust against his minor female cousin (the victim) because the substantial similarities between the victim's allegations and defendant's inappropriate conduct with two other minors clearly showed that their testimony was admissible to prove defendant's use his position of trust to take advantage of young girls, motive, intent, knowledge, and absence of mistake or accident, the probative value of that evidence was not substantially outweighed by the danger of unfair prejudice, and the jury was properly instructed that it could consider the testimony only for specific purposes. Boggs v. State, 188 So. 3d 515, 2016 Miss. LEXIS 147 (Miss. 2016).

Trial court did not abuse its discretion in allowing witness testimony of alleged prior bad acts and bad character evidence attributed to defendant and codefendant because the court found that the evidence was admissible for the permissible purpose of showing motive and that the evidence was more probative than prejudicial. Allen v. State, 179 So. 3d 1138, 2015 Miss. App. LEXIS 99 (Miss. Ct. App. 2015), cert. dismissed, 2015 Miss. LEXIS 576 (Miss. Dec. 3, 2015).

In a prosecution for gratification of lust involving two minors, testimony establishing defendant's pattern of molesting prepubescent girls while they were sleeping was properly admitted under Miss. R. Evid. 404(b) because it was relevant to issues of motive, pattern or practice, and absence of mistake, and the trial court found that its probative value outweighed its prejudicial effect. O'Connor v. State, 120 So. 3d 390, 2013 Miss. LEXIS 353 (Miss. 2013).

In defendant's trial on charges of molestation and enticement of a child for sexual purposes, the trial court did not abuse its discretion in allowing the testimony of defendant's two nephews, regarding sexual abuse defendant inflicted upon them for a limited purpose, Miss. R. Evid. 404(b), even though the allegations were remote in time and not identical to the current allegations, because the trial court applied the Miss. R. Evid. 403 filter and provided appropriate limiting instructions to the jury about the limited purpose for which it could use the prior-sexual-acts testimony; the State offered the nephews' testimony to show defendant's "pedophilic activity with young and developing males" and his use of intimidation to keep the victims silent. Westbrook v. State, 109 So. 3d 609, 2013 Miss. App. LEXIS 117 (Miss. Ct. App. 2013).

Where a defendant appealed his conviction and sentence for sexual battery and gratification of lust, his prior bad acts could be considered to show, among other things, the absence of mistake or accident. The trial judge complied with the requirements of the Derouen decision by filtering the Miss. R. Evid. 404(b) evidence through Miss. R. Evid. 403 and providing the jury with an appropriate limiting instruction. Cole v. State, 126 So. 3d 880, 2013 Miss. LEXIS 544 (Miss. 2013), cert. denied, 572 U.S. 1062, 134 S. Ct. 1901, 188 L. Ed. 2d 914, 2014 U.S. LEXIS 2878 (U.S. 2014).

In a case in which defendant was convicted of capital murder and the defense had sought to exclude evidence that defendant had previously committed acts of violence against the victim's mother, the trial court did not abuse its discretion in allowing the testimony. The court allowed the prosecution to ask questions about defendant's prior conduct, and, in his trial testimony, defendant admitted that he had taken some aggression out on the mother, including hitting her. Logan v. State, 42 So. 3d 594, 2010 Miss. App. LEXIS 83 (Miss. Ct. App.), cert. denied, 49 So. 3d 106, 2010 Miss. LEXIS 458 (Miss. 2010).

Evidence of a sexual offense, other than the one charged, which involves a victim other than the victim of the charged offense for which an accused is on trial, if properly admitted under Miss. R. Evid. 404(b), filtered through Miss. R. Evid. 403, and accompanied by an appropriately-drafted limiting or cautionary instruction to the jury, should not be considered a per se error. Derouen v. State, 994 So. 2d 748, 2008 Miss. LEXIS 587 (Miss. 2008).

Trial court does not abuse its discretion in admitting testimony under Miss. R. Evid. 404(b), even where the judge fails to balance whether the prejudicial effect outweighed its probative value under Miss. R. Evid. 403, because, where the testimony is evidence of plan and preparation and aids in telling a complete story, the prejudicial effect, if any, is minimal; therefore, a trial court did not err by admitting evidence of other inappropriate sexual conduct of defendant in a statutory rape case. Price v. State, 898 So. 2d 641, 2005 Miss. LEXIS 127 (Miss. 2005).

Defendant's conviction for two counts of selling a controlled substance was affirmed as the trial court did not abuse its discretion by allowing an officer testify as to a prior drug sale as it went to motive and intent as required by Miss. R. Evid. 404(b), was accompanied by a limiting instruction and passed muster under Miss. R. Evid. 403. Pena v. State, 932 So. 2d 89, 2006 Miss. App. LEXIS 475 (Miss. Ct. App. 2006).

Testimony that one of defendant's victims was involved in an insurance scam with defendant was properly admitted under Miss. R. Evid. 404(b) because the trial court conducted an appropriate Miss. R. Evid. 403 balancing analysis, and the trial court was not obligated to give a sua sponte limiting instruction on evidence pursuant to Miss. R. Evid. 404(b). Rubenstein v. State, 941 So. 2d 735, 2006 Miss. LEXIS 411 (Miss. 2006).

**Sanity.**

The trial court in a murder prosecution did not commit reversible error in refusing to allow the defendant to call a court-appointed psychologist to testify as to his sanity at the time of the killing where no evidence had been presented whatsoever that the defendant was not sane at the time of the killing. Winters v. State, 773 So. 2d 973, 2000 Miss. App. LEXIS 539 (Miss. Ct. App. 2000).

**Sexual orientation.**

In a prosecution for armed robbery of a convenience store in which the defendant asserted that the store clerk concocted the robbery story in order to cover up the fact that he had taken money from the cash register in order to purchase drugs and sex, whether the store clerk was homosexual was not relevant and also was prejudicial, potentially to the clerk and more certainly to the state. Hughey v. State, 729 So. 2d 828, 1998 Miss. App. LEXIS 1103 (Miss. Ct. App. 1998).

**Social media.**

Snapchat video was relevant and its probative value was not substantially outweighed by the danger of unfair prejudice or misleading the jury. The video was relevant because it showed the victim's condition during the incident and corroborated the State's testimony regarding the incident, and given the testimony, simply because defendant was not actually recorded and/or depicted in the Snapchat video was of no consequence. Pugh v. State, 270 So. 3d 949, 2018 Miss. App. LEXIS 455 (Miss. Ct. App. 2018).

**Suspensions.**

In an action by a police officer against an insurance company for actual and punitive damages arising out of the failure to pay a claim for theft, the trial court did not abuse its discretion in excluding evidence that the officer had been suspended from his police work pending a review of a shooting incident since the evidence had a great potential to unduly prejudice the jury while having little probative value. State Farm Mut. Auto. Ins. Co. v. Grimes, 722 So. 2d 637, 1998 Miss. LEXIS 525 (Miss. 1998).

**Tape recordings.**

Trial court did not err in defendant's trial for aggravated assault by allowing law-enforcement officer's duty tape to be played to the jury, when tape contained a racial slur, because the tape had probative value as to defendant's motive and intent in that the jury could have deduced from defendant's tone of voice that defendant was angry and frustrated enough to hit or clip the victim with defendant's truck intentionally and the tape was more probative of defendant's state of mind at the time than defendant's less detailed written statement. Middleton v. State, 281 So. 3d 858, 2019 Miss. App. LEXIS 33 (Miss. Ct. App. 2019).

Defendant's conviction for the sale of cocaine and his enhanced 40-year sentence were both proper where the trial court's opening remarks on voir dire did not constitute reversible error and where defendant never objected at trial; further, the tape recording in question was offered to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, and under Miss. R. Evid. 403, the tape was certainly relevant and more probative than prejudicial. Easter v. State, 878 So. 2d 10, 2004 Miss. LEXIS 484 (Miss. 2004).

**Testimony.**

Trial court did not err by admitting evidence of defendant's prior bad acts because defendant's former paramour's testimony was very akin to what happened in the instant case and the probative value of the paramour's testimony was not substantially outweighed by the danger of unfair prejudice, nor was it confusing or misleading to the jury. The trial judge also instructed the jury that the testimony was admitted to show a motive, intent, or a plan. Taylor v. State, — So. 3d —, 2019 Miss. App. LEXIS 34 (Miss. Ct. App. Jan. 22, 2019).

Trial court did not abuse its discretion in excluding the testimony of certain witnesses, given that the probative value, if any, of defendant's boyfriend's alleged statements and act of throwing away the injured child's high chair was substantially outweighed by the risk of confusing the jury, and this issue was without merit. Carpenter v. State, 196 So. 3d 1136, 2016 Miss. App. LEXIS 476 (Miss. Ct. App. 2016), cert. denied, 214 So. 3d 1058, 2017 Miss. LEXIS 140 (Miss. 2017).

Trial court did not abuse its discretion in excluding an expert's testimony because the expert did not apply his principles and methodologies reliably to the facts of the case, and his testimony was unreliable; the expert could not reliably apply the science to the facts of the case, and his testimony was inconclusive and speculative because he testified only that a lineup identification "could" be unreliable and that in-court identifications "probably" were suggestive. Corrothers v. State, 148 So. 3d 278, 2014 Miss. LEXIS 311 (Miss. 2014), cert. denied, 576 U.S. 1023, 135 S. Ct. 2835, 192 L. Ed. 2d 877, 2015 U.S. LEXIS 3926 (U.S. 2015).

Denial of defendant's motion for judgment of acquittal notwithstanding the verdict and, in the alternative, motion for a new trial, after he had been convicted of sexual battery was appropriate because the defense failed to make a sufficient proffer after the trial court excluded a doctor's testimony. Further, even finding that the doctor's testimony would have been relevant, the record was insufficient for the supreme court to determine whether it could have survived under the Miss. R. Evid. 403 balancing test for admissibility. Abernathy v. State, 30 So. 3d 320, 2010 Miss. LEXIS 103 (Miss. 2010).

Trial judge did not err in not allowing defendant to question arresting police officers regarding their termination from the police department because the testimony was not relevant as defendant's assertions were general in nature, and defense counsel never established with certainty why the two officers were terminated and what effect that had on defendant's case; the probative value of the testimony was substantially outweighed by the danger of unfair prejudice. Betts v. State, 10 So. 3d 519, 2009 Miss. App. LEXIS 29 (Miss. Ct. App. 2009).

Testimony regarding a prior incident when defendant allegedly threw a beer bottle at his victim was admissible under Miss. R. Evid. 403 because, even though the trial court did not conduct the Rule 403 balancing test after defendant objected to the admission of the incident, the failure to conduct the test did not affect defendant's rights; the probative value of the evidence was extremely significant, as it gave meaning to what would have otherwise been a random act of violence. Given the overwhelming weight of the evidence against defendant, any error in admitting the victim's testimony about the prior incident was harmless. West v. State, 969 So. 2d 147, 2007 Miss. App. LEXIS 766 (Miss. Ct. App. 2007).

Male suspect's testimony about shoplifting plan related to acts and conduct that occurred during the course and in furtherance of a conspiracy at a time when the defendant, based upon the evidence and reasonable inferences drawn from the evidence, could be deemed to be a co-conspirator, and was thus not hearsay under Miss. R. Evid. 801(a)(1) or (2) and was both relevant and admissible under Miss. R. Evid. 401, 402, and 403. Wilson v. State, 967 So. 2d 32, 2007 Miss. LEXIS 593 (Miss. 2007).

In a simple assault on a law enforcement officer case, where defendant's parole officer was called to testify about what took place on the night defendant was involved in the altercation with the deputy, after the officer was called to testify and identified himself, the defense objected to the officer being identified as a parole officer; the trial judge excused the jury and heard arguments from both the prosecution and defense and determined that the officer could testify about what took place on the night defendant was involved in the altercation with the deputy because the testimony did not indicate that defendant and the officer had any relationship, and thus pursuant to Miss. R. Evid. 403, the trial judge did not abuse his discretion in allowing the officer to testify. Keys v. State, 963 So. 2d 1193, 2007 Miss. App. LEXIS 299 (Miss. Ct. App.), cert. denied, 973 So. 2d 245, 2007 Miss. LEXIS 703 (Miss. 2007).

Denial of the inmate's petition for post-conviction relief was proper where inmate was not denied any constitutional or fundamental rights when testimony of the victim's children was admitted since their testimony corroborated portions of the victim's husband's testimony, Miss. R. Evid. 403, 401; the inmate also offered no proof that defense counsel had been ineffective. Puckett v. State, 879 So. 2d 920, 2004 Miss. LEXIS 592 (Miss. 2004), cert. denied, 544 U.S. 924, 125 S. Ct. 1638, 161 L. Ed. 2d 483, 2005 U.S. LEXIS 2506 (U.S. 2005).

**Videotapes.**

There was no abuse of discretion by admitting into evidence a video of the victim sleeping recorded on defendant's phone because the trial court heard testimony from both parties regarding the validity and veracity of the cell phone video recording and found that the video was more probative than prejudicial; defendant failed to show how the admission of the video adversely affected a substantial right. Marion v. State, 281 So. 3d 174, 2019 Miss. App. LEXIS 91 (Miss. Ct. App. 2019).

Probative value of videos was not substantially outweighed by any danger of unfair prejudice to defendant because the State offered used the videos to aid its identification of defendant as one of the perpetrators of a home invasion; the videos helped the State establish that defendant and an accomplice knew each other, and they also showed the men in possession of weapons like those used to commit the home invasion and in possession of property actually stolen during the home invasion. Jarvis v. State, 281 So. 3d 133, 2019 Miss. App. LEXIS 72 (Miss. Ct. App. 2019).

In a case in which a jury found defendant guilty of accessory after the fact to murder, the trial court did not abuse its discretion in admitting into evidence a profane rap video featuring defendant and others, who acted out a violent scene at the end of the video. The video was relevant to show defendant's attempt to prevent a witness from testifying at trial, through intimidation, and the video's probative value was not substantially outweighed by the danger of unfair prejudice. Henderson v. State, 211 So. 3d 761, 2016 Miss. App. LEXIS 426 (Miss. Ct. App. 2016).

Trial court did not err in admitting a portion of a surveillance videotape that showed defendant passing a bag to an undercover agent, who examined it and passed it to a confidential informant, because while there might have been some possibility of confusion had the video been shown to the jury absent any elaboration, the agent clearly explained on both direct and cross-examination that the sale of cocaine occurred off-camera, later on the video. Watson v. State, 19 So. 3d 747, 2008 Miss. App. LEXIS 692 (Miss. Ct. App. 2008), cert. denied, 19 So. 3d 82, 2009 Miss. LEXIS 503 (Miss. 2009), cert. denied, 559 U.S. 981, 130 S. Ct. 1708, 176 L. Ed. 2d 195, 2010 U.S. LEXIS 2141 (U.S. 2010).

In a negligence case, a trial court abused its discretion by failing to admit a videotape of an injured party into evidence, which showed her riding roller coasters at an amusement park, because the evidence was relevant under Miss. R. Evid. 401; a reasonable juror could have concluded that it casted doubt on the severity of her injuries and her medical expenses, even though she claimed to not be seeking damages after the date of a second epidural injection. Further, the evidence was not subject to exclusion under Miss. R. Evid. 403 because its probative value was not substantially outweighed by the danger of unfair prejudice. James v. Carawan, 995 So. 2d 69, 2008 Miss. LEXIS 423 (Miss. 2008).

In defendant's trial for capital murder of his sister's husband, with the sister also charged for the same murder, a video of the appearance of the sister and her husband on a television talk show was improperly excluded under Miss. R. Evid. 403 as unfairly prejudicial because the sister and defendant were not tried together and the video was highly relevant in defendant's trial to show the sister's motive to kill her husband. Edmonds v. State, 955 So. 2d 787, 2007 Miss. LEXIS 349 (Miss.), cert. denied, 552 U.S. 1064, 128 S. Ct. 708, 169 L. Ed. 2d 557, 2007 U.S. LEXIS 12868 (U.S. 2007).

Trial court improperly admitted two-day-in-the-life videos. The first video included prejudicial photos of the decedent's wedding and the decedent's stepson, who was not a party; the second video showed the decedent's mother sobbing, and it was redundant. Eckman v. Moore, 876 So. 2d 975, 2004 Miss. LEXIS 287 (Miss. 2004).

Where defendant confessed to participating in the wife's plan to murder her husband, the circuit court erred by excluding a videotape showing the couple on a talk show discussing their tumultuous marriage; the videotape was relevant to the wife's motive to kill, and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, confusion of the issues and misleading the jury. Edmonds v. State, 2007 Miss. LEXIS 7 (Miss. Jan. 4, 2007), op. withdrawn, sub. op., 955 So. 2d 787, 2007 Miss. LEXIS 349 (Miss. 2007).

A videotape which depicted the crime scene and the murder victims was properly admitted into evidence because (1) it accurately depicted the location of the bodies and the scene at the crime, (2) it assisted an officer and a physician with their respective testimony; (3) it identified the victims for the jury, showed the effect on the victims from the blows delivered with the baseball bats, corroborated various aspects of the defendant's confession and aided the prosecution in identifying him as the guilty party; (4) it was instrumental in helping the jury visualize the bloody crime scene, the victims' injuries and the force necessary to inflict them; (5) it showed blood smears on the wall, which created the impression that someone had attempted to clean up the crime scene, and (6) it aided the jury in determining the heinous, atrocious, and cruel nature of the crime; although photographs of the crime scene were admitted that depicted essentially the same evidence, the video's probative value still substantially outweighed any unfair prejudicial effect on the defendant. McGilberry v. State, 741 So. 2d 894, 1999 Miss. LEXIS 196 (Miss. 1999), cert. denied, 529 U.S. 1006, 120 S. Ct. 1273, 146 L. Ed. 2d 222, 2000 U.S. LEXIS 1788 (U.S. 2000).

The trial court erred in sua sponte excluding a color videotape which showed the state's expert performing a direct comparison test of the defendant's teeth and bite marks on the murder victim since the videotape was more useful that available still photographs and background sounds were not significant to the extent that it would have been error to exclude them or admit them; however, the error was harmless. Brewer v. State, 725 So. 2d 106, 1998 Miss. LEXIS 345 (Miss. 1998), cert. denied, 526 U.S. 1027, 119 S. Ct. 1270, 143 L. Ed. 2d 365, 1999 U.S. LEXIS 2032 (U.S. 1999).

The trial court did not err by admitting into evidence a videotape of the crime scene and the victim's body, notwithstanding the grotesque nature of the videotape, because, due to a lack of still photographs (all had been overexposed) depicting the crime scene and the condition in which the victim's body was found, the probative value outweighed any prejudicial effect. Walters v. State, 720 So. 2d 856, 1998 Miss. LEXIS 393 (Miss. 1998).

Trial court did not err in admitting videotape and photographs of crime scene and murder victim's body; videotape was not cumulative and was necessary in helping jury visualize crime scene when hearing testimony regarding victim's injuries, and although photographs were subsequently admitted and revealed essentially the same evidence, the photographs were clearer than the video and also aided the jury. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 19 (Miss.), op. withdrawn, sub. op., 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss. 1996).

Videotape taken at booking of defendant charged with assaulting police officers was properly admitted for impeachment purposes; tape was not collateral or too remote in time, probative value of tape substantially outweighed its prejudicial value, and tape was relevant to credibility of defendant's brother, whose recollection of events wavered significantly. Johnson v. State, 655 So. 2d 37, 1995 Miss. LEXIS 232 (Miss. 1995).

**Written documents.**

Simple consideration and discussion by a power company of the possible underground installation of power lines was of no moment to the issue of whether the company violated the appropriate standard of care in the overhead installation of its power lines that may have caused a wrongful death by electrocution; an internal memorandum indicating the power company was willing to install lines underground could clearly mislead the jury as to the company's legal obligations under Miss. Code Ann. § 11-27-43, and thus any probative value of this supposed relevant evidence would be outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. It was proper to exclude that memorandum in a motion in limine. Ware v. Entergy Miss., Inc., 887 So. 2d 763, 2003 Miss. LEXIS 876 (Miss. 2003).

In a rape and simple assault case, the trial court did not abuse its discretion in admitting letters that defendant had apparently written to the victim, because, although their introduction may have had little probative value as to the pivotal issues of the case, it seemed likewise true that there was no real prejudice to the defense in permitting the jury to discover defendant's apparently strong, perhaps even excessively strong, emotional ties to his estranged wife. Williams v. State, 868 So. 2d 346, 2003 Miss. App. LEXIS 669 (Miss. Ct. App. 2003).

Chancellor did not abuse his discretion in admitting letter, written by mother, which was critical of doctor engaged to evaluate children in connection with custody dispute; prejudice from admission of letter was outweighed by letter's probative value. Bredemeier v. Jackson, 689 So. 2d 770, 1997 Miss. LEXIS 77 (Miss. 1997).

**Illustrative cases.**

Defendant failed to demonstrate constitutional ineffectiveness for defense counsel's failure to request a limiting instruction or a balancing test with regard to a prosecution witness's prior unsworn statements because the decision was trial strategy; the witness's prior sworn and unsworn statements coincided, and given the admissibility of his prior sworn inconsistent statements, any success in keeping his prior unsworn inconsistent statements out of the trial would have been minimal at most. Thames v. State, 310 So. 3d 1163, 2021 Miss. LEXIS 17 (Miss. 2021).

Because defendant did not object at trial to the State's use of a prosecution witness's prior inconsistent statements (sworn or unsworn) or request a limiting instruction or a balancing test, the issue was barred from review absent plain error. Thames v. State, 310 So. 3d 1163, 2021 Miss. LEXIS 17 (Miss. 2021).

Trial court had the discretion in defendant's trial for sexual battery of minors to limit the evidence from the counseling sessions of a former resident of the home for children where defendant was a house parent when the court was concerned about wasting time and the amount of time spent on the former resident when the former resident, who alleged sexual abuse by defendant, was not one of the residents who was named as a victim in the indictment. Copes v. State, — So. 3d —, 2021 Miss. App. LEXIS 54 (Miss. Ct. App. Feb. 2, 2021), aff'd, 333 So. 3d 1, 2022 Miss. LEXIS 37 (Miss. 2022).

Trial court, which found the contents of defendant's bag (a tube of warming gel lubricant and latex gloves) were near enough in time and place to be part of the complete story of the crime, did not err by admitting the contents at defendant's trial for sexual battery. Thus, the gel and gloves had probative value, even though the State never claimed defendant used them in the crime. Blake v. State, 256 So. 3d 1161, 2018 Miss. LEXIS 404 (Miss. 2018).

Defendant's recorded interview with police officers, which was made after defendant voluntarily waived defendant's Miranda rights, was erroneously entered into evidence at defendant's trial for child molestation because defendant's statements in the interview pertaining to defendant's watching pornography on a computer at home, consensual sexual activity with defendant's wife, and defendant's marijuana use were inflammatory and neither relevant, nor probative to any issue. Gabriel v. State, 270 So. 3d 58, 2018 Miss. App. LEXIS 344 (Miss. Ct. App. 2018).

Circuit court did not abuse its discretion, at defendant's trial for sexual battery and gratification of lust, by admitting testimony by a witness other than the alleged minor victim that defendant also sexually abused the witness when the witness was a child because the evidence's probative value outweighed its prejudice. The circuit court also provided the jury an appropriate limiting instruction about the limited purpose for which it could consider the prior-bad-acts evidence. Shoemaker v. State, 256 So. 3d 604, 2018 Miss. App. LEXIS 105 (Miss. Ct. App.), cert. denied, 256 So. 3d 593, 2018 Miss. LEXIS 449 (Miss. 2018).

State of Mississippi was allowed to present defendant's written statement, in which defendant admitted robbing a restaurant and committing an armed carjacking of someone driving a maroon Impala on the same evening within a short time of the charged offense of robbing a restaurant, to show defendant's plan and motive in committing a string of armed robberies and to prove defendant's identity. The evidence's probative value was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Horton v. State, 253 So. 3d 334, 2018 Miss. App. LEXIS 42 (Miss. Ct. App.), cert. denied, 252 So. 3d 595, 2018 Miss. LEXIS 390 (Miss. 2018).

Trial court did not abuse its discretion in finding that the probative value of civil judgments against defendant outweighed the danger of any unfair prejudice because the civil judgments clearly were relevant to show defendant's knowledge and his intent to use forged deeds to steal the victim's timber by illegally "selling" it to an unwitting timber company; the timing of the entry of the civil judgments went to the weight, not the relevance, and thus, the admissibility of the evidence. Terrell v. State, 237 So. 3d 717, 2018 Miss. LEXIS 1 (Miss. 2018).

In a capital murder case, the trial court did not abuse its discretion in admitting evidence of a single particle of gunshot residue found on defendant's hand, where the witness clearly explained to the jury that the residue did not unequivocally showed that defendant had fired a gun. Because the testimony was clearly explained, there was little risk that the jury was confused or misled by the testimony. Flowers v. State, 240 So. 3d 1082, 2017 Miss. LEXIS 431 (Miss. 2017), rev'd, — U.S. —, 139 S. Ct. 2228, 204 L. Ed. 2d 638, 2019 U.S. LEXIS 4196 (U.S. 2019).

State's motions in limine were properly granted because the evidence of the shooting of defendant's mother months earlier was not relevant and allowing the evidence to be introduced certainly would have confused the jury. Wells v. State, 233 So. 3d 279, 2017 Miss. LEXIS 409 (Miss. 2017).

Whether the sexual assault victim's medical records actually contained anything relevant, material, or exculpatory was unknown. However, even if the medical records contained such information, it was subject to being weighed to determine whether its probative value exceeded its prejudicial effect. Roberts v. State, 234 So. 3d 1251, 2017 Miss. LEXIS 383 (Miss. 2017).

Trial court did not abuse its discretion in permitting witnesses to testify that they viewed a surveillance video of the armed robbery of a store and, based on their familiarity with how defendant walked, were of the opinion that one of the robbers in the video was defendant. Defendant's claims of lack of sufficient familiarity with how defendant walked and bias against defendant were weight-and-credibility issues for defendant to expose on cross-examination, and not reasons to reverse the trial court's evidentiary ruling. Lenoir v. State, 222 So. 3d 273, 2017 Miss. LEXIS 193 (Miss. 2017).

In a case in which plaintiff was sexually assaulted by an undocumented worker in the hotel-lobby bathroom of defendant's resort, and a jury returned a verdict in favor of defendant, the circuit court did not err in prohibiting plaintiff from referencing the attacker's status as an "illegal immigrant" or an "undocumented worker," as such evidence was irrelevant and potentially prejudicial. Magers v. Diamondhead Resort, LLC, 224 So. 3d 106, 2016 Miss. App. LEXIS 793 (Miss. Ct. App. 2016), cert. denied, 2017 Miss. LEXIS 337 (Miss. July 17, 2017), cert. denied, 222 So. 3d 311, 2017 Miss. LEXIS 284 (Miss. 2017).

In a case in which plaintiff was sexually assaulted by an undocumented worker in the hotel-lobby bathroom of defendant's resort, and a jury returned a verdict in favor of defendant, the circuit court did not err in excluding evidence of a security guard's prior criminal convictions. The circuit court properly weighed the evidence of the security guard's past criminal convictions against the prejudicial effect such an admission would have on the proceedings. Magers v. Diamondhead Resort, LLC, 224 So. 3d 106, 2016 Miss. App. LEXIS 793 (Miss. Ct. App. 2016), cert. denied, 2017 Miss. LEXIS 337 (Miss. July 17, 2017), cert. denied, 222 So. 3d 311, 2017 Miss. LEXIS 284 (Miss. 2017).

In a case in which a jury found defendant guilty of aggravated domestic violence, the trial court did not err in admitting evidence of defendant's prior bad acts. The trial court applied Miss. R. Evid. 403 correctly to the prior-acts evidence. Johnson v. State, 204 So. 3d 763, 2016 Miss. LEXIS 487 (Miss. 2016).

Trial court did not err by allowing the prosecution to cross-examine defendant at defendant's trial for sexual battery about defendant's previous paramours to discredit defendant's alibi witness when matters involving defendant's interracial dating and having children out of wedlock were disclosed because defendant's omission of the name of the alibi witness from defendant's list of previous paramours tended to make it more probable that the testimony of the alibi witness was not credible. Grant v. State, 198 So. 3d 400, 2016 Miss. App. LEXIS 139 (Miss. Ct. App. 2016).

Trial court did not abuse its discretion in allowing defendant's two stepdaughters to testify at defendant's trial for the molestation of defendant's granddaughter that defendant molested them when they were children because the evidence of similar acts under similar circumstances was admissible to show motive, opportunity, intent, knowledge, and absence of mistake, and an appropriate limiting instruction concerning their testimonies was given. Harris v. State, 165 So. 3d 473, 2015 Miss. App. LEXIS 162 (Miss. Ct. App. 2015).

Trial court in a legal malpractice action did not abuse its discretion by excluding the former client's legal expert from referencing the underlying medical malpractice suit and by excluding expert testimony regarding an estimate of damages pertaining to the suit because any probative value of the evidence was outweighed by the potential confusion of the issues and unfair prejudice that presenting the evidence may have caused. White v. Nelson, 196 So. 3d 1039, 2016 Miss. App. LEXIS 4 (Miss. Ct. App.), cert. denied, 202 So. 3d 612, 2016 Miss. LEXIS 332 (Miss. 2016).

Witness's testimony that she believed defendant was responsible for the victim's death when she heard that the victim had been killed was not irrelevant and was admissible because it was based on her involvement in the events that preceded the victim's death including defendant following her and threatening the victim; and because the prejudicial effect of the witness's testimony was substantially mitigated by the circuit court's instruction that it was the jurors' exclusive province to determine the facts in the case and to consider and weigh the evidence for that purpose. Ellis v. State, 196 So. 3d 1029, 2015 Miss. App. LEXIS 680 (Miss. Ct. App. 2015), cert. denied, 202 So. 3d 613, 2016 Miss. LEXIS 316 (Miss. 2016).

Because there was no objection on the basis that the probative value of a video was outweighed by the danger of unfair prejudice, there was no error in the trial court failure to ensure the danger of prejudice substantially outweighed the probative value of the video before admitting it into evidence. Jordan v. State, 212 So. 3d 836, 2015 Miss. App. LEXIS 655 (Miss. Ct. App. 2015), aff'd, 212 So. 3d 817, 2016 Miss. LEXIS 542 (Miss. 2016).

Testimony of an ex-girlfriend's mother that defendant called her and stated that he had nothing to lose and was coming to teach her daughter a lesson for breaking up with him, and that indicated defendant had nothing to live for was admissible because it was necessary to prove defendant's state of mind, and its probative value in establishing the crime was not substantially outweighed by the danger of unfair prejudice. Moss v. State, 190 So. 3d 9, 2015 Miss. App. LEXIS 645 (Miss. Ct. App. 2015).

Trial court did not err in excluding evidence of marijuana found at the scene of a shooting because it was irrelevant, and even if the evidence were relevant, it was properly excluded so as to avoid misleading the jury. Bufford v. State, 191 So. 3d 755, 2015 Miss. App. LEXIS 558 (Miss. Ct. App. 2015), cert. denied, 202 So. 3d 210, 2016 Miss. LEXIS 225 (Miss. 2016).

Trial court did not abuse its discretion by allowing a police officer's testimony and a photograph of some white powder on a tray, a razor blade, and a rolled up bill of money found in defendant's apartment because there was no testimony that the powder belonged to defendant, or that defendant used it that night. Moreover, the court did not abuse its discretion by allowing police officers to testify about defendant's belligerence, including defendant's use of racial slurs, outside of defendant's apartment, and kicking out the window of a patrol car when questioned by the police. Kuebler v. State, 205 So. 3d 623, 2015 Miss. App. LEXIS 461 (Miss. Ct. App. 2015), rev'd, 204 So. 3d 1220, 2016 Miss. LEXIS 462 (Miss. 2016).

Trial court did not abuse its discretion in refusing to allow text messages sent by the victim within 24 hours of the victim's death into evidence because, although defendant alleged that the victim committed suicide, the texts sent by the victim expressing the victim's feelings for defendant and worry about payment of automotive repairs were not probative of suicide. Additionally, the texts about the victim's drug usage the day of the victim's death were inadmissible. Kuebler v. State, 205

So. 3d 623, 2015 Miss. App. LEXIS 461 (Miss. Ct. App. 2015), rev'd, 204 So. 3d 1220, 2016 Miss. LEXIS 462 (Miss. 2016).

There was no error in excluding any reference to defendant's truck smelling like marijuana because whether the relevancy of the testimony was outweighed by the danger of unfair prejudice was a decision left to the broad discretion of the trial judge, who did not abuse his discretion. Snyder v. State, 174 So. 3d 331, 2015 Miss. App. LEXIS 457 (Miss. Ct. App. 2015).

Consulting physician's consultation notes were properly admitted as the probative value was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury for purposes of Miss. R. Evid. 403. Marie v. North, 180 So. 3d 624, 2015 Miss. LEXIS 518 (Miss. 2015).

Trial court did not err in admitting evidence concerning two prior convictions, as the trial judge explained in detail why she found the evidence probative and discussed the potential for prejudice, which she found ameliorated by cautionary instructions. Hubbard v. State, 176 So. 3d 1181, 2015 Miss. App. LEXIS 536 (Miss. Ct. App. 2015), cert. denied, 204 So. 3d 290, 2016 Miss. LEXIS 466 (Miss. 2016).

Since an expert specifically opined that a knife found in defendant's car was consistent with the type of knife that caused the victim's stab wounds, and because defendant admitted to stabbing the victim with a knife, the knife was relevant and its probative value was not outweighed by any arguable prejudicial effect. Ronk v. State, 172 So. 3d 1112, 2015 Miss. LEXIS 219 (Miss. 2015), cert. denied, 578 U.S. 926, 136 S. Ct. 1657, 194 L. Ed. 2d 773, 2016 U.S. LEXIS 2643 (U.S. 2016).

Trial court abused its discretion in excluding a pre-negotiation appraisal report under Miss. R. Evid. 403 where it did not find that the probative value of the report was substantially outweighed by the danger of unfair prejudice, and since the landowners were allowed to impeach an expert witness appraiser with his prior appraisal under Miss. R. Evid. 607, it was relevant evidence in the eminent domain action. Redding v. Miss. Transp. Comm'n, 169 So. 3d 958, 2014 Miss. App. LEXIS 676 (Miss. Ct. App. 2014), cert. denied, 168 So. 3d 962, 2015 Miss. LEXIS 374 (Miss. 2015).

Trial court did not abuse its discretion by not excluding evidence of a single particle of gunshot residue found on defendant's hand because the forensic scientist set out three events that could result in a person having gunshot residue on his hands, he clearly explained that the gunshot residue did not unequivocally show that defendant had fired a gun, and therefore there was little risk that the jury was confused or misled by the testimony and it was admissible under this rule. Flowers v. State, 158 So. 3d 1009, 2014 Miss. LEXIS 569 (Miss. 2014), vacated, 579 U.S. 913, 136 S. Ct. 2157, 195 L. Ed. 2d 817, 2016 U.S. LEXIS 3930 (U.S. 2016).

Defendant's convictions for murder, aggravated assault, and felon in possession of a firearm were proper because there was no error in the exclusion of evidence concerning defendant's blood-alcohol content. The toxicology results were cumulative to the witness testimony establishing that the victim had been drinking that evening and went to the store to get more beer and no evidence presented at trial reflected that the victim possessed a propensity for violence when drinking, or that defendant was aware of any propensity for violence by the victim. Anderson v. State, 185 So. 3d 1015, 2014 Miss. App. LEXIS 597 (Miss. Ct. App. 2014), aff'd, 185 So. 3d 966, 2015 Miss. LEXIS 567 (Miss. 2015).

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It was not error to deny landlords' pretrial motion to bar a tenant's counsel from using the phrase "sexual assault and battery" in closing argument because Miss. R. Evid. 403 did not apply to arguments of counsel. Lang v. Beasley, 159 So. 3d 593, 2014 Miss. App. LEXIS 491 (Miss. Ct. App. 2014), cert. denied, 158 So. 3d 1153, 2015 Miss. LEXIS 143 (Miss. 2015).

Where defendant was convicted of two counts of sexual battery of his stepdaughter, even if the circuit court should have conducted a more thorough analysis on the record of the probative value of defendant's use of a prescription drug usually prescribed for male sexual function problems, the error was harmless, as there was no evidence that defendant was prejudiced by admission of the prescription drug evidence or that its admission misled the jury or led to a confusion of the issues. Corser v. State, 147 So. 3d 357, 2013 Miss. App. LEXIS 834 (Miss. Ct. App. 2013), cert. denied, 146 So. 3d 981, 2014 Miss. LEXIS 473 (Miss. 2014).

Where trial counsel stipulated that defendant was a convicted felon, but did not object to the introduction of defendant's three prior convictions in violation of Miss. R. Evid. 403 and Rule 404(b), the trial court committed plain error in admitting the evidence; therefore, defendant was entitled to a new trial. Herrington v. State, 102 So. 3d 1241, 2012 Miss. App. LEXIS 791 (Miss. Ct. App. 2012).

Circuit court's admission of a farmer's practices prior to his first termination by a corporation did not violate Miss. R. Evid. 404 because evidence of the farmer's poor performance was relevant to the corporation's defense of the farmer's claim that it had entered into the contract with him for the sole purpose of convincing him to refinance his defaulted loan with another lender and wipe the loan from its books; the farmer failed to show that evidence of his prior performance had to be excluded under Miss. R. Evid. 403. Harrison v. Walker, 91 So. 3d 41, 2011 Miss. App. LEXIS 395 (Miss. Ct. App. 2011), cert. denied, 95 So. 3d 654, 2012 Miss. LEXIS 333 (Miss. 2012).

Defendant's manslaughter conviction was proper because a witness's testimony that the victim had cursed the witness's father and that the victim had a bad temper and was overbearing was correctly deemed not admissible. The hearsay testimony was not only too remote in time to be admissible, it was also irrelevant, and its probative value was outweighed by its prejudicial effect. Booker v. State, 64 So. 3d 988, 2010 Miss. App. LEXIS 329 (Miss. Ct. App. 2010), aff'd, 64 So. 3d 965, 2011 Miss. LEXIS 316 (Miss. 2011).

Because Miss. R. Evid. 403 does not mandate exclusion but rather provides that the evidence may be excluded and the determination of admissibility is highly discretionary, an appellate court does not conduct a de novo review of evidence under Rule 403. Logan v. State, 42 So. 3d 594, 2010 Miss. App. LEXIS 83 (Miss. Ct. App.), cert. denied, 49 So. 3d 106, 2010 Miss. LEXIS 458 (Miss. 2010).

Trial court did not err in allowing evidence related to a homeowner's letter to her insurance company, which placed the blame of the damage to the homeowner's real and personal property upon the insurance company because the evidence was admissible under Miss. R. Evid. 801(d)(2) as an admission by party-opponent; the evidence was offered for a purpose other than to allow a carpet cleaning company to mitigate its damages, and the statement's probative value outweighed the possibility of prejudice. Wright v. Royal Carpet Servs., 29 So. 3d 109, 2010 Miss. App. LEXIS 92 (Miss. Ct. App. 2010).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the trial court did not err in excluding the truck driver's driving record. The record was not relevant to the issue of the wrongful-death case and was too remote in time to have had any relevance to the case; further, the number and severity of the violations did not demonstrate a routine or practice sufficient to support the widow's arguments. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450, 2010 Miss. LEXIS 200 (Miss. 2010).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because issue of visibility, or lack thereof, of the trailer was presented to the jury for consideration. The testimony on visibility was not expressed in terms of the decedent's actual ability to see the truck on the night of the accident; however, without the decedent's testimony, which unfortunately was not possible in the case, any testimony concerning that issue was properly excluded. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450, 2010 Miss. LEXIS 200 (Miss. 2010).

In defendant's trial on charges of sexual batttery and child fondling, the trial court did not err in permitting the State to introduce prior statements of the victim's mother in cross-examining her. Because the victim's mother testified that her daughter was lying about the abuse and because, by the time of trial, the mother had abandoned her child and resumed her residence with defendant, the mother's prior statements–including the affidavit that she signed under oath charging defendant with the child molestation of her daughter and her statement that defendant promised her that he would not touch her daughter again–were relevant and admissible. Tate v. State, 20 So. 3d 623, 2009 Miss. LEXIS 529 (Miss. 2009).

Defendants' murder convictions were appropriate because an officer's testimony about one defendant's admission was not hearsay, Miss. R. Evid. 801(d)(2)(A); extrajudicial statements by a criminal defendant, so long as the statements were relevant to the matter being tried, were admissible in evidence. Further, the probative evidence of the officer's testimony was not outweighed by its prejudice. Sneed v. State, 31 So. 3d 33, 2009 Miss. App. LEXIS 556 (Miss. Ct. App. 2009), cert. denied, 2010 Miss. LEXIS 150 (Miss. Mar. 25, 2010), cert. denied, 29 So. 3d 774, 2010 Miss. LEXIS 152 (Miss. 2010), cert. denied, 562 U.S. 1150, 131 S. Ct. 931, 178 L. Ed. 2d 775, 2011 U.S. LEXIS 350 (U.S. 2011).

Trial court did not violate Miss. R. Evid. 613 by denying the defense's request to call defendant's girlfriend on surrebuttal after a police investigator testified as a rebuttal witness about a phone conversation she had with the girlfriend because it was very likely that the girlfriend's testimony would not have changed from her original testimony. Fraise v. State, 17 So. 3d 160, 2009 Miss. App. LEXIS 171 (Miss. Ct. App. 2009).

Defendant's convictions for capital murder, aggravated assault, and conspiracy to commit aggravated assault were appropriate because counsel was not ineffective in failing to object to testimony in which the weapon used during the incident was connected to defendant since the probative value of that evidence, connecting defendant and the murder weapons, was not substantially outweighed by any prejudicial effect given the totality of the evidence. As such, trial counsel's failure to object did not constitute deficient performance. Williams v. State, 3 So. 3d 105, 2009 Miss. LEXIS 68 (Miss. 2009).

Trial court did not violate defendant's Sixth Amendment right to confrontation by excluding testimony that his victims were smoking marijuana at the time he assaulted them by limiting his ability to cross-examine one victim regarding the intoxication. The trial court properly balanced the probative and prejudicial effects of the evidence under Miss. R. Evid. 403, and found that the proposed testimony would have had no probative value because the possible testimony of marijuana usage was not linked to a propensity for violence; also, the prejudicial fact that the possible intoxication was of an illegal substance–marijuana–and not mere alcohol, further outweighed any probative effect. Rouster v. State, 981 So. 2d 314, 2007 Miss. App. LEXIS 781 (Miss. Ct. App. 2007).

Trial court did not abuse its discretion by admitting into evidence misdemeanor charge affidavits of the victim against defendant because the prosecutor argued that the evidence was offered to establish motive for the victim's murder, and the trial court concluded that the prejudicial effect of the testimony did not outweigh its probative value. Jones v. State, 962 So. 2d 1263, 2007 Miss. LEXIS 473 (Miss. 2007).

In a negligence case, a trial court erred by excluding a post-accident eye doctor visit from evidence, as although this was a subsequent remedial measure covered by Miss. R. Evid. 407, an exception for impeachment existed; moreover, Miss. R. Evid. 403 did not warrant the exclusion of the evidence either since a driver's credibility was paramount since he was the only person who remembered what had occurred. Alexander v. Greer, 959 So. 2d 586, 2007 Miss. App. LEXIS 436 (Miss. Ct. App. 2007).

In a capital murder case, the trial court did not abuse its discretion pursuant to Miss. R. Evid. 401 and Miss. R. Evid. 403 in admitting .22 caliber pistol into evidence, and while the pistol was not directly connected to defendant through any forensic evidence, other evidence in the case demonstrated that it was of the same caliber as the one that killed the victim and that defendant had access to the weapon; further, the forensic scientist called by the state did not state that the pistol introduced into evidence could have been the weapon used in the victim's murder, but he was careful to note only that the weapon had the same caliber, and that both the weapon in evidence and the murder weapon lacked distinguishing characteristics that would allow a positive identification, and therefore the state's witness did not impermissibly speculate whether the pistol had been used in the crime. Ross v. State, 954 So. 2d 968, 2007 Miss. LEXIS 235 (Miss. 2007).

Where defendant was taken to a hospital after a two-car collision, the search warrant for a blood draw was invalid because: (1) the officer who requested the search warrant falsely stated in his affidavit that defendant had (a) refused to submit to an "analysis of his breath" after having been offered an opportunity to submit, and (b) been placed under arrest for driving while under the influence, although at that time he had not yet been arrested; and (2) there were no exigent circumstances present at the hospital that would have justified a blood test since defendant was not fleeing, and the officer obviously had time to secure a warrant, albeit an invalid one. As to the admissibility of defendant's statements about having consumed several beers, made to police at the scene of the accident, defendant did not claim that he was in custody at the time, and his statements clearly had probative value, thus the trial court did not abuse its discretion in allowing the statements to be admitted into evidence despite the defendant's argument that he was disoriented, confused, and suffering from shock and retrograde amnesia when he made the statements and they were therefore not reliable. Shaw v. State, 938 So. 2d 853, 2005 Miss. App. LEXIS 987 (Miss. Ct. App. 2005), cert. denied, 937 So. 2d 450, 2006 Miss. LEXIS 602 (Miss. 2006).

Trial court did not abuse its discretion by excluding evidence of the husband's conduct prior to and after his marriage to his wife during the husband's alienation of affection action against the wife's boyfriend because the key time frame for the action was that of the marriage, and the evidence fell outside that time frame. Fitch v. Valentine, 959 So. 2d 1012, 2007 Miss. LEXIS 227 (Miss. 2007), cert. denied, 552 U.S. 1100, 128 S. Ct. 911, 169 L. Ed. 2d 730, 2008 U.S. LEXIS 127 (U.S. 2008).

Appellant was properly sentenced pursuant to Miss. Code Ann. § 99-19-81 as a habitual offender following an attempted burglary conviction pursuant to Miss. Code Ann. § 97-17-23 because the trial court did not err, after analyzing them under Miss. R. Evid. 403, in admitting his prior felony convictions; they were allowed by Miss. R. Evid. 404(b) as appellant's intent was greatly in issue. Carter v. State, 953 So. 2d 224, 2007 Miss. LEXIS 203 (Miss. 2007).

In a murder case, the court properly admitted evidence of an ongoing family feud between defendant's family and the victim's family because whether or not defendant was directly involved in each individual altercation, the evidence was relevant and was not so prejudicial as to constitute reversible error because the testimony had the tendency of making the action more or less probable; defendant obviously knew of the ongoing feud and had participated in several altercations with members of the victim's family. Morris v. State, 963 So. 2d 1170, 2007 Miss. App. LEXIS 165 (Miss. Ct. App.), cert. denied, 964 So. 2d 508, 2007 Miss. LEXIS 502 (Miss. 2007).

Defendant's conviction for aggravated domestic violence against his girlfriend was appropriate because defendant's statements in which he alluded to prior domestic violence were admissible under Miss. R. Evid. 404(b) to show the absence of an accident; additionally, the circuit court did not abuse its discretion when it found that the evidence was more probative then prejudicial. Fugate v. State, 951 So. 2d 604, 2007 Miss. App. LEXIS 145 (Miss. Ct. App. 2007).

Trial court properly ruled that an animation that driver attempted to introduce into evidence in a trial arising out of a car accident was more prejudicial than probative, and it was irrelevant. Etheridge v. Harold Case & Co., 960 So. 2d 474, 2006 Miss. App. LEXIS 623 (Miss. Ct. App. 2006), cert. denied, 959 So. 2d 1051, 2007 Miss. LEXIS 383 (Miss. 2007).

It was implicit in the trial court's statements that it found evidence that defendant had not paid a customer for several loads of timber cut from his land more probative than prejudicial, and the court could not find that the trial court had abused its discretion in admitting the evidence during defendant's trial for larceny of lumber. Pollard v. State, 932 So. 2d 82, 2006 Miss. App. LEXIS 477 (Miss. Ct. App. 2006).

In a former client's assault claim against his former attorney, arguably, evidence of the client's domestic violence was prejudicial, however, in light of its impeachment value, the appellate court could not say that the circuit court abused its discretion in admitting the evidence. Walker v. Benz, 914 So. 2d 1262, 2005 Miss. App. LEXIS 903 (Miss. Ct. App. 2005).

Defendant's convictions for kidnapping and sexual battery were proper where the handcuffs were properly admitted during trial pursuant to Miss. R. Evid. 401 and 403 because they tended to lend credence to the testimony of the victim and of an investigator that defendant masqueraded as a police officer in order to carry out the crimes in question. Winding v. State, 908 So. 2d 163, 2005 Miss. App. LEXIS 332 (Miss. Ct. App. 2005).

Court did not abuse its discretion in overruling defendant's objection to the prosecution's questioning of its witness because the witness, defendant's girlfriend, became hostile during questioning; questioning was not repetitive, no abusive language was used, and it was over in a matter of seconds. Questioning was not irrelevant under Miss. R. Evid. 403 because it was used to impeach the witness. Brassfield v. State, 905 So. 2d 754, 2004 Miss. App. LEXIS 1108 (Miss. Ct. App. 2004).

In his murder trial, defendant's defense was that he had accidentally shot his wife. Defendant's son's testimony regarding defendant's and his wife's history of domestic violence contradicted defendant's defense by showing no accident and a common scheme of physical violence; as such, there was no error in admitting the son's testimony as the value of the evidence was not substantially outweighed by the danger of unfair prejudice. Marbra v. State, 904 So. 2d 1169, 2004 Miss. App. LEXIS 1040 (Miss. Ct. App. 2004).

Court did not err in admitting a vibrator into evidence during defendant's trial for sexual battery of a child because the prejudicial effect of admittiing the vibrator into evidence did not outweigh its probative value. Physician had testified that the vibrator was consistent with the child's injuries, and the child's mother had testified that defendant had tried to use the vibrator during sex with the mother the night before the child was injured. Renfrow v. State, 882 So. 2d 800, 2004 Miss. App. LEXIS 919 (Miss. Ct. App. 2004).

In a breach of contract case, evidence that a television station employee performed well before and after her termination was relevant to show continuity in the high quality of her job performance, and it was not unduly prejudicial because its weight and credibility could be thoroughly attacked on cross-examination. Morris Newspaper Corp. v. Allen, 2004 Miss. App. LEXIS 981 (Miss. Ct. App. Oct. 12, 2004), op. withdrawn, sub. op., 932 So. 2d 810, 2005 Miss. App. LEXIS 765 (Miss. Ct. App. 2005).

In a breach of contract case, evidence of the employee's manager's sexual and romantic conduct was relevant where a fact question existed as to the manager's level of involvement in the termination decision, the evidence of his sexual and romantic conduct was relevant to show his possible wrongful motive for firing the employee. The evidence was probative because it tended to show the manager's motive for the wrongful termination, and the main thrust of the employee's case was that she was fired for reasons other than those stated by the employer. Morris Newspaper Corp. v. Allen, 2004 Miss. App. LEXIS 981 (Miss. Ct. App. Oct. 12, 2004), op. withdrawn, sub. op., 932 So. 2d 810, 2005 Miss. App. LEXIS 765 (Miss. Ct. App. 2005).

Testimony that defendant threatened a witness with a gun at the scene of a murder and told him he would kill him if he talked about the crime was properly admitted under Miss. R. Evid. 404(b) and 403 as it was part of the "single transaction" of the murder. Brown v. State, 890 So. 2d 901, 2004 Miss. LEXIS 1104 (Miss. 2004), cert. denied, 544 U.S. 981, 125 S. Ct. 1842, 161 L. Ed. 2d 735, 2005 U.S. LEXIS 3424 (U.S. 2005).

In defendant's trial for unlawfully taking possession of a motor vehicle, the trial court was acting within its discretion in finding: (1) that the knife on defendant's person had evidentiary value in helping the jury understand how defendant might have been able to start the vehicle, and (2) that its probative value was not outweighed by prejudice from the jury learning that defendant was armed with a knife. Parks v. State, 859 So. 2d 1084, 2003 Miss. App. LEXIS 1087 (Miss. Ct. App. 2003).

In a wrongful death case, a court properly granted plaintiff's motion in limine regarding accidental death benefits where any reference to the accidental insurance death benefit claim was more prejudicial than probative. Eckman v. Moore, 2003 Miss. LEXIS 552 (Miss. Oct. 23, 2003), op. withdrawn, 2004 Miss. LEXIS 310 (Miss. Mar. 25, 2004), sub. op., 876 So. 2d 975, 2004 Miss. LEXIS 287 (Miss. 2004).

In a wrongful death case, a court did not abuse its discretion by excluding defendant's expert's testimony where the testimony of the expert would have been cumulative to defendant's other expert testimony. Eckman v. Moore, 2003 Miss. LEXIS 552 (Miss. Oct. 23, 2003), op. withdrawn, 2004 Miss. LEXIS 310 (Miss. Mar. 25, 2004), sub. op., 876 So. 2d 975, 2004 Miss. LEXIS 287 (Miss. 2004).

In a wrongful death case, a court did not abuse its discretion by admitting photographs of the decedent and two "day in the life" videos where the photographs were relevant to show plaintiff's loss, and the videos were relevant to proving plaintiff's case. The footage showed the type of person the decedent was prior to his injuries, the type of care decedent required subsequently, and his drastically diminished capacity to interact with his wife, child and family, among other things. Eckman v. Moore, 2003 Miss. LEXIS 552 (Miss. Oct. 23, 2003), op. withdrawn, 2004 Miss. LEXIS 310 (Miss. Mar. 25, 2004), sub. op., 876 So. 2d 975, 2004 Miss. LEXIS 287 (Miss. 2004).

In a case where defendant father and defendant adopted son were convicted of conspiracy to commit sexual battery, sexual battery, and contributing to the delinquency of a minor, the evidence of pornography was admissible in toto due to the nature of the charges against defendant father, one of which was of contributing to the delinquency of a minor, and had the evidence consisted of child pornography, then Miss. R. Evid. 403 might have warranted its exclusion, but the bulk of the evidence admitted was garden variety homosexual material; thus, there was no danger that the jury would convict defendant father for molesting the victim based solely on his possession of child pornography. King v. State, 857 So. 2d 702, 2003 Miss. LEXIS 450 (Miss. 2003).

Driver successfully argued that the testimony of the injured person's proposed additional witnesses, all family members, would have been cumulative, that it was unbelievable that the injured person did not know the family members did not have discoverable knowledge until 17 days before trial, and that the injured person was allowed to testify to the injured person's alleged injuries and introduce medical evidence; reversal was not appropriate, as Miss. R. Evid. 401 and 403 were properly used by the trial court to determine that the proposed testimony was not relevant, and was cumulative. Busick v. St. John, 856 So. 2d 304, 2003 Miss. LEXIS 491 (Miss. 2003).

Trial court acted within its discretion in finding that evidence, in a medical malpractice case, that a doctor was admitted for inpatient alcohol treatment, and of subsequent incidents involving his attempted treatment of patients while under the influence of alcohol, would mislead the jury by inviting it to speculate from the doctor's subsequent acts that he had acted improperly in the plaintiff's treatment. Griffin v. McKenney, 877 So. 2d 425, 2003 Miss. App. LEXIS 942 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 867 (Miss. 2004).

Trial court's ruling to exclude material depicting a small child in a rearward facing passenger seat from a wrongful death lawsuit following the death of a 10-year-old child when a car air bag deployed on the ground that the material was not similar enough to the subject case was an abuse of the trial court's discretion. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564, 2003 Miss. App. LEXIS 752 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 2005 Miss. LEXIS 21 (Miss. Jan. 13, 2005), aff'd in part and rev'd in part, 904 So. 2d 1077, 2005 Miss. LEXIS 247 (Miss. 2005).

Trial court did not abuse its discretion in allowing the admission of a whiskey bottle into evidence in a driving while impaired trial; the court properly balanced the probative value of the bottle and its contents against the prejudicial effect; moreover, defendant was unable to show how the ruling prejudiced the defense. Watson v. State, 835 So. 2d 112, 2003 Miss. App. LEXIS 6 (Miss. Ct. App. 2003).

In a strict products liability action, the evidence supported the manufacturer's theory, and established a causal connection, that the accidental firing of the rifle was a result of a full-cocked discharge, and not an accidental bump on the headrest as alleged; for the injured person was in the cab of a compact pick-up with a loaded deer rifle, admitted to having been illegally spotlighting deer, and the rifle's safety was disengaged. Such evidence, including that the injured person smelled of alcohol, was very relevant under Miss. R. Evid. 401, and its probative value was not outweighed by unfair prejudice. Abrams v. Marlin Firearms Co., 838 So. 2d 975, 2003 Miss. LEXIS 87 (Miss. 2003).

In a murder prosecution, the trial court properly admitted testimony that defendant had stood outside the victim's home with a gun, as this was just one of several incidents that fit the pattern of defendant's behavior, was not unduly prejudicial to defendant, and did not confuse the issues. Cox v. State, 2003 Miss. LEXIS 103 (Miss. Mar. 13, 2003), op. withdrawn, sub. op., 849 So. 2d 1257, 2003 Miss. LEXIS 337 (Miss. 2003).

Defendant opened the door to questioning of defendant regarding the existence of a restraining order prohibiting defendant from having contact with a 15-year old statutory rape victim by denying contact with the victim; trial court did not err in admitting evidence regarding the order and defendant's violations thereof despite having previously ruled such evidence inadmissible. Farrish v. State, 840 So. 2d 820, 2003 Miss. App. LEXIS 232 (Miss. Ct. App. 2003).

In a prosecution for possession of more than one ounce of marijuana with the intent to distribute, evidence of defendant's prior misdemeanor conviction for possession of marijuana and witnesses' accounts of his prior marijuana sales to them were properly admitted under Miss. R. Evid. 404 and 403 to show his intent to distribute, and the trial court gave a proper limiting instruction, albeit not the one defendant requested. White v. State, 842 So. 2d 565, 2003 Miss. LEXIS 166 (Miss. 2003).

The defendant was not entitled to reversal of his conviction for armed robbery where (1) the defendant's coperpetrator testified that the defendant threatened him while they were in jail awaiting trial, (2) the defendant's objection to this testimony was sustained, and (3) the jury was instructed to disregard the statement. Hall v. State, 785 So. 2d 302, 2001 Miss. App. LEXIS 80 (Miss. Ct. App. 2001).

In a prosecution for aggravated assault, there was no violation of the rule where (1) the victim testified, in an uninvited and unresponsive manner, that she was one week pregnant at the time she was shot, and (2) the court then determined that the jury should be informed that the unborn child was not harmed by the gunshot so as to avoid any undue bias against the defendant. Williams v. State, 784 So. 2d 230, 2000 Miss. App. LEXIS 538 (Miss. Ct. App. 2000).

In an action for assault, battery, and false imprisonment arising from an incident in which the plaintiffs drove their pickup truck across property owned by the defendant and the defendant, who was a municipal judge, stopped the truck by firing several shots in the air and then shooting out one of the tires, it was not error for the trial court to permit testimony that the defendant told the plaintiffs they could pursue a legal claim and put it in front of the local "nigger judge," but that nothing would come of it, notwithstanding the defendant's statement that he did not use the word "nigger" and that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Whitten v. Cox, 799 So. 2d 1, 2000 Miss. LEXIS 185 (Miss. 2000).

In a prosecution for murder, the victim's girlfriend was properly permitted to testify that, on the morning of the crime, the victim told her that he was going to pick up "Jerry," the defendant, on his way to work, notwithstanding the defendant's contention that the statement was unfairly prejudicial because it implied a possible conspiracy with the victim and placed him at the scene of the crime. Bogan v. State, 754 So. 2d 1289, 2000 Miss. App. LEXIS 27 (Miss. Ct. App. 2000).

In a prosecution for a murder which occurred during a burglary, it was not an abuse of discretion for the court to permit the introduction of evidence that the defendant had a pistol in his possession two days prior to the murder, which he allegedly said he was going to use should anything go wrong during the burglary. Humphrey v. State, 759 So. 2d 368, 2000 Miss. LEXIS 101 (Miss. 2000).

In a prosecution for defrauding the state government and uttering forgery, the court improperly allowed the introduction into evidence of extensive records of forged receipts for repaired vehicles that the police seized from the defendant's house since such receipts were not the basis of the charges against the defendant and were highly prejudicial. Logan v. State, 1999 Miss. App. LEXIS 182 (Miss. Ct. App. Apr. 20, 1999), rev'd, 2000 Miss. LEXIS 128 (Miss. May 25, 2000).

In an action arising from the failure to pay an insurance claim for theft, the trial judge did not err in disallowing evidence that the plaintiff insured had been suspended from his police work pending a review of a shooting incident, given that the evidence had a great potential to unduly prejudice the jury while having little probative value. State Farm Mut. Auto. Ins. Co. v. Grimes, 722 So. 2d 637, 1998 Miss. LEXIS 525 (Miss. 1998).

In a prosecution for embezzlement, the court erred when it refused to allow the defendant to present evidence that a third person committed the crime; the defendant was entitled to present her theory of the case and have the jury determine whether someone else could have taken the money, and any fears of confusion the trial judge may have harbored could have been resolved by giving limiting instructions to the jury. Terry v. State, 718 So. 2d 1115, 1998 Miss. LEXIS 366 (Miss. 1998).

Judge at trial for possession of illegal drugs with intent to distribute did not err in excluding evidence of judgment in civil forfeiture proceeding declaring money found in defendant's car to be nonforfeitable, since its admission into evidence would add no probative value on issue of defendant's guilt or innocence of possession with intent to distribute, and there was danger of confusing the issues or misleading the jury. Sample v. State, 643 So. 2d 524, 1994 Miss. LEXIS 466 (Miss. 1994).

Circuit court did not err in striking designation and testimony of expert witness originally hired but later withdrawn by plaintiffs in product liability action, since allowing manufacturer to call expert as a trial witness and to allude to fact that he had been retained and later dismissed by plaintiffs would be highly prejudicial. General Motors Corp. v. Jackson, 636 So. 2d 310, 1992 Miss. LEXIS 735 (Miss. 1992), cert. denied, 513 U.S. 928, 115 S. Ct. 317, 130 L. Ed. 2d 279, 1994 U.S. LEXIS 7105 (U.S. 1994).

Probative value of undercover agent's statement, relating to defendant's offer to sell her cocaine in future at a lower price, outweighed danger of unfair prejudice, and was properly admitted in drug prosecution. Bradley v. State, 562 So. 2d 1276, 1990 Miss. LEXIS 267 (Miss. 1990).

Circuit court correctly allowed police officer to describe defendant's reenactment of murder for the jury's benefit, since reenactment was an admission and the proper predicate had been laid. Jackson v. State, 551 So. 2d 132, 1989 Miss. LEXIS 330 (Miss. 1989).

**Cited in:** Washington v. State, 912 So. 2d 996, 2005 Miss. App. LEXIS 195 (Miss. Ct. App. 2005).

## RESEARCH REFERENCES

**ALR.**

Admissibility, in Rape Case, of Evidence that Accused Raped, or Attempted to Rape Person Other than Prosecutrix – Prior Offenses. 86 A.L.R.5th 59.

Admissibility, in rape case, of evidence that accused raped, or attempted to rape, person other than prosecutrix – offenses unspecified as to time. 88 A.L.R.5th 429.

Admissibility of computer-generated animation. 111 A.L.R.5th 529.

Admissibility in state criminal case of results of polygraph (lie detector) test – Post-Daubert cases. 10 A.L.R.6th 463.

Admissibility and Effect of Evidence or Comment on Party's Military Service or Lack Thereof. 24 A.L.R. 6th 747.

**Law Reviews.**

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## Rule 404. Character evidence; crimes or other acts.

(a) *Character evidence.* —

(1) *Prohibited uses.* — Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) *Exceptions for a defendant or victim in a criminal case.* — The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it; and

(C) the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) *Exceptions for a witness.* — Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) *Crimes, wrongs, or other acts.* —

(1) *Prohibited uses.* — Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted uses.* — This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

**HISTORY: Restyled effective July 1, 2016.**

## ADVISORY COMMITTEE NOTE

The language of Rule 404 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. The term "alleged" has been inserted before references to "victim" in subdivision (a), in order to provide consistency with Rule 412. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 404(a)(2) has been clarified to state more explicitly that in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait. This is consistent with the original intent of the Rule, which was to prohibit the circumstantial use of character evidence in civil cases, even where closely related to criminal charges. *See Ginter v. Northwestern Mut. Life Ins. Co.,* 576 F. Supp. 627, 629-30 (D. Ky. 1984) ("It seems beyond peradventure of doubt that the drafters of F.R.Evi. 404(a) explicitly intended that all character evidence, except where 'character is at issue' was to be excluded" in civil cases.). This is in accord with the only Mississippi case to discuss the subject, *Walker v. Benz,* 914 So. 2d 1262 (Miss. Ct. App. 2005), which concluded that the defendant's character evidence would not be admissible under 404(a)(2) *even if* it applied by analogy in a civil assault case.

Nothing in the amendments to Rule 404(a) affect the scope of 404(b). The admissibility standards of Rule 404(b) remain fully applicable to both civil and criminal cases.

**(a)** Character evidence may arise in three different ways: (1) when character is an issue in a case; (2) when the character of a witness is impugned for lack of veracity; and (3) when the character of a party is being used as the basis for an inference that he behaved in the instant case as he did on prior occasions.

Character is straightforwardly introduced into evidence when it is a direct issue in the case. A defamation case exemplifies when character is a direct issue. *New Orleans Great Northern R. v. Frazer,* 158 Miss. 407, 130 So. 493 (1930).

With regard to character evidence relating to the veracity of witnesses, Rule 404 refers one to Rules 607, 608, and 609.

The difficulty surrounding character evidence is with regard to its inferential use. When a party attempts to prove that a person has a certain character trait and that he acted in accordance with it, the court will exclude the testimony. To do otherwise is to prejudice the person, to render him in the eyes of jurors liable, not because of what he did or did not do in the instant case, but because of what he has done or failed to do in the past. *Floyd v. State,* 166 Miss. 15, 148 So. 226 (1933); *Eubanks v. State,* 419 So. 2d 1330 (Miss. 1972); *Riley v. State,* 254 Miss. 86, 180 So. 2d 321 (1965). This particular kind of circumstantial evidence most often appears in criminal cases. The general rule serves as a bar to the introduction of the inferential evidence. *US. v. Cochran,* 546 F.2d 27 (5th Cir. 1977); *Davis v. State,* 431 So. 2d 468 (Miss. 1983).

Ordinarily a victim's character is irrelevant. The fact that a "bad" man rather than a "good" man was murdered or beaten is inconsequential. *Spivey v. State,* 58 Miss. 858 (1881). Under specific circumstances, however, the character of a victim may be relevant. This would most likely arise in instances where the defendant claims that the victim was the initial aggressor and that the defendant's actions were in the nature of self-defense. In order to prove this the defendant must offer evidence of an overt act perpetrated against him by the victim. *Freeman v. State,* 204 So. 2d 842 (Miss. 1967). Having proved the act, the defendant may then offer proof of the victim's character. *Shinall v. State,* 199 So. 2d 251 (Miss. 1967), cert. denied 389 U.S. 1014 [88 S. Ct. 590, 19 L. Ed. 2d 660] (1967), outlined the permissible exceptions which would still be applicable under this rule. The recognized exceptions are: "(A) when, from the circumstances of the case, it is a part of the *res gestae;* . . . (B) where the evidence of the homicide is wholly circumstantial . . . ; (C) where it is doubtful as to who the aggressor was at the time of the homicide . . . ; or (D) where the immediate circumstances of the killing render it doubtful as to whether or not the act was justifiable."

**(b)** Against the general prohibition of producing evidence of prior offenses or actions to show that the party acted in conformity with past behavior, is posited a list of exceptions. These past acts introduced into evidence may be ones for which the person in question was either convicted or not convicted. All of the exceptions in Rule 404(b) have been recognized and applied on numerous occasions by the Mississippi Supreme Court. Evidence of another crime, for instance, is admissible where the offense in the instant case and in the past offense are so inter-connected as to be considered part of the same transaction. *Neal v. State,* 451 So. 2d 743 (Miss. 1984). The court has consistently recognized that evidence of a prior crime or act may be admitted to show identity, knowledge, intent, or motive. *Carter v. State,* 450 So. 2d 67 (Miss. 1984).

It should be noted that the exceptions listed in Subdivision (b) are not exclusive. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

In general.
Bias and veracity.
Cautionary instructions.
Character of victim.
Complete story.
Confession.
Construction.
Drug offenses.
Drug transactions.
Failure to consider Miss. R. Evid. 403.
Flight or escape.
Gang affiliation.
Harmless error.
Identity.
Intent.
Intimidation of witnesses.
Knowledge.
Limiting instruction.
Motive.
Negating claim of accident or mistake.
Other crimes.
Preservation for review.
Prior arrest.
Prior assault.
Prior drug sales.
Prior drug use.
Prior sexual offenses.
Prior similar convictions.
Prior violence.
Rebuttal of assertions of good character.
Recorded statement.
Remoteness.
Res gestae.
Series of transactions.
Sex offenses.
Subsequent conduct.
Videotapes.
Illustrative cases.

**In general.**

Circuit court did not weigh the probative value of the evidence versus its prejudicial effect on the record, but that is not always required; where, as here, a defendant fails to make a contemporaneous objection to prior act evidence, the circuit court cannot be faulted for failing to conduct an explicit on-the-record balancing test analysis. Wilson v. State, 149 So. 3d 544, 2014 Miss. App. LEXIS 354 (Miss. Ct. App. 2014).

Trial court erred in admitting evidence of defendant's escape into defendant's trial for murder; however, this error was harmless because the evidence of flight paled in comparison to more direct evidence of guilt. Shaw v. State, 915 So. 2d 442, 2005 Miss. LEXIS 465 (Miss. 2005).

While prior convictions which have been found relevant under Miss. R. Evid. 401, and which satisfy Miss. R. Evid. 404(b) may be potentially admissible to prove disposition, they may be allowed into evidence only after passing a Miss. R. Evid. 403 balancing test, which must be conducted on the record. Tate v. State, 912 So. 2d 919, 2005 Miss. LEXIS 194 (Miss. 2005).

In a capital murder case, a trial court did not err by failing to determine whether or not prior evidence was admissible by conducting a balancing test to determine if the probative value was outweighed by the prejudicial effect because the State never sought to introduce the evidence at trial. Le v. State, 913 So. 2d 913, 2005 Miss. LEXIS 151 (Miss.), cert. denied, 546 U.S. 1004, 126 S. Ct. 622, 163 L. Ed. 2d 508, 2005 U.S. LEXIS 8254 (U.S. 2005).

Trial court did not err in admitting evidence that defendant planned an attempted robbery at another restaurant;

the trial judge properly followed the required procedure, found that the evidence was more probative than prejudicial, and instructed the jury not to consider the testimony as a substitute for proof that defendant committed the robbery. Powell v. State, 878 So. 2d 144, 2004 Miss. App. LEXIS 37 (Miss. Ct. App.), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 962 (Miss. 2004).

Court rejected defendant's contention that the State violated Miss. R. Evid. 404(b) in asking the girlfriend whether defendant had coerced her to lie on the stand; given the change in the girlfriend's testimony from what she said in a previous statement, the State was permitted to present evidence under Miss. R. Evid. 616, and the question was not so inflammatory as to have constituted prosecutorial misconduct. Pipkins v. State, 878 So. 2d 119, 2004 Miss. App. LEXIS 15 (Miss. Ct. App.), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 946 (Miss. 2004).

In a capital murder case, the trial court did not err by allowing co-defendant and witnesses to testify that he stated that defendant needed money to pay his probation officer as any prejudice from admitting the testimony did not substantially outweigh the probative value of allowing the testimony to establish defendant's motive and intent for the murder. Howell v. State, 860 So. 2d 704, 2003 Miss. LEXIS 556 (Miss. 2003), cert. dismissed, 543 U.S. 440, 125 S. Ct. 856, 160 L. Ed. 2d 873, 2005 U.S. LEXIS 1371 (U.S. 2005).

Circuit court did not abuse its discretion in allowing a witness to testify concerning an incident with the victim where the incident was just one more incident fitting the pattern of defendant's behavior, was not unduly prejudicial to defendant, and did not confuse the issues. Cox v. State, 849 So. 2d 1257, 2003 Miss. LEXIS 337 (Miss. 2003).

It is contrary to the spirit of Miss. R. Evid. 404 to hold an appellant barred from raising an issue on appeal because of citing the wrong subpart of the correct Rule. Kolberg v. State, 829 So. 2d 29, 2002 Miss. LEXIS 268 (Miss. 2002), cert. denied, 538 U.S. 981, 123 S. Ct. 1787, 155 L. Ed. 2d 672, 2003 U.S. LEXIS 3010 (U.S. 2003), overruled in part, Harrell v. State, 134 So. 3d 266, 2014 Miss. LEXIS 52 (Miss. 2014), overruled in part, Rowsey v. State, 188 So. 3d 486, 2015 Miss. LEXIS 573 (Miss. 2015).

If an accused objects to Rule 404(b) evidence and the trial court, after conducting a Rule 403 analysis, finds that the probative value of the evidence outweighs the prejudicial effect, the trial court must treat the objection to the admissibility of Rule 404(b) evidence as a request for a limiting instruction. Webster v. State, 754 So. 2d 1232, 2000 Miss. LEXIS 19 (Miss. 2000).

Even when other-crimes evidence is admissible under subsection (b) of this rule, it must pass through the ultimate filter of Rule 403. Jasper v. State, 759 So. 2d 1136, 1999 Miss. LEXIS 377 (Miss. 1999).

In the context of the admissibility of other evidence, the rule makes no distinctions between prior and subsequent acts. Fielder v. Magnolia Bev. Co., 757 So. 2d 925, 1999 Miss. LEXIS 165 (Miss. 1999).

The determination of "prior " testimony is a dual test encompassing both Rule 404(b) and the prejudice test of Rule 403. Kelly v. State, 735 So. 2d 1071, 1999 Miss. App. LEXIS 133 (Miss. Ct. App. 1999).

Proof of another crime is admissible where the offense charged and that offered to be proved are so connected as to constitute one transaction, where it is necessary to identify the defendant, where it is material to prove motive and there is an apparent relation or connection between the act proposed to be proved and that charged, where the accusation involves a series of criminal acts which must be proved to make out the offense, or where it is necessary to prove scienter or guilty knowledge. Watts v. State, 717 So. 2d 314, 1998 Miss. LEXIS 346 (Miss. 1998).

Evidence of prior offenses committed by a defendant, not resulting in a conviction, is generally inadmissible either for impeachment purposes or as a part of the state's case in chief. Underwood v. State, 708 So. 2d 18, 1998 Miss. LEXIS 45 (Miss. 1998).

Proof of another crime is admissible where the offense charged and that offered to be proved are so interrelated as to constitute a single transaction or occurrence or a closely related series of transactions or occurrences; such proof of another crime is also admissible where it is necessary to identify the defendant, where it is material to prove motive, and there is an apparent relation or connection between the act proposed to be proved and that charged, where the accusation involves a series of criminal acts which must be proved to make out the offense, or where it is necessary to prove scienter or guilty knowledge. Underwood v. State, 708 So. 2d 18, 1998 Miss. LEXIS 45 (Miss. 1998).

Evidence of specific acts of the deceased toward third parties are not admissible to show bad character of the deceased or non-conformity therewith. Russell v. State, 607 So. 2d 1107, 1992 Miss. LEXIS 474 (Miss. 1992).

Even if exception under M.R.E. Rule 404(b) is invoked, a trial court is still required to conduct balancing analysis under Rule 403, to determine whether probative value of evidence is substantially outweighed by the danger of unfair prejudice. Lockett v. State, 517 So. 2d 1317, 1987 Miss. LEXIS 2854 (Miss. 1987).

Trial court did not abuse its discretion in admitting evidence of defendant increasing drug and alcohol use because it carefully crafted the conditions for the testimony and evidence to be admitted and excluded evidence of drug distribution and limited the testimony to only the recent past. Bowman v. State, 283 So. 3d 154, 2019 Miss. LEXIS 359 (Miss. 2019).

There was no error in the State's closing argument that civil judgments showed defendant's knowledge, intent, and opportunity to steal timber through the use of forged deed because defendant could not show prejudice; the trial court clearly instructed the jury on the limited admissibility of the prior evidence. Terrell v. State, 237 So. 3d 717, 2018 Miss. LEXIS 1 (Miss. 2018).

Trial court did not abuse its discretion in finding that the probative value of civil judgments against defendant outweighed the danger of any unfair prejudice because the civil judgments clearly were relevant to show defendant's knowledge and his intent to use forged deeds to steal the victim's timber by illegally "selling" it to an unwitting timber company; the timing of the entry of the civil judgments went to the weight, not the relevance, and thus, the admissibility of the evidence. Terrell v. State, 237 So. 3d 717, 2018 Miss. LEXIS 1 (Miss. 2018).

Circuit court considered the evidence's admissibility and then filtered the evidence through the balancing test and thus did not abuse its discretion by admitting the bad act evidence; the evidence showed defendant's motive, intent, and modus operandi, the facts were substantially similar in each incident, and the evidence's probative value substantially outweighed the danger of unfair prejudice. Parks v. State, 228 So. 3d 853, 2017 Miss. App. LEXIS 58 (Miss. Ct. App.), cert. denied, 220 So. 3d 977, 2017 Miss. LEXIS 262 (Miss. 2017).

It was no error to admit hearsay evidence of defendant's arguments with a victim because (1) the evidence was relevant to defendant's motive and intent, and (2) other evidence supporting defendant's conviction made any error harmless. Carter v. State, 195 So. 3d 238, 2016 Miss. App. LEXIS 423 (Miss. Ct. App. 2016), cert. denied, 209 So. 3d 431, 2017 Miss. LEXIS 63 (Miss. 2017).

Petitioner inmate was not denied the effective assistance of counsel due to counsel's failure to object to evidence of the inmate's alleged ; evidence that a jacket the inmate brought into the house had been stolen from a vehicle was admissible under Miss. R. Evid. 404(b), and counsel did not render ineffective assistance of counsel in failing to object to admissible evidence. Manning v. Epps, 695 F. Supp. 2d 323, 2009 U.S. Dist. LEXIS 120719 (N.D. Miss. 2009).

Trial court properly employed the two-part analysis for admissibility under Miss. R. Evid. 404(b) and the balancing test required by Miss. R. Evid. 403 in admitting evidence of defendant's acts prior to the murder; the challenged testimony was relevant and probative, establishing that defendant and the victim were together less than half an hour before the victim's body was discovered and placing the murder weapon in defendant's hands shortly before the shooting. Welde

v. State, 3 So. 3d 113, 2009 Miss. LEXIS 70 (Miss. 2009).

Accident victim's testimony that she heard a neighbor say that the defendant driver had previously been speeding was admitted in violation of Miss. R. Evid. 404(b) because it was evidence of a prior act that was offered to create the inference that, because the driver had sped in the past, he was speeding on the day of the accident. Washington v. Kelsey, 990 So. 2d 242, 2008 Miss. App. LEXIS 243 (Miss. Ct. App. 2008).

When the state introduced evidence of a struggle between defendant and police officers in a pool hall, where a bag of marijuana fell out of defendant's sleeve, the evidence was admissible under Miss. R. Evid. 404(b) because the evidence showed intent, motive, preparation, plan, knowledge, identity, absence of mistake or accident, or opportunity, and the evidence was not more prejudicial than probative, under Miss. R. Evid. 403. Williams v. State, 962 So. 2d 129, 2007 Miss. App. LEXIS 498 (Miss. Ct. App. 2007).

Trial court did not err in admitting victim's testimony that defendant said he was going to rape the victim and her daughter as the evidence was admissible under Miss. R. Evid. 404(b) as it went to defendant's intent to hurt the victim and her daughter. Hampton v. State, 910 So. 2d 651, 2005 Miss. App. LEXIS 173 (Miss. Ct. App. 2005).

It was implicit in the trial court's statements that it found evidence that defendant had not paid a customer for several loads of timber cut from his land more probative than prejudicial, and the court could not find that the trial court had abused its discretion in admitting the evidence during defendant's trial for larceny of lumber. Pollard v. State, 932 So. 2d 82, 2006 Miss. App. LEXIS 477 (Miss. Ct. App. 2006).

Testimony that one of defendant's victims was involved in an insurance scam with defendant was properly admitted under Miss. R. Evid. 404(b) because the trial court conducted an appropriate Miss. R. Evid. 403 balancing analysis, and the trial court was not obligated to give a sua sponte limiting instruction on evidence pursuant to Miss. R. Evid. 404(b). Rubenstein v. State, 941 So. 2d 735, 2006 Miss. LEXIS 411 (Miss. 2006).

In a burglary of a house conviction, since the victim's vehicle was stolen during the commission of the burglary of the house, the admission of testimony about the stolen car was necessary for the jury to get a full and complete picture of the facts. Therefore, the trial court did not commit reversible error by allowing testimony about that bad act into evidence. Harris v. State, 907 So. 2d 972, 2005 Miss. App. LEXIS 148 (Miss. Ct. App.), cert. denied, 910 So. 2d 574, 2005 Miss. LEXIS 453 (Miss. 2005).

Court rejected defendant's claim that evidence of prior were improperly admitted in violation of Miss. R. Evid. 404(b) because defense counsel never objected and the prior bad act evidence was admitted in rebuttal after the defense opened the door to defendant's character. Also the court rejected defendant's claim that the prior bad act evidence was not relevant to any of the statutory aggravating factors enumerated in Miss. Code Ann. § 99-19-101(5) because § 99-19-101(1) did not limit the evidence that could be presented at the sentencing phase to evidence relevant to the aggravating circumstances, but rather the State was allowed to rebut mitigating evidence through cross-examination, introduction of rebuttal evidence or by argument. Hodges v. State, 912 So. 2d 730, 2005 Miss. LEXIS 164 (Miss.), cert. denied, 546 U.S. 1037, 126 S. Ct. 739, 163 L. Ed. 2d 579, 2005 U.S. LEXIS 8670 (U.S. 2005).

Where defendant was tried for murdering his wife, having 2 out of more than the 20 witnesses who testified at trial briefly mention that the victim had bruises at various times prior to death did not violate Miss. R. Evid. 404(a)(1). Defendant never objected to the substance of the testimony, but only asked that the State show a time frame in which the bruises had occurred; the State did so and the trial court properly found the testimony was relevant and admissible. Ross v. State, 883 So. 2d 1181, 2004 Miss. App. LEXIS 557 (Miss. Ct. App.), cert. denied, 883 So. 2d 1180, 2004 Miss. LEXIS 1274 (Miss. 2004).

Defendant adopted son testified that he had never engaged in any kind of homosexual conduct with defendant father; thus, pursuant to Miss. R. Evid. 404(b), evidence that he and and defendant father engaged in homosexual activities while incarcerated was admissible to impeach his testimony and the probative value of that testimony was not substantially outweighed by the dangers espoused in Miss. R. Evid. 403. Moreover, the jury was specifically instructed that it could consider the witness's testimony for the limited purpose of determining the truth and veracity of the defendant son's testimony. King v. State, 857 So. 2d 702, 2003 Miss. LEXIS 450 (Miss. 2003).

Defendant's conviction for aggravated assault was proper where his objection to admission of other wrong or criminal acts was untimely; even if the trial judge had wrongly admitted such testimony, defendant's objection was untimely under Miss. R. Evid. 103(a)(1) because a full six pages in the transcript fell between the testimony and the objection. Ball v. State, 845 So. 2d 736, 2003 Miss. App. LEXIS 441 (Miss. Ct. App. 2003).

In a rape and simple assault case, Miss. R. Evid. 404(b) did not play any part in the issue of the admissibility of letters that defendant had apparently written to the victim, his estranged wife, because the act of writing a letter was not a prior bad act similar in any way to the act of rape. Williams v. State, 868 So. 2d 346, 2003 Miss. App. LEXIS 669 (Miss. Ct. App. 2003).

Trial court did not improperly limit defendant's testimony when it sustained an objection by the State to defense counsel's invitation to defendant to proceed with particulars about why defendant believed, through talking with others, that a prison correctional officer was violent; while in a self-defense case, pursuant to Miss. R. Evid. 404(a)(2), the reputation of the victim, in this case the officer, was relevant when there was a claim that the victim was the initial aggressor, the defense was not truly based on such a claim, and defendant did not submit a proffer that gave greater details as to exactly what defendant understood about the officer's violent behavior, and pursuant to Miss. R. Evid. 103(a), the court failed to find that a substantial right of defendant's was affected by the trial court's ruling. Sheffield v. State, 844 So. 2d 519, 2003 Miss. App. LEXIS 374 (Miss. Ct. App. 2003).

Trial court did not improperly limit a defense witness's testimony when the trial court sustained an objection by the State to the witness's attempt to begin talking about a prison correctional officer's alleged sexual improprieties with a female inmate; while in a self-defense case, pursuant to Miss. R. Evid. 404(a)(2), the reputation of the victim, in this case the officer, was relevant when there was a claim that the victim was the initial aggressor, the defense was not truly based on such a claim, and an allegation of sexual misconduct did nothing to show a propensity for unprovoked violence on the part of the officer. Sheffield v. State, 844 So. 2d 519, 2003 Miss. App. LEXIS 374 (Miss. Ct. App. 2003).

Trial court did not improperly refuse to allow a defense witness to testify about an incident in which the witness was allegedly assaulted by a prison correctional officer; while in a self-defense case, pursuant to Miss. R. Evid. 404(a)(2), the reputation of the victim, in this case the officer, was relevant when there was a claim that the victim was the initial aggressor, the defense was not truly based on such a claim, and absent a showing that defendant was aware of the alleged prior incident, there was no basis for defendant's claim that defendant attacked the officer preemptively to avoid injury. Sheffield v. State, 844 So. 2d 519, 2003 Miss. App. LEXIS 374 (Miss. Ct. App. 2003).

Defendant's objection to "other acts" evidence was properly denied, as defense counsel's cross-examination questions "opened the door" for the State's questioning on redirect examination. Kolberg v. State, 829 So. 2d 29, 2002 Miss. LEXIS 268 (Miss. 2002), cert. denied, 538 U.S. 981, 123 S. Ct. 1787, 155 L. Ed. 2d 672, 2003 U.S. LEXIS 3010 (U.S. 2003), overruled in part, Harrell v. State, 134 So. 3d 266, 2014 Miss. LEXIS 52 (Miss. 2014), overruled in part, Rowsey v. State, 188 So. 3d 486, 2015 Miss. LEXIS 573 (Miss. 2015).

In a capital murder prosecution, evidence of the child victim's vaginal abrasions and unexplained bruising after defendant moved into her home was properly admitted to rebut his theory that the death was accidental. Kolberg v. State, 829 So. 2d 29, 2002 Miss. LEXIS 268 (Miss. 2002), cert. denied, 538 U.S. 981, 123 S. Ct. 1787, 155 L. Ed. 2d 672, 2003 U.S. LEXIS 3010 (U.S. 2003), overruled in part, Harrell v. State, 134 So. 3d 266, 2014 Miss. LEXIS 52 (Miss. 2014), overruled in part, Rowsey v. State, 188 So. 3d 486, 2015 Miss. LEXIS 573 (Miss. 2015).

Trial court did not err in admitting statement that defendant had threatened the victim the day before she was killed as it was highly probative of motive and intent, and evidence of an earlier bad act can be admitted when it is so interrelated to the crime that it shows a continuing occurrence. Anthony v. State, 843 So. 2d 51, 2002 Miss. App. LEXIS 511 (Miss. Ct. App. 2002), cert. denied, 842 So. 2d 578, 2003 Miss. App. LEXIS 411 (Miss. Ct. App. 2003).

In defendant's murder trial, while defendant's dealings with a witness did constitute evidence of prior , the evidence was admissible to show motive, intent, preparation, plan, knowledge and absence of mistake or accident, and also because the probative value of the evidence outweighed any possible unfair prejudice, and an instruction was given to the jury on the limited purpose for which the evidence was being allowed. Adams v. State, 851 So. 2d 366, 2002 Miss. App. LEXIS 696 (Miss. Ct. App. 2002), cert. denied, 849 So. 2d 899, 2003 Miss. App. LEXIS 699 (Miss. Ct. App. 2003).

Where defendant shot victim in both legs, trial court did not err in prohibiting defense counsel from delving into victim's prior criminal history. McNair v. State, 814 So. 2d 153, 2001 Miss. App. LEXIS 428 (Miss. Ct. App. 2001).

Subsequent bad act evidence was admissible under Miss. R. Evid. 404(b) where the other crime evidence showed defendant had essentially the same plan and preparation to kill a man for life insurance proceeds as she did when she conspired to murder the victim in the instant case. Leedom v. State, 2001 Miss. LEXIS 213 (Miss. Aug. 30, 2001), op. withdrawn, sub. op., 796 So. 2d 1010, 2001 Miss. LEXIS 241 (Miss. 2001).

The theory of the law as found in Rule 404(b) that bars the jury from considering unrelated does not apply with the same force to that are inextricably intertwined in the criminal event being tried; thus, in a prosecution for robbery, it was not error for the court to permit the introduction of evidence that the defendant threatened to rape one of the victims and committed two acts of sexual battery upon her. Weathersby v. State, 769 So. 2d 857, 2000 Miss. App. LEXIS 373 (Miss. Ct. App. 2000).

**Bias and veracity.**

In a prosecution for possession of marijuana with intent to distribute arising from the discovery of the defendant in his mother's home in possession of more than eight ounces of marijuana, it was not error, during the cross-examinaton of the defendant's brother, for the court to allow the prosecution to ask hypothetically if there had been any marijuana found anytime in the house before or after the incident at issue and if that would change his mind about whether the defendant would have tolerated marijuana in his mother's home since such question was asked to show the defendant's brother's bias and veracity, rather than to elicit inadmissible character evidence. Fox v. State, 756 So. 2d 753, 2000 Miss. LEXIS 41 (Miss. 2000).

**Cautionary instructions.**

Defendant moved for a mistrial after the improper testimony of a police officer during defendant's trial for sale of cocaine; however, the trial court did not abuse its discretion in denying the mistrial because after defendant's counsel objected, the trial court quickly admonished the jury, and the prosecutor did not intentionally elicit the witness' testimony. Yarbrough v. State, 911 So. 2d 951, 2005 Miss. LEXIS 610 (Miss. 2005).

**Character of victim.**

Defendant's proposed testimony as to a victim's homicide of another was properly excluded because (1) defendant had no personal knowledge of that homicide, (2) the testimony was based on rumor, and (3) defendant did not call those from whom defendant obtained this information to testify. Bell v. State, 303 So. 3d 22, 2020 Miss. App. LEXIS 56 (Miss. Ct. App.), cert. denied, 303 So. 3d 418, 2020 Miss. LEXIS 359 (Miss. 2020).

Trial court properly excluded five photographs of the victim and one social media post after defendant attacked her where she was shown smiling or enjoying life because they were not relevant inasmuch as they did not establish whether or not the victim's allegations were credible or to whether defendant attacked her, and the evidence was uncontested that she was injured and suffered major loss of blood. Phillips v. State, 285 So. 3d 685, 2019 Miss. App. LEXIS 278 (Miss. Ct. App.), cert. denied, 284 So. 3d 754, 2019 Miss. LEXIS 441 (Miss. 2019), cert. denied, — So. 3d —, 2019 Miss. LEXIS 469 (Miss. 2019).

Trial court erred in refusing to allow the victim's ex-wife to testify about the threats, physical abuse, and intimidation she suffered at his hands during their marriage, separation, and divorce because the refusal affected defendant's right to a fair trial where the evidence was relevant and admissible to show defendant's state of mind at the time of the incident, the reasonableness of his use of force, an essential element of self-defense, and the prior incidents were linked with more contemporaneous ones and formed part of a continuing course of conduct. Jordan v. State, 211 So. 3d 713, 2016 Miss. App. LEXIS 330 (Miss. Ct. App. 2016), cert. denied, 2017 Miss. LEXIS 86 (Miss. Mar. 2, 2017).

In a murder case it was not error to exclude evidence of the victim's intoxication because defendant did not claim self-defense. Boudreaux v. State, 189 So. 3d 1274, 2016 Miss. App. LEXIS 262 (Miss. Ct. App. 2016).

In a prosecution of defendant for aggravated assault and possession of a firearm by a felon, the trial court did not err in excluding defendant's testimony of the victim's intoxication on the night of the assault. At best, defendant's testimony merely inferred his contention that the victim was more intimidating while he was high on drugs, and this contention shed minimal light, if any, on the effects of cocaine on the victim's propensity for violence. Lewis v. State, 198 So. 3d 431, 2016 Miss. App. LEXIS 179 (Miss. Ct. App. 2016).

In a murder case, the trial judge should have allowed defendant to introduce evidence of his knowledge of victim's violent criminal history. The trial judge committed reversible error by refusing to allow defendant to defend himself with evidence that tended to show his state of mind at the time of the killing, as the evidence was crucial to defendant's claim of self defense. Richardson v. State, 147 So. 3d 838, 2014 Miss. LEXIS 310 (Miss. 2014).

Trial court did not abuse its discretion in sustaining the State's objection to defense counsel's line of questioning inferring that the victim had used cocaine on the day of the incident as defendant presented no evidence to show that the victim had used cocaine on the day of the shooting or that cocaine use increased the victim's propensity for violence. Sallie v. State, 155 So. 3d 872, 2013 Miss. App. LEXIS 833 (Miss. Ct. App. 2013), aff'd in part, vacated in part, 155 So. 3d 760, 2015 Miss. LEXIS 38 (Miss. 2015).

Although defendant was authorized to offer specific instances of his murder victim's threats in order to support his claim of self-defense, as he failed to proffer any details of the alleged prior threats and the alleged prior violent instances were not clear, there could be no abuse of discretion with respect to the trial court's evidentiary rulings. Davis v. State, 130 So. 3d 1141, 2013 Miss. App. LEXIS 490 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 578, 2014 Miss. LEXIS 73 (Miss. 2014).

Circuit court did not abuse its discretion by refusing to admit evidence of a murder victim's alleged propensity towards homosexual conduct because nothing in the record suggested that the victim committed an overt act of aggression against defendant. The evidence indicated that defendant shot the victim in the back of the head during a robbery, while the victim was driving a vehicle. McKenzie v. State, 119 So. 3d 1145, 2013 Miss. App. LEXIS 480 (Miss. Ct. App. 2013).

Because the defense witness's proffered testimony regarding the victim's violent tendencies while under the influence of cocaine and/or alcohol lacked a sufficient

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evidentiary foundation for admission since the proffered testimony failed to show that defendant believed the victim to be violent when using cocaine or alcohol, the trial court did not err in excluding the defense witness from testifying. Barber v. State, 143 So. 3d 586, 2013 Miss. App. LEXIS 701 (Miss. Ct. App. 2013), cert. denied, 139 So. 3d 74, 2014 Miss. LEXIS 350 (Miss. 2014).

Circuit court did not err in excluding evidence of a victim's pending solicitation charges under Miss. R. Evid. 609 and 403 because defendant did not claim that the victim was an aggressor and that he killed the victim in self-defense or in defense or another; therefore, there was no basis for allowing the victim's pending criminal charges admitted into evidence, especially where the crimes did not reflect on the victim's character for truthfulness, dishonesty, violence, or peacefulness. Reith v. State, 135 So. 3d 892, 2013 Miss. App. LEXIS 126 (Miss. Ct. App. 2013), rev'd, 135 So. 3d 862, 2014 Miss. LEXIS 194 (Miss. 2014).

Pursuant to Miss. R. Evid. 404(a)(2), defendant failed to note specifically how the trial court denied him the opportunity to present evidence that either he exhibited a character of peacefulness or that the victim was the aggressor; as the record was void of an occasion where defendant was prohibited from introducing evidence or testimony pertaining to that issue, a claim that there was an evidentiary error lacked merit. Branch v. State, 118 So. 3d 646, 2013 Miss. App. LEXIS 649 (Miss. Ct. App.), cert. denied, 117 So. 3d 330, 2013 Miss. LEXIS 376 (Miss. 2013).

In a manslaughter case, defendant's right to a fundamentally fair trial was denied because the trial court refused to allow the admission of the testimony of two police officers under Miss. R. Evid. 404(a)(2) where there was sufficient testimony to create a jury issue as to whether the victim was the aggressor in the incident that led to his death; the officers' testimony was relevant to show prior incidents so that the jury could have placed itself in defendant's shoes at the time of the incident. Miller v. State, 956 So. 2d 221, 2007 Miss. LEXIS 278 (Miss. 2007).

Trial court did not err in excluding evidence proffered by defendant's ex-wife that defendant had been a chaperone for their children's high school activities and she did not believe he would harm a young person, as the bases for the ex-wife's opinions were events that had occurred nine years earlier. Thus, the events were too remote in time to be relevant. Ladnier v. State, 878 So. 2d 926, 2004 Miss. LEXIS 623 (Miss. 2004).

Defendant's conviction for aggravated assault in violation of Miss. Code Ann. § 97-3-7(2)(b) was appropriate because the testimony provided by the victim and another dispelled the argument in support of allowing testimony under Miss. R. Evid. 404(a)(2) to prove a character trait for violence on the part of the victim; the evidence at issue failed to demonstrate that the victim was the initial aggressor during a prior incident. Gates v. State, 936 So. 2d 335, 2006 Miss. LEXIS 384 (Miss. 2006).

In a murder prosecution, the trial court properly excluded reference to an altercation between the defendant and the victim two months before the shooting, in which the victim allegedly beat the defendant with an iron pipe, since the victim was not the aggressor on the day he was shot but rather, the defendant went to the victim's place of business armed and looking for the victim. McGilberry v. State, 784 So. 2d 919, 2001 Miss. LEXIS 118 (Miss. 2001).

In a prosecution for sexual battery characterized as a "he said, she said" case, the defendant was improperly precluded from introducing evidence of the reputation for truthfulness of the complaining witness. Vaughan v. State, 759 So. 2d 1092, 1999 Miss. LEXIS 178 (Miss. 1999).

It was not error for court at murder trial to exclude victim's criminal records, because victim's prior drug conviction and probation were simply not at issue. Davis v. State, 684 So. 2d 643, 1996 Miss. LEXIS 292 (Miss. 1996), cert. denied, 520 U.S. 1170, 117 S. Ct. 1437, 137 L. Ed. 2d 544, 1997 U.S. LEXIS 2295 (U.S. 1997).

Wife's propensity for violence with a butcher knife was admissible as a character trait, where husband's defense at murder trial rested on justifiable homicide. Heidel v. State, 587 So. 2d 835, 1991 Miss. LEXIS 646 (Miss. 1991).

**Complete story.**

Evidence that defendant locked the victim in a dog crate and bound her with a chain was admissible as it was part of the series of occurrences forming the assault and it was relevant and probative to the assault itself because the State introduced photographs of the victim that showed yellow, rust-colored marks on her legs, consistent with being wrapped with a chain, and the victim's testimony was relevant to show how those marks got there; evidence that defendant caged the victim in a crate with dog feces was admissible as the victim testified that defendant hit her with a can of disinfectant after releasing her from the dog crate and claiming that she smelled bad; and the evidence passed the more probative than prejudicial test. Casey v. State, 179 So. 3d 74, 2015 Miss. App. LEXIS 578 (Miss. Ct. App. 2015).

In a receiving stolen property case, the trial court did not err in not preventing an investigator from testifying that authorities were working on several cases that involved defendant and his family and that the investigation spanned several counties in order to allow the prosecution to tell the complete story because the investigator's testimony that the investigation spanned multiple counties was helpful to the jury as it explained the course of events that led to defendant's implication in the possession of the stolen skid steer; and the investigator's testimony was helpful as it explained why he did not arrest the individual who had possession of the stolen skid steer as the investigator knew that he did not steal it. Taylor v. State, 167 So. 3d 1239, 2014 Miss. App. LEXIS 397 (Miss. Ct. App. 2014), rev'd, 167 So. 3d 1143, 2015 Miss. LEXIS 351 (Miss. 2015).

Evidence that defendant had stolen two trucks on the day of the shooting was properly admitted because the prior were integrally related in time, place and fact with the capital murder for which the defendant was being tried and furthered the State's legitimate interest in telling a rational and coherent story of what happened. Keller v. State, 138 So. 3d 817, 2014 Miss. LEXIS 89 (Miss. 2014), cert. denied, 574 U.S. 1159, 135 S. Ct. 1397, 191 L. Ed. 2d 371, 2015 U.S. LEXIS 1353 (U.S. 2015).

Recording of a 911 call was admissible as the trial judge had discretion to allow the State to tell the complete story of defendant's arrest, and it had the probative value of communicating to the jury the report of the violent situation. Edwards v. State, 124 So. 3d 105, 2013 Miss. App. LEXIS 700 (Miss. Ct. App. 2013).

**Confession.**

Defendant's confession to a contemporaneous burglary was properly admitted during a trial for armed robbery because it showed identity, and the two crimes were so interrelated that they were part of the same transaction or occurrence; exclusion under Miss. R. Evid. 403 was not required because the confession was highly probative. Weaver v. State, 852 So. 2d 82, 2003 Miss. App. LEXIS 541 (Miss. Ct. App. 2003).

**Construction.**

Rule does not give criminal defendants carte blanche to offer evidence of truthfulness or peacefulness; rather, the character evidence must be presented to show that on a particular occasion, the defendant or victim acted in accordance with a particular trait he has. In this case, without a proffer of the nature of the character evidence, the court could not find that the trial court erred in excluding it. Williams v. State, 281 So. 3d 263, 2019 Miss. App. LEXIS 128 (Miss. Ct. App. 2019).

Criminal defendant is not required to testify prior to offering character evidence, but the character evidence that could be allowed would only be evidence to prove that on a particular occasion the person acted in accordance with the character or trait. If a defendant claims that the victim was the initial aggressor and defendant's actions were self-defense, he may put in evidence of the victim's violent character but only after defendant had offered evidence of an overt act perpetrated against him by the victim. Williams v. State, 281 So. 3d 263, 2019 Miss. App. LEXIS 128 (Miss. Ct. App. 2019).

When defense counsel objected to the mention of prior crimes, wrongs, or acts, the trial court committed reversible error when it failed to weigh the prejudicial and probative value of that evidence. Robinson

v. State, 735 So. 2d 208, 1999 Miss. LEXIS 126 (Miss. 1999).

**Drug offenses.**

Defendant's trial counsel was not constitutionally ineffective for not objecting to the admission of defendant's prior felony drug-related conviction because the prosecution offered evidence of defendant's prior conviction for the purpose of proving intent to distribute; the trial court found that the probative value was not substantially outweighed by the danger of unfair prejudice; and the trial court gave a limiting instruction. Anderson v. State, 195 So. 3d 835, 2016 Miss. App. LEXIS 20 (Miss. Ct. App.), cert. denied, 209 So. 3d 433, 2016 Miss. LEXIS 301 (Miss. 2016).

Circuit court did not err in admitting defendant's prior drug-sale convictions into evidence because the prior drug convictions were properly admitted under Miss. R. Evid. 404(b) to show defendant's intent to sell; the circuit court conducted a proper Miss. R. Evid. 403 balancing test. Campbell v. State, 118 So. 3d 598, 2012 Miss. App. LEXIS 608 (Miss. Ct. App. 2012), cert. denied, 117 So. 3d 330, 2013 Miss. LEXIS 377 (Miss. 2013).

Testimony of defendant's prior cocaine sales was properly admitted as the trial court did a Miss. R. Evid. 403 balancing test and gave the jury a limiting instruction. Long v. State, 33 So. 3d 1122, 2010 Miss. LEXIS 224 (Miss. 2010).

Defendant's convictions for possession of more than 500 grams but less than 1 kilogram of marijuana with the intent to distribute within 1,500 feet of a church, and possession of more than 10 grams but less than 30 grams of cocaine with intent to distribute within 1,500 feet of a church were proper because an officer's testimony that a confidential informant went to an address identified as defendant's residence and purchased narcotics from defendant was admissible under Miss. R. Evid. 404(b) to demonstrate the intent element of both counts of possession of narcotics with intent to distribute them. Furthermore, the circuit court issued a limiting instruction to the jury and consequently, defendant did not suffer undue prejudice due to the admission of the testimony at issue. Thompson v. State, 33 So. 3d 542, 2010 Miss. App. LEXIS 209 (Miss. Ct. App. 2010).

As the marijuana and the cocaine were in the same container within appellant's purse, the discovery of the marijuana led to a deputy's discovery of the cocaine at issue in the second trial; further, appellant's admission that the marijuana was hers demonstrated that it was more likely that the cocaine was also appellant's as she had control of the container in which both drugs were discovered. Even if the marijuana showed evidence of a separate crime, its introduction at trial was necessary to provide context for the deputy's ultimate discovery of the cocaine; accordingly, there was no abuse of discretion by the circuit court judge in allowing this evidence to be introduced to the jury. Field v. State, 28 So. 3d 697, 2010 Miss. App. LEXIS 101 (Miss. Ct. App. 2010).

Evidence of defendant's prior convictions for selling drugs was admissible under Miss. R. Evid. 404(b) at defendant's trial on a charge of possession of marijuana with the intent to sell, transfer, or distribute to establish defendant's intent; the admission was not prejudicial where the admission of the prior conviction evidence was accompanied by a limiting instruction indicating that the jury could only consider the evidence when considering the intent element of the charged offense. Tarver v. State, 15 So. 3d 446, 2009 Miss. App. LEXIS 40 (Miss. Ct. App.), cert. denied, 15 So. 3d 426, 2009 Miss. LEXIS 398 (Miss. 2009).

Although a state's witness testified as to other prior in defendant's trial on drug charges, defendant had opened the door to this testimony. Alexander v. State, 875 So. 2d 261, 2004 Miss. App. LEXIS 558 (Miss. Ct. App. 2004).

Defendant's drug paraphernalia fit the enumerated exceptions to Miss. R. Evid. 404(b) where the possession of the objects was relevant to show defendant's participation in the drug culture; the drug paraphernalia was highly relevant to show defendant's intent, preparation, knowledge, and absence of mistake in possessing methamphetamine, and the trial court did not err in admitting evidence of defendant's drug paraphernalia. Flake v. State, 948 So. 2d 493, 2007 Miss. App. LEXIS 47 (Miss. Ct. App. 2007).

Defendant's convictions for two counts of the sale of methadone and one count of the sale of morphine were appropriate under Miss. R. Evid. 404(b) and Miss. R. Evid. 403 because testimony from a witness about his prior narcotics dealings with defendant was admissible for purposes of proving intent, motive, and in completing the story of the charged crime. Palmer v. State, 939 So. 2d 792, 2006 Miss. LEXIS 549 (Miss. 2006).

Although evidence of defendant's prior drug offense was improperly admitted by the trial court, the admission was harmless error, because the evidence against defendant was overwhelming, including DNA evidence tending to show that defendant raped the victim. Williford v. State, 820 So. 2d 13, 2002 Miss. App. LEXIS 31 (Miss. Ct. App. 2002).

In a prosecution for possession of marijuana, a prior out-of-state misdemeanor conviction for possession of marijuana was properly introduced in order to show knowledge where 117 pounds of marijuana was found in the trunk of a rental car driven by the defendant and he claimed not to have known that the marijuana was in the trunk despite a strong smell of raw marijuana inside the passenger compartment. Harrison v. State, 2000 Miss. App. LEXIS 44 (Miss. Ct. App. Feb. 8, 2000), aff'd, 800 So. 2d 1134, 2001 Miss. LEXIS 223 (Miss. 2001).

In a prosecution for possession of cocaine with intent to distribute, it was not error for the court to permit the introduction into evidence of two prior drug sales by the defendant in order to show intent to distribute, even though those sales occurred almost 10 years prior to the date of the commission of the crime at issue; however, such evidence alone was insufficient to prove that the defendant intended to distribute the cocaine found in his possession. Mitchell v. State, 754 So. 2d 519, 1999 Miss. App. LEXIS 660 (Miss. Ct. App. 1999).

In a prosecution for conspiracy to sell cocaine, the court properly permitted a witness to testify to prior similar drug sales by the defendants since such testimony constituted circumstantial evidence of the charged offense. Harris v. State, 731 So. 2d 1125, 1999 Miss. LEXIS 37 (Miss. 1999).

In a prosecution for conspiracy, arising from the defendant's arrest in connection with the transportation of marijuana on an airplane flight, the court properly permitted the defendant's co-conspirator to testify concerning the defendant's assistance in transporting marijuana five times before the date of the crime at issue since such testimony was relevant to intent. Smith v. State, 716 So. 2d 1076, 1998 Miss. LEXIS 285 (Miss. 1998).

**Drug transactions.**

Defendant's conviction for the sale of cocaine and his enhanced 40-year sentence were both proper under Miss. R. Evid. 404(b) where the trial court properly denied defendant's request for a mistrial based on an agent's testimony mentioning other transactions, because of the defense's refusal to allow the trial court to grant the limiting instruction, and the trial court immediately sustained defendant's objection. Easter v. State, 878 So. 2d 10, 2004 Miss. LEXIS 484 (Miss. 2004).

In defendant's trial for possession of cocaine, the prosecution had not violated Miss. R. Evid. 404(b) by asking a police officer why defendant had been used as an informant in the past because the defense clearly had opened the door to that line of questioning by asking the officer if defendant had worked as informant in the past and whether or not the department had had successful results. Watson v. State, 941 So. 2d 881, 2006 Miss. App. LEXIS 820 (Miss. Ct. App. 2006).

In a prosecution for burglary of a dwelling, evidence that a stolen video cassette recorder (VCR) was exchanged for crack cocaine was properly admitted into evidence to show how the VCR came into the possession of law enforcement and to show an apparent relation between the exchange and the stealing of the VCR. Potts v. State, 759 So. 2d 500, 2000 Miss. App. LEXIS 190 (Miss. Ct. App. 2000).

In a prosecution for possession of cocaine with the intent to sell and possession of marijuana with intent to sell, the state was properly permitted to introduce evidence of the defendant's prior involvement in the drug trade in order to show intent or plan with regard to the transaction at issue. Sumrall v. State, 758 So. 2d

1091, 2000 Miss. App. LEXIS 185 (Miss. Ct. App. 2000).

In a prosecution for aggravated assault arising out of the defendant's attempt to collect $10 owed to him by the victim, evidence of the defendant's involvement in drug sales was properly admitted as it was relevant to the nature of the disputed debt. Shields v. State, 751 So. 2d 476, 1999 Miss. App. LEXIS 518 (Miss. Ct. App. 1999).

**Failure to consider Miss. R. Evid. 403.**

Circuit court did not abuse its discretion in the admission of defendant's prior acts of domestic violence against the victim because there was no error in its failure to conduct an on-the-record balancing test since the evidence was not "patently prejudicial"; the circuit court reviewed both cases the State provided and arguments of counsel prior to making its ruling. Carter v. State, 288 So. 3d 397, 2019 Miss. App. LEXIS 477 (Miss. Ct. App. 2019).

Miss. R. Evid. 404(b) exceptions are, indeed, subject to a Miss. R. Evid. 403 balancing test. Pitchford v. State, 45 So. 3d 216, 2010 Miss. LEXIS 328 (Miss. 2010), cert. denied, 563 U.S. 939, 131 S. Ct. 2098, 179 L. Ed. 2d 897, 2011 U.S. LEXIS 3058 (U.S. 2011).

Trial court does not abuse its discretion in admitting testimony under Miss. R. Evid. 404(b), even where the judge fails to balance whether the prejudicial effect outweighed its probative value under Miss. R. Evid. 403, because, where the testimony is evidence of plan and preparation and aids in telling a complete story, the prejudicial effect, if any, is minimal; therefore, a trial court did not err by admitting evidence of other inappropriate sexual conduct of defendant in a statutory rape case. Price v. State, 898 So. 2d 641, 2005 Miss. LEXIS 127 (Miss. 2005).

**Flight or escape.**

Because there was evidence to support the trial court's finding that defendant's flight was not explained by any reason other than consciousness of guilt, the trial court did not abuse its discretion in giving a flight instruction. Sheriff v. State, 156 So. 3d 924, 2014 Miss. App. LEXIS 561 (Miss. Ct. App. 2014).

Defendant's convictions for aggravated assault and murder were appropriate because the trial court did not err in giving a flight instruction. Defendant's proffered reasons were illogical and contradicted by the evidence and the circumstances surrounding defendant's flight had considerable probative value, Miss. R. Evid. 404(b). Jackson v. State, 28 So. 3d 638, 2009 Miss. App. LEXIS 476 (Miss. Ct. App. 2009), cert. denied, 27 So. 3d 404, 2010 Miss. LEXIS 85 (Miss. 2010).

It was not error for the court to permit the introduction of evidence that on the day after the crimes at issue, the defendant failed and refused to stop his vehicle in response to a patrol car's lights and siren, drove through two roadblocks, kept driving even when all four of his tires were flattened, and only stopped when threatened with a shotgun, since such evidence was admissible as proof of consciousness of guilt. Armstrong v. State, 771 So. 2d 988, 2000 Miss. App. LEXIS 540 (Miss. Ct. App. 2000).

The court did not err in permitting the state to introduce evidence that the defendant did not appear at his first trial since such evidence was probative of flight, no flight instruction was offered or given which would have drawn emphasis to the defendant's failure to appear for his first trial, and the defendant testified on his own behalf and had ample opportunity to refute the evidence or to explain why he failed to appear on the date his trial was originally set. Waldon v. State, 749 So. 2d 262, 1999 Miss. App. LEXIS 556 (Miss. Ct. App. 1999).

Evidence of flight or escape is admissible in order to show guilty knowledge. Davis v. State, 722 So. 2d 143, 1998 Miss. LEXIS 441 (Miss. 1998).

Evidence of the defendant's flight was properly introduced into evidence, notwithstanding that he was fleeing from capture for an offense other than the one at issue, since he discarded evidence from the offense at issue as he fled and was wearing the same clothes as he wore at the time of the offense at issue. Davis v. State, 722 So. 2d 143, 1998 Miss. LEXIS 441 (Miss. 1998).

**Gang affiliation.**

Defendant's conviction for robbery by use of a deadly weapon was appropriate because the sparse reference by the State to defendant's possible gang membership was not part of the State's case-in-chief; the evidence had some probative weight; its probative value substantially outweighed the danger of unfair prejudice; and limited statements about gang membership went to show possible motive, opportunity, intent, or preparation, Miss. R. Evid. 404(b). Pritchett v. State, 32 So. 3d 545, 2010 Miss. App. LEXIS 155 (Miss. Ct. App. 2010).

Although the State failed to lay the proper foundation for evidence of defendant's gang affiliation to be admitted as prior acts evidence, and defense counsel should have objected to any further testimony or questioning regarding gang affiliation, the error was harmless because an accessory to the crime gave evidence that directly attributed the arson to defendant. That testimony was corroborated by two other witnesses, who testified about going to the trailer and the subsequent purchase of gasoline. Bennett v. State, 18 So. 3d 272, 2009 Miss. App. LEXIS 139 (Miss. Ct. App.), cert. denied, 19 So. 3d 82, 2009 Miss. LEXIS 467 (Miss. 2009).

Defendant's conviction for aggravated assault was appropriate pursuant to Miss. R. Evid. 404(b) because, although there was no evidence that the incident in the case was gang related, the issue of the admissibility of gang-affiliation evidence to show bias was presented and it was on that basis that the trial judge admitted the evidence of defendant's gang affiliation; that type of evidence was clearly permitted under Miss. R. Evid. 616. Dao v. State, 984 So. 2d 352, 2007 Miss. App. LEXIS 816 (Miss. Ct. App. 2007), cert. denied, 984 So. 2d 277, 2008 Miss. LEXIS 281 (Miss. 2008).

Evidence of the murder victim's gang tattoo offered to show that the victim had a violent character was properly excluded as irrelevant under Miss. R. Evid. 404(a)(2) where defendant did not show that the victim had performed an aggressive act against defendant before defendant shot the victim in the back. Hodge v. State, 823 So. 2d 1162, 2002 Miss. LEXIS 251 (Miss. 2002).

In a capital murder case, under Miss. R. Evid. 404(b), the trial court did not err in allowing a lookout to testify regarding defendant's membership in a gang because it explained why he acted as a lookout during the crime but later notified the police about the crime; the lookout's inconsistent actions, without explanation, could leave the jury without a complete understanding of why he participated as a lookout. Hudson v. State, 977 So. 2d 344, 2007 Miss. App. LEXIS 229 (Miss. Ct. App. 2007), cert. denied, 977 So. 2d 1144, 2008 Miss. LEXIS 139 (Miss. 2008).

The introduction in a prosecution for aggravated assault of evidence of the defendant's gang affiliation was reversible error where the state produced no witnesses or evidence with which to directly link the defendant's gang affiliation to the crime charged. Goree v. State, 748 So. 2d 829, 1999 Miss. App. LEXIS 540 (Miss. Ct. App. 1999).

**Harmless error.**

State did not purposefully elicit improper testimony of a witness indicating that defendant had been charged with a crime and had spent time in jail with the witness because the witness made an unsolicited response to the State's question; the lone fleeting, unexplained reference to prior jail time did not constitute reversible error and was at most harmless error, and the reference did not result in plain error. Swinney v. State, 241 So. 3d 599, 2018 Miss. LEXIS 8 (Miss. 2018).

Improper admission of defendant's prior conviction for simple battery was not harmless because: (1) the issue of innocence or guilt was close; (2) the quantity and character of the evidence favored neither defendant nor the State substantially; (3) the aggravated-assault charge was a grave offense for which defendant was sentenced to 20 years; and (4) the impeachment was reversible error since the State first sought to put defendant's character at issue by asking whether he was a violent person in order to impeach him with his prior conviction. Gilmore v. State, 119 So. 3d 278, 2013 Miss. LEXIS 361 (Miss. 2013).

Although trial court erred by allowing DVD recording of interrogation and confession into evidence because it tended to show that he was more likely to have been violent with the victim based on a previous altercation with another woman in violation of Miss. R. Evid. 404(b), the error was harmless because defendant testified as to his previous convictions for domestic violence. Robinson v. State, 35 So. 3d 524, 2009 Miss. App. LEXIS 298 (Miss. Ct. App. 2009), rev'd, 35 So. 3d 501, 2010 Miss. LEXIS 237 (Miss. 2010).

Whatever error the trial court committed in failing to distinguish the Miss. R. Evid. 404(b) evidence clearly was harmless as the State produced overwhelming evidence of defendant's guilt that went undiscredited, and whatever evidence was admitted by Rule 404(b) was merely superfluous; because the trial court's failure to distinguish evidence of prior under Rule 404(b) was harmless error, the trial court's refusal to grant defendant's request for a mistrial on the entire indictment was not error. Caldwell v. State, 6 So. 3d 1076, 2009 Miss. LEXIS 75 (Miss. 2009).

In a prosecution for burglary and aggravated assault with a deadly weapon, admission of a videotape of a search of defendant's home, showing various martial arts weapons, was harmless error as its cumulative nature did not prejudice defendant. Al-Fatah v. State, 856 So. 2d 494, 2003 Miss. App. LEXIS 333 (Miss. Ct. App.), cert. denied, 860 So. 2d 315, 2003 Miss. LEXIS 714 (Miss. 2003).

In trying appellant for attempted burglary, a trial court did not err in instructing the jury that it could consider appellant's prior felony convictions as motive when they had not been introduced for that purpose, as the instruction that was given was a correct statement of law, and pursuant to Miss. R. Evid. 404(b), evidence of appellant's prior felony convictions, while not admissible to prove his character, was admissible to show his intent or motive; moreover, as the trial court had already made a Miss. R. Evid. 403 analysis and admitted the evidence, it could not be fairly argued that appellant was prejudiced by the trial court's silence to support the additional exception granted by the very same evidentiary rule, and thus any perceived error was harmless. Carter v. State, 953 So. 2d 224, 2007 Miss. LEXIS 203 (Miss. 2007).

Trial court erred in ruling that defendant's prior aggravated assault conviction could be admitted in his trial for aggravated assault if he testified; the evidence was more prejudicial than probative, but defendant never proffered what he would testify to if he testified, and as a result, the error was harmless in light of the overwhelming weight of the evidence against defendant. Walker v. State, 936 So. 2d 424, 2006 Miss. App. LEXIS 550 (Miss. Ct. App. 2006).

In a prosecution for conspiracy and sale of a controlled substance, it was not error for the court to permit the introduction of evidence that the defendant was on probation for another unrelated crime on the ground that the statement was admissible for identification purposes, notwithstanding the assertion that such evidence was not used for such purpose, where the court gave a proper limiting instruction and there was no showing that the trial judge had abused his discretion and that the admission of the evidence resulted in prejudice and harm or adversely affected a substantial right of the defendant. Fortune v. State, 766 So. 2d 827, 2000 Miss. App. LEXIS 418 (Miss. Ct. App. 2000).

In a prosecution for capital rape arising from an ongoing sexual relationship between the 37 year old defendant and a 13 year old friend of his daughter, evidence of an incident in which the defendant was found in the victim's bedroom after the incident at issue was improperly introduced into evidence but constituted harmless error in light of the overwhelming evidence of guilt. Tompkins v. State, 759 So. 2d 471, 2000 Miss. App. LEXIS 117 (Miss. Ct. App. 2000).

In a prosecution on three counts of false pretenses arising from incidents in which the defendant charged gasoline and other merchandise to the victim's account at a service station, it was not reversible error for the state to refer to 19 uncharged similar incidents as there was overwhelming evience of guilt. Bishop v. State, 761 So. 2d 894, 2000 Miss. App. LEXIS 98 (Miss. Ct. App. 2000).

Harmless error analysis is applicable in cases where the trial court does not sua sponte give the required limiting instruction when Rule 404(b) evidence is admitted. Webster v. State, 754 So. 2d 1232, 2000 Miss. LEXIS 19 (Miss. 2000).

In a prosecution for armed robbery and capital murder, although it was error to permit a witness to testify that he was robbed at gunpoint by the defendant shortly after the incident at issue, such error was harmless given the overwhelming weight of the evidence against the defendant. Lindsey v. State, 754 So. 2d 506, 1999 Miss. App. LEXIS 588 (Miss. Ct. App. 1999).

**Identity.**

Trial court did not err by admitting evidence of defendant's prior conviction for child pornography because the issue of identity was called into question when defense counsel began suggesting during a neighbor's cross-examination that another person may have accessed defendant's laptop and downloaded the child pornography. Lowe v. State, 269 So. 3d 244, 2018 Miss. App. LEXIS 141 (Miss. Ct. App. 2018), cert. denied, 258 So. 3d 285, 2018 Miss. LEXIS 521 (Miss. 2018), cert. denied, 2018 Miss. LEXIS 510 (Miss. Dec. 13, 2018), cert. denied, — U.S. —, 139 S. Ct. 1639, 203 L. Ed. 2d 914, 2019 U.S. LEXIS 3074 (U.S. 2019).

Trial court did not err in allowing, pursuant to Miss. R. Evid. 404(b), a confidential informant to testify about prior drug purchases from defendant where it was clear from the transcript that the prosecutor was offering the evidence to prove that defendant had a modus operandi of conducting business and, thus, to establish defendant's identity. Liddell v. State, 33 So. 3d 524, 2010 Miss. App. LEXIS 183 (Miss. Ct. App. 2010).

Because defendant opened the door during his cross-examination with a line of questions designed to show that someone else might have been the culprit in the embezzlement of money from the justice clerk's office, the identity of the perpetrator was an issue; therefore, Miss. R. Evid. 404(b) permitted evidence of other crimes, wrongs, or acts to prove identity and the investigator was properly permitted to testify that he found similar problems of missing money prior to the other two clerks' employment in the justice clerk's office. Fagan v. State, 881 So. 2d 851, 2003 Miss. App. LEXIS 1091 (Miss. Ct. App. 2003), rev'd, 894 So. 2d 576, 2004 Miss. LEXIS 1486 (Miss. 2004).

Pubic hairs found at the scene, proven by DNA analysis to belong to the inmate, were significant in identifying the victim's attacker and thus relevant to more than just the alleged sexual battery, Miss. R. Evid. 404(b). Lambert v. State, 941 So. 2d 804, 2006 Miss. LEXIS 485 (Miss. 2006).

Trial court's statements in the record showed the trial court properly conducted a required balancing test in holding that a pending charge against defendant for burglary was admissible under Miss. R. Evid. 404 to prove in a trial for burglary to prove identity and to show why the police were looking for defendant. Hodge v. State, 801 So. 2d 762, 2001 Miss. App. LEXIS 460 (Miss. Ct. App. 2001).

In a prosecution for the sale of cocaine, testimony by an informant regarding his identification of the defendant from a "jail photo" was properly admitted into evidence where the identity of the defendant was in question and the record of the trial judge's comments demonstrated that he conducted the requisite balancing test. Brooks v. State, 788 So. 2d 794, 2001 Miss. App. LEXIS 40 (Miss. Ct. App. 2001).

In a prosecution for the sale or transfer of a controlled substance, it was reversible error for a witness to testify that he had known the defendant for 12 to 15 years and that he had bought drugs from him on numerous occasions, notwithstanding the contention that the evidence of prior was offered to show identity, since the witness could have identified the defendant by simply testifying that he had known him for 12 to 15 years without mentioning the prior drug transactions which he had with him. Burrell v. State, 727 So. 2d 761, 1998 Miss. App. LEXIS 1123 (Miss. Ct. App. 1998).

In a prosecution for voyeurism, testimony that the defendant watched the victim's house from a nearby baseball field on one date and threatened her and her children while peeping into her home on another date was properly admitted into evidence to support the victim's identification of the defendant since her testimony regarding her identification of the defendant based upon the incident at issue was anything but conclusive. Warren v. State, 709 So. 2d 415, 1998 Miss. LEXIS 64 (Miss. 1998).

**Intent.**

Trial court did not abuse its discretion in admitting prior-assault evidence as proof of defendant's intent because it found the testimony and exhibits showing his wife's bruises from that prior assault were probative to prove defendant intent, a necessary element of attempted murder; after filtering the evidence, the trial court found it was more probative than prejudicial. Bowman v. State, 283 So. 3d 154, 2019 Miss. LEXIS 359 (Miss. 2019).

In a case in which defendant was convicted of burglary of a dwelling, the trial court did not abuse its discretion in admitting defendant's prior felony convictions for burglary into evidence because the evidence of defendant's prior convictions was offered to prove that defendant's intent was to burglarize the house, not to offer aid to someone; given defendant's vigorous assertion of a lack of intent to steal, the admission of the prior burglary convictions was extremely relevant and appropriate in the State's effort to rebut defendant's assertion that he did not intend to burglarize the home; and the evidence of the prior convictions was not overly prejudicial compared to its probative value. Chism v. State, 253 So. 3d 343, 2018 Miss. App. LEXIS 72 (Miss. Ct. App.), cert. denied, 252 So. 3d 595, 2018 Miss. LEXIS 388 (Miss. 2018).

In a prosecution for possession of marijuana with intent to distribute, evidence of defendant's prior cocaine distribution conviction was admissible to show his intent to distribute, but evidence of his drug possession convictions was not; however, in light of the overwhelming evidence of his guilt, the error was harmless. McDonald v. State, 130 So. 3d 102, 2013 Miss. App. LEXIS 359 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 37 (Miss. 2014).

In a case in which defendant appealed his conviction for violating Miss. Code Ann. § 97-3-7(2)(a), he unsuccessfully argued that the trial court erred in allowing the victim's wife to testify about an encounter she and defendant had months after the incident. Defendant contended that the wife's testimony was not relevant, and its prejudicial effect outweighed its probative value in violation of Miss. R. Evid. 403, but the evidence was offered to show defendant's state of mind on the day of the assault; the trial court weighed the probative value of the evidence against the potential for undue prejudice. David v. State, 29 So. 3d 129, 2010 Miss. App. LEXIS 112 (Miss. Ct. App. 2010).

In defendant's trial for false pretenses, the introduction into evidence of bank statements properly fell under Miss. R. Evid. 404(b) exceptions of knowledge and intent, and under Miss. R. Evid. 403, the evidence was not overly prejudicial as the bank record did not include any information regarding other indictments, it was accompanied by a limiting instruction and the prosecutor did not emphasize any other bounced checks. Lyles v. State, 12 So. 3d 532, 2009 Miss. App. LEXIS 263 (Miss. Ct. App. 2009).

In defendant's sale of cocaine case, the court properly admitted a buyer's testimony concerning her prior transactions with defendant for the limited purpose of showing intent to distribute because the trial court conducted a balancing test and the court gave a proper limiting instruction to the jury; defendant's intent was a necessary element of his conviction. Phinizee v. State, 983 So. 2d 322, 2007 Miss. App. LEXIS 631 (Miss. Ct. App. 2007).

Appellate court rejected defendant's contention that the trial court improperly allowed evidence of his prior against the victim in violation of the procedures set forth in Miss. R. Evid. 404(b); evidence of a prior physical altercation between the victim and defendant was not offered to show his character, but was presented as an integral part of the story for the purpose of showing intent and establishing motive, which was admissible. Simmons v. State, 813 So. 2d 710, 2002 Miss. LEXIS 132 (Miss. 2002).

Appellant was properly sentenced pursuant to Miss. Code Ann. § 99-19-81 as a habitual offender following an attempted burglary conviction pursuant to Miss. Code Ann. § 97-17-23 because the trial court did not err, after analyzing them under Miss. R. Evid. 403, in admitting his prior felony convictions; they were allowed by Miss. R. Evid. 404(b) as appellant's intent was greatly in issue. Carter v. State, 953 So. 2d 224, 2007 Miss. LEXIS 203 (Miss. 2007).

In a case involving the manufacturing of methamphetamine, defendant's motion in limine was properly denied because nothing in the record indicated that the admission of photographs, items, and testimony regarding methamphetamine and methamphetamine residue prejudiced the defense or substantially affected defendant's rights; rather, the evidence was properly used to show intent. Halderman v. State, 964 So. 2d 1163, 2007 Miss. App. LEXIS 14 (Miss. Ct. App.), cert. denied, 964 So. 2d 508, 2007 Miss. LEXIS 527 (Miss. 2007).

In a case of sexual abuse of a daughter by her father, subsection (b) allowed evidence of other crimes, wrongs, or acts to be admitted for purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. B.R.C. v. State (In the Interest of S.C.), 795 So. 2d 526, 2001 Miss. LEXIS 244 (Miss. 2001).

In a prosecution of the defendant for the murder of her husband, evidence of the defendant's prior plans and attempts to kill her husband was properly admitted into evidence in order to show intent. Alford v. State, 760 So. 2d 48, 2000 Miss. App. LEXIS 230 (Miss. Ct. App. 2000).

**Intimidation of witnesses.**

Testimony that defendant threatened a witness with a gun at the scene of a murder and told him he would kill him if he talked about the crime was properly admitted under Miss. R. Evid. 404(b) and 403 as it was part of the "single transaction" of the murder. Brown v. State, 890 So. 2d 901, 2004 Miss. LEXIS 1104 (Miss. 2004), cert. denied, 544 U.S. 981, 125 S. Ct. 1842, 161 L. Ed. 2d 735, 2005 U.S. LEXIS 3424 (U.S. 2005).

In a prosecution for intimidating a witness, evidence of drug transactions which occurred on the day before the conduct at issue, which were unresolved when the defendant allegedly threatened the victims, was necessary to prove that the defendant had the motive and intent to threaten and intimidate these potential witnesses at any subsequent trial. Ott v. State, 742 So. 2d 1197, 1999 Miss. App. LEXIS 355 (Miss. Ct. App. 1999).

**Knowledge.**

Although a proper jury instruction concerning defendant's prior felony convictions was given, the jury was aware that he had been convicted previously for the possession of methamphetamine and methamphetamine precursors, Miss. R. Evid. 404(b); considering that, it certainly would not have been unreasonable for the jury to disbelieve defendant's assertion that he was unaware that the products he was purchasing, at least two times per week, were methamphetamine precursors. The cumulative effect of the testimony and exhibits presented at trial could certainly have lead a fair-minded juror to determine that defendant indeed purchased and possessed the precursors with the intent to use them for an illegal purpose and thus, the weight of the evidence was sufficient to support the jury's verdict. Houser v. State, 29 So. 3d 813, 2009 Miss. App. LEXIS 562 (Miss. Ct. App. 2009), cert. denied, 29 So. 3d 774, 2010 Miss. LEXIS 135 (Miss. 2010).

In an action by a railroad conductor for injuries sustained when he tripped over a piece of wood in a rail yard, evidence of prior complaints regarding wood in the rail yard was properly admitted since it related to the defendant's notice or knowledge of the condition of the rail yard. Rawson v. Midsouth Rail Corp., 738 So. 2d 280, 1999 Miss. App. LEXIS 67 (Miss. Ct. App. 1999).

**Limiting instruction.**

Trial court did not plainly err in instructing the jury after a witness's testimony about the alleged sexual abuse committed by defendant because the jury instructions as a whole fairly announced the applicable caselaw, as they informed the jurors that defendant was not on trial for any alleged prior and that the witness's testimony was admissible only for the limited purpose of showing defendant's motive, intent, and absence of mistake or accident in sexual abusing the victim. Lawson v. State, 292 So. 3d 266,

2019 Miss. App. LEXIS 501 (Miss. Ct. App. 2019).

Trial court did not abuse its discretion in denying defendant's motion for a mistrial after a State witness mentioned his prior imprisonment in violation of Miss. R. Evid. 404(b) because the witness's brief comment about defendant's imprisonment was not prompted by the State and was immediately addressed by the trial court's limiting instruction that defendant's time in prison had nothing to do with the case; the curative instruction was sufficient to remedy any improper reference to defendant's criminal past and prevent any undue prejudice. Moore v. State, 105 So. 3d 390, 2012 Miss. App. LEXIS 506 (Miss. Ct. App. 2012), cert. denied, 109 So. 3d 567, 2013 Miss. LEXIS 101 (Miss. 2013).

In a case in which defendant was convicted of violating Miss. Code Ann, § 47-5-193, he unsuccessfully argued on appeal that the trial judge failed to instruct the jury to disregard evidence of other crimes, wrongs, or acts where there was no foundation for their admissibility and no showing that the probative value outweighed the prejudicial effect. Defense counsel failed to request a limiting instruction, and the trial judge was not required to issue the limiting instruction sua sponte after defense counsel objected; Rule 105 clearly placed the burden of requesting a Miss. R. Evid. Rule 404(b) limiting instruction upon counsel. Lindsey v. State, 29 So. 3d 121, 2010 Miss. App. LEXIS 89 (Miss. Ct. App. 2010).

Circuit court did not err in failing to give a Miss. R. Evid. 404(b) limiting instruction because such instruction was never requested by defense counsel; defendant's requested limiting instruction was a misstatement of Rule 404(b) because it went beyond a mere limiting instruction and excluded evidence of his for all purposes, including proof of his intent. Peterson v. State, 37 So. 3d 669, 2010 Miss. App. LEXIS 58 (Miss. Ct. App. 2010).

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Because only other-crimes evidence appeared at trial, the character evidence instruction as requested by petitioner state inmate was not supported by the evidence, thus, counsel was not ineffective in failing to appeal the denial of a limiting character evidence instruction and the grant of federal habeas relief was inappropriate. Brooks v. Kelly, 579 F.3d 521, 2009 U.S. App. LEXIS 18393 (5th Cir. Miss. 2009).

Because the burden to request a limiting instruction falls upon defense counsel in the admittance of Miss. R. Evid. 404(b) evidence, the burden falls upon defense counsel to request a limiting instruction in the context of the admittance of prior convictions through impeachment under Miss. R. Evid. 609. Moss v. State, 977 So. 2d 1201, 2007 Miss. App. LEXIS 632 (Miss. Ct. App. 2007), cert. denied, 977 So. 2d 1144, 2008 Miss. LEXIS 151 (Miss. 2008).

Denial of defendant's motion for a new trial after he had been convicted of aggravated assault and rape was appropriate pursuant to Miss. R. Evid. 404(b) because defendant did not request a limiting instruction and was barred from bringing the issue on appeal; the trial judge was not obligated to provide a limiting instruction sua sponte regarding the admission of defendant's prior convictions. Moss v. State, 977 So. 2d 1201, 2007 Miss. App. LEXIS 632 (Miss. Ct. App. 2007), cert. denied, 977 So. 2d 1144, 2008 Miss. LEXIS 151 (Miss. 2008).

As to evidence of proof of another crime under Miss. R. Evid. 404(b),the trial court was not required to issue a limiting instruction sua sponte.Further, where the evidence against defendant was overwhelming in the subject assault case, the trial court's failure to have conducted an on the record balancing test was harmless error. Richardson v. State, 911 So. 2d 1026, 2005 Miss. App. LEXIS 692 (Miss. Ct. App. 2005).

Miss. R. Evid. 105 clearly places the burden of requesting a Miss. R. Evid.

404(b) limiting jury instruction upon counsel. Tate v. State, 912 So. 2d 919, 2005 Miss. LEXIS 194 (Miss. 2005).

Jury instructions that reference prior arrests and convictions may be counterproductive to defendant; while serving to limit the jury's consideration of the prior wrongs, such instructions also remind and emphasize to the jury that defendant committed prior . Whether to request such an instruction is a matter of trial strategy in the exclusive province of defendant, in consultation with his or her attorney; thus, without a request by defense counsel, the trial court properly did not sua sponte give a limiting jury instruction in defendant's case. Tate v. State, 912 So. 2d 919, 2005 Miss. LEXIS 194 (Miss. 2005).

Trial court need not issue a sua sponte limiting instruction when other evidence is admitted under Miss. R. Evid. 404(b) and 403; Miss. R. Evid. 105 clearly places the burden of requesting a limiting instruction under Miss. R. Evid. 404(b) on the party objecting to the evidence. Brown v. State, 890 So. 2d 901, 2004 Miss. LEXIS 1104 (Miss. 2004), cert. denied, 544 U.S. 981, 125 S. Ct. 1842, 161 L. Ed. 2d 735, 2005 U.S. LEXIS 3424 (U.S. 2005).

Wherever Miss. R. Evid. 404(b) evidence is offered and there is an objection that is overruled, the objection shall be deemed an invocation of the right to a Miss. R. Evid. 403 balancing analysis and a limiting instruction, and the court shall conduct a Miss. R. Evid. 403 analysis; if the evidence passes that hurdle, the court shall give a limiting instruction, unless the party objecting to the evidence objects to the giving of the limiting instruction. Triggs v. State, 803 So. 2d 1229, 2002 Miss. App. LEXIS 12 (Miss. Ct. App. 2002).

When a defendant brings a motion in limine, a trial court has to conduct a balancing test to weigh the possible prejudice against the probative value; if a trial court finds that the probative value outweighs the possible prejudice, and admits the evidence, the trial court must treat the motion as a request for a limiting instruction even if no such request is explicitly made by the defendant. Bell v. State, 812 So. 2d 235, 2001 Miss. App. LEXIS 405 (Miss. Ct. App. 2001).

A trial court's decision to admit 404(b) evidence over a defendant's objection entitles the defendant to a limiting instruction informing the jury of the limited purpose for which the 404(b) evidence may be considered by them. Wilhite v. State, 791 So. 2d 231, 2000 Miss. App. LEXIS 302 (Miss. Ct. App. 2000).

**Motive.**

Trial court did not abuse its discretion in admitting defendant's voice mail because it was not admitted as evidence of his character for violence but was presented to describe to the jury why defendant was at a bar on the night of the incident, and it explained the motive and intent behind his altercation with the victim. Newell v. State, 175 So. 3d 1260, 2015 Miss. LEXIS 505 (Miss. 2015).

Trial court did not abuse its discretion in allowing witness testimony of alleged prior and bad character evidence attributed to defendant and codefendant because the court found that the evidence was admissible for the permissible purpose of showing motive and that the evidence was more probative than prejudicial. Allen v. State, 179 So. 3d 1138, 2015 Miss. App. LEXIS 99 (Miss. Ct. App. 2015), cert. dismissed, 2015 Miss. LEXIS 576 (Miss. Dec. 3, 2015).

When petitioner admitted that he broke into the victim's house because he needed money to buy drugs, the fact that he actually purchased drugs was admissible as proof of motive. Grayson v. State, 118 So. 3d 118, 2013 Miss. LEXIS 163 (Miss. 2013).

Trial judge should have analyzed evidence of manslaughter victim's prior incarceration pursuant to Miss. R. Evid. 404(b) because the evidence was pertinent to show the victim's motive and intent, which formed the basis of the defense that the victim was the initial aggressor in a fight with defendant. Graves v. State, 45 So. 3d 283, 2010 Miss. App. LEXIS 93 (Miss. Ct. App. 2010).

On appeal from his criminal convictions, defendant's argument that any probative value of introducing his prior convictions was outweighed by the prejudice it caused was without merit under Miss. R. Evid. 404(b); the introduction of the sentencing report was necessary to show the terms of defendant's probation and the prior convictions were not being used to show defendant's character or that he acted in conformity with a previous crime since the charges of burglary were distinct from the charges of aggravated assault. The trial court found it necessary to introduce defendant's prior judgment of conviction and sentencing order because it was part of the State's theory of the case to show a motive for the aggravated assault on the law enforcement officers. Mayers v. State, 42 So. 3d 33, 2010 Miss. App. LEXIS 88 (Miss. Ct. App.), cert. denied, 42 So. 3d 24, 2010 Miss. LEXIS 437 (Miss. 2010).

In an embezzlement case, the trial court did not err in allowing the testimonies of three witnesses who testified that they gave defendant money with the understanding that defendant would procure a vehicle for them. To rebut defendant's allegations that he had no intent to take the victim's money and that it was only a mistake that the victim had not yet received a promised vehicle, the trial court properly allowed the testimonies of the three witnesses pursuant to Miss. R. Evid. 404(b). Wilson v. State, 12 So. 3d 8, 2008 Miss. App. LEXIS 746 (Miss. Ct. App. 2008), cert. denied, 14 So. 3d 731, 2009 Miss. LEXIS 306 (Miss. 2009).

Testimony regarding a prior incident when defendant allegedly threw a beer bottle at his victim was admissible under Miss. R. Evid. 404(b), because the prior incident showed defendant's motive for assaulting the victim, namely, that the victim had accused defendant's sister of having a sexually transmitted disease, and had transmitted the disease to the victim. Because the incident helped establish that defendant had a prior animus against the victim, the trial court did not abuse its discretion in admitting testimony about the prior incident. West v. State, 969 So. 2d 147, 2007 Miss. App. LEXIS 766 (Miss. Ct. App. 2007).

Trial court properly denied defendant's motion to sever three prescription forgery counts that occurred over a five-month period because the trial court applied the Corley Factors and found that five months was not a significant amount of time so as to require severance, and the total evidence in the case would have been admissible in separate trials of each count under Miss. R. Evid. 404(b). Rushing v. State, 911 So. 2d 526, 2005 Miss. LEXIS 612 (Miss. 2005).

Defendant's conviction for the sale of marijuana within a correctional facility was appropriate because an officer's testimony was admissible since it was necessary to show the jury the full and complete sequence of events; further, it was admissible under Miss. R. Evid. 404(b) as evidence of defendant's motive of financial gain. Jackson v. State, 962 So. 2d 649, 2007 Miss. App. LEXIS 104 (Miss. Ct. App.), cert. denied, 962 So. 2d 38, 2007 Miss. LEXIS 434 (Miss. 2007).

Court did not commit reversible error when it allowed evidence of another crime with which defendant had been charged at her trial for aggravated assault because the victim's planned testimony against defendant at an armed robbery trial was a plausible motive for the assault that the State was entitled to place before the jury pursuant to Miss. R. Evid. 404(b). Jones v. State, 913 So. 2d 436, 2005 Miss. App. LEXIS 304 (Miss. Ct. App. 2005).

In a prosecution for aggravated assault under Miss. Code Ann. § 97-3-7, the trial court did not err in allowing evidence regarding an altercation that defendant and the victim had prior to the assault; the altercation, allegedly a prior bad act, was properly admitted to establish motive under Miss. R. Evid. 404(b), and the probative value of the evidence outweighed the prejudice caused under Miss. R. Evid. 403. Brown v. State, 864 So. 2d 1009, 2004 Miss. App. LEXIS 55 (Miss. Ct. App. 2004).

Trial court did not err in admitting defendant's outstanding civil judgment, or the fact that he worked two part-time jobs, into evidence, as the evidence went to the issue of intent or motive in defendant's trial for grand larceny. Myles v. State, 854 So. 2d 502, 2003 Miss. App. LEXIS 856 (Miss. Ct. App. 2003).

Defendant failed to show that the trial court had abused its discretion in admitting evidence of his prior arrest as the evidence was admitted not for the purpose of prejudicing the jury, but to show motive. Gray v. State, 846 So. 2d 260, 2002 Miss. App. LEXIS 599 (Miss. Ct. App. 2002).

Evidence that defendant had earlier robbed the stolen vehicle's owner at gunpoint was not admissible to prove defendant's character, but was admissible to show defendant's motive for the level of resistance he exhibited up to and including during his arrest by a police officer at whom defendant fired his weapon. Powell v. State, 806 So. 2d 1069, 2001 Miss. LEXIS 271 (Miss. 2001).

In a prosecution for driving under the influence in which the defendant claimed that a police officer lied at trial when he testified that the defendant admitted to being drunk, the state was properly permitted to cross-examine the defendant on the issues of his suspended license and his giving a false Social Security number to another police officer since such was relevant to the defendant's credibility and to his motive for keeping the officer from retrieving his driving record. Strickland v. State, 784 So. 2d 957, 2001 Miss. LEXIS 139 (Miss. 2001).

In a murder prosecution, evidence of the defendant's drinking habits was properly introduced where introduced to show the defendant's propensity for becoming angry while drinking and, thus, his state of mind or motive. Chambers v. State, 800 So. 2d 1178, 2001 Miss. App. LEXIS 203 (Miss. Ct. App. 2001).

In a prosecution for murder, evidence of a prior incident involving the defendant and the victim was properly introduced into evidence since the evidence was relevant to prove motive on the basis that the defendant had a score to settle with the victim. Rodgers v. State, 777 So. 2d 673, 2000 Miss. App. LEXIS 444 (Miss. Ct. App. 2000).

Failure to accomplish the act giving rise to the motive does not prevent evidence of motive from being admitted under Rule 404(b). Wilhite v. State, 791 So. 2d 231, 2000 Miss. App. LEXIS 302 (Miss. Ct. App. 2000).

In a prosecution for aggravated assault and shooting into a motor vehicle, witnesses were properly permitted to testify regarding prior confrontations between the defendant and the victim and threats made by the defendant since such evidence was admissible to show motive. Johns v. State, 746 So. 2d 947, 1999 Miss. App. LEXIS 120 (Miss. Ct. App. 1999).

In a prosecution for murder, the court properly permitted the introduction of evidence of a fight between the defendant and the victim which occurred almost one year earlier since such evidence showed motive and intent. Webster v. State, 755 So. 2d 451, 1999 Miss. App. LEXIS 65 (Miss. Ct. App. 1999), aff'd in part and rev'd in part, 754 So. 2d 1232, 2000 Miss. LEXIS 19 (Miss. 2000).

In a prosecution for conspiracy to sell LSD, the court properly permitted the introduction of evidence of prior sales of LSD by the defendant since such evidence was not introduced to prove the character of the defendant, but to show the frequency with which he sold LSD for later distribution elsewhere, and this was evidence of a continuing pattern of behavior which showed motive, plan, and knowledge. Lee v. State, 733 So. 2d 336, 1999 Miss. App. LEXIS 8 (Miss. Ct. App.), rev'd, 756 So. 2d 744, 1999 Miss. LEXIS 382 (Miss. 1999).

Testimony that the defendant killed the victim because "he didn't want to go back to the pen" was properly admitted into evidence to show motive - that the defendant killed the victim so that he could not be identified and be sent back to the penitentiary. Burns v. State, 729 So. 2d 203, 1998 Miss. LEXIS 567 (Miss. 1998), cert. denied, 527 U.S. 1041, 119 S. Ct. 2406, 144 L. Ed. 2d 804, 1999 U.S. LEXIS 4526 (U.S. 1999).

**Negating claim of accident or mistake.**

Where a defendant appealed his conviction and sentence for sexual battery and gratification of lust, his prior could be considered to show, among other things, the absence of mistake or accident. The trial judge complied with the requirements of the Derouen decision by filtering the Miss. R. Evid. 404(b) evidence through Miss. R. Evid. 403 and providing the jury with an appropriate limiting instruction. Cole v. State, 126 So. 3d 880, 2013 Miss. LEXIS 544 (Miss. 2013), cert. denied, 572 U.S. 1062, 134 S. Ct. 1901, 188 L. Ed. 2d 914, 2014 U.S. LEXIS 2878 (U.S. 2014).

Where the prosecuting attorney initially framed the prosecutor's motion to admit evidence of a prior conviction as being brought under Miss. R. Evid. 609, but the thrust of the prosecutor's argument was that the prior conviction was admissible under Miss. R. Evid. 404(b), specifically to negate a claim of accident or mistake, and the trial court admitted the evidence under Miss. R. Evid. 404(b), defendant's claim that defendant elected not to testify based on the chilling effect of the trial court's erroneous ruling was rejected, as nothing in the issues raised or argued on appeal significantly challenged the trial court's ruling as to the evidence's admissibility under Miss. R. Evid. 404(b); in all events, the ruling based on Miss. R. Evid. 404, even if erroneous, did nothing to improperly interfere with defendant's right to testify in defendant's own defense. Vince v. State, 844 So. 2d 510, 2003 Miss. App. LEXIS 383 (Miss. Ct. App. 2003).

**Other crimes.**

Detective's testimony of his investigation of a later robbery was given the prove a key fact, that the man shown in the videos was the perpetrator, and without victims testifying to this fact, the detective's assertion amounted to testimonial hearsay, and defendant's right to confront witnesses was violated; even if the evidence qualified as a Miss. R. Evid. 404(b)(2) exception, it failed to pass the balancing test, as defendant had not been charged with the later robbery and that testimony was not needed. Jones v. State, 287 So. 3d 995, 2019 Miss. App. LEXIS 617 (Miss. Ct. App. 2019).

Trial judge did not abuse the judge's discretion by admitting certified records of defendant's prior convictions and by overruling defendant's request for extensive redactions of the certified records because defendant would not stipulate that defendant was a prior convicted felon and the records were used to prove the charge against defendant of illegal possession of a firearm by a convicted felon. Page v. State, 269 So. 3d 440, 2018 Miss. App. LEXIS 305 (Miss. Ct. App. 2018), cert. dismissed, 2018 Miss. LEXIS 524 (Miss. Dec. 13, 2018).

Trial court did not err in finding that the prior conviction and a police officer's testimony were admissible to show defendant's intent and a common scheme or plan because defendant was eligible for enhanced sentencing as a subsequent drug offender, the trial court addressed the prior-conviction evidence, conducted the proper balancing test, and gave the jury a limiting instruction, the evidence of defendant's guilt was extensive, and the officer did not go into detail about her prior encounter with defendant, but simply stated that she knew him because she previously encountered him at the home where the transaction took place. Pritchett v. State, 201 So. 3d 1095, 2016 Miss. App. LEXIS 620 (Miss. Ct. App. 2016).

In a case convicting defendant of possession of controlled substance with intent to distribute and unlawful possession of a firearm as a convicted felon, because the possession and discovery of the other two firearms were so interrelated to the charged crime of possession with intent to distribute cocaine that the events constituted a single transaction or occurrence, the admission of the two other firearms discovered along with the other handgun at the time of defendant's arrest did not violate the other crimes evidence rule. Anderson v. State, 195 So. 3d 835, 2016 Miss. App. LEXIS 20 (Miss. Ct. App.), cert. denied, 209 So. 3d 433, 2016 Miss. LEXIS 301 (Miss. 2016).

Defendant was denied his constitutionally guaranteed right to effective assistance of counsel because defense counsel's failure to object to the expansive inquiry into defendant's prior convictions constituted ineffective assistance of counsel, the prejudicial effect of the admissions clearly outweighed any probative value in allowing them, defendant's right to a fair trial was compromised by defense counsel's withdrawal of a motion in limine regarding defendant's criminal history and failure to object to the State's extensive cross-examination regarding defendant's prior convictions, and the State's extensive cross-examination regarding defendant's numerous past felony convictions was clearly more prejudicial than probative in a case that largely turned on the respective credibility of defendant and the State's main witness. Taylor v. State, 167 So. 3d 1143, 2015 Miss. LEXIS 351 (Miss. 2015).

Trial court did not err by admitting evidence of defendant's past drug use under this rule where the record showed that it heard each side's arguments regarding the admissibility of the evidence and its possible prejudicial effect before making a decision, and that its implicit balancing test was sufficient. Jones v. State, 154 So. 3d 872, 2014 Miss. LEXIS 563 (Miss. 2014).

Because the circuit court used only defendant's prior convictions to enhance the penalty of his murder conviction, and because the circuit court did not engage in additional fact-finding with respect to the crime charged, defendant's enhanced sentencing failed to violate the holdings in Apprendi and Blakely. As a result, defendant's argument that his sentence as a habitual offender was unconstitutional was meritless. Collins v. State, 172 So. 3d 813, 2014 Miss. App. LEXIS 563 (Miss. Ct. App. 2014), rev'd, 172 So. 3d 724, 2015 Miss. LEXIS 435 (Miss. 2015).

Because it was defendant's attorney, not the State, that brought up the underlying reason for his arrest – that he allegedly possessed a stolen pistol – defendant could not argue that the gun evidence was improperly introduced. Grindle v. State, 134 So. 3d 330, 2013 Miss. App. LEXIS 535 (Miss. Ct. App. 2013), cert. denied, 133 So. 3d 818, 2014 Miss. LEXIS 163 (Miss. 2014).

Because an officer's testimony was not admitted to prove that defendant committed other crimes the day of the murder, or that he possessed a propensity toward criminal activity, but, rather, to tell the jury a complete story as to how defendant was taken into the State's custody, where he went after the murder, and his state of mind when he was arrested, the admission of the officer's testimony was not improper. Barber v. State, 143 So. 3d 586, 2013 Miss. App. LEXIS 701 (Miss. Ct. App. 2013), cert. denied, 139 So. 3d 74, 2014 Miss. LEXIS 350 (Miss. 2014).

Trial court did not abuse its discretion in denying defendant's motion for a mistrial after a State witness mentioned his prior imprisonment in violation of Miss. R. Evid. 404(b) because the State did not elicit the witness's statements about defendant being in the penitentiary to prove defendant's bad character; in briefly mentioning the penitentiary, the witness did not say what crime defendant had committed. Moore v. State, 105 So. 3d 390, 2012 Miss. App. LEXIS 506 (Miss. Ct. App. 2012), cert. denied, 109 So. 3d 567, 2013 Miss. LEXIS 101 (Miss. 2013).

Trial court abused its discretion by allowing evidence of defendant's possession convictions because the they occurred years before the events for which defendant was on trial, they were not necessary to inform the jury of the whole story alleged in the indictment, they did not satisfy the purposes listed in Miss. R. Evid. 404(b) and their admission prejudiced defendant. Mitchell v. State, 110 So. 3d 732, 2013 Miss. LEXIS 28 (Miss. 2013).

Inmate was not entitled to habeas relief on the ground that counsel was ineffective for failing to object to the use of evidence of other crimes the inmate committed because under Miss. R. Evid. 404(b), although evidence of other crimes or misdeeds was not admissible to prove the character of person in order to prove that the person acted in conformity with that character; such proof may be admissible for other purposes, such as to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Miss. R. Evid. 404(b). The State could not paint a rational picture of the events leading up to the shooting or show motive, the stolen drugs, or preparation, theft of the gun, without mentioning those acts, and defendant could not have put on proof of self-defense without mentioning those facts; therefore, counsel had no basis for raising an objection to use of that evidence, and as such his counsel was effective. Chandler v. Marshall County Corr. Ctr., 2010 U.S. Dist. LEXIS 96070 (N.D. Miss. Sept. 14, 2010).

Defendant's murder convictions were proper because testimony regarding his prior threats against one of the victim, his former girlfriend, and his previous arrest for domestic violence were properly admitted into evidence, Miss. R. Evid. 404(b). The evidence was relevant for the impeachment of a prior statement made by defendant, as well as relevant evidence of defendant's motive, intent, knowledge, and preparation. Madden v. State, 42 So. 3d 566, 2010 Miss. App. LEXIS 10 (Miss. Ct. App.), cert. dismissed, 49 So. 3d 106, 2010 Miss. LEXIS 460 (Miss. 2010).

Although defendant asked the court to apply the plain error doctrine, the court did not find that the State's line of questioning as to what prior convictions defendant had substantially affected his right to a fair trial when he openly admitted that he had a record of multiple convictions. Butler v. State, 16 So. 3d 751, 2009 Miss. App. LEXIS 485 (Miss. Ct. App. 2009).

When defendant introduced his record of prior convictions on his own initiative during direct examination, he effectively denied the trial court the opportunity to perform the appropriate balancing test under Miss. R. Evid. 609(a)(1)(B) and 403 so that it could determine whether the prior convictions constituted admissible evidence, plus when the State cross-examined defendant about his prior convictions, defense counsel failed to object; the trial judge did not abuse his discretion by allowing the State to question defendant about his prior convictions. Butler v. State, 16 So. 3d 751, 2009 Miss. App. LEXIS 485 (Miss. Ct. App. 2009).

Testimony by a narcotics agent and a confidential informant (CI) explained why petitioner state inmate was being investigated and how the state came to use the CI (one of her narcotics customers) against her; it was admissible under Miss. R. Evid. 403, 404(b), thus, counsel was not ineffective for objecting and habeas relief had been inappropriate. Brooks v. Kelly, 579 F.3d 521, 2009 U.S. App. LEXIS 18393 (5th Cir. Miss. 2009).

In defendant's trial on charges of felony possession of cocaine with the intent to sell, transfer, or deliver and possession of a firearm by a convicted felon, the trial court did not err in permitting the State to introduce evidence that a bag containing 6.7 grams of cocaine was retrieved from the backseat of defendant's car at the time of his arrest because the evidence painted a complete picture of the events surrounding defendant's arrest and was relevant to show defendant's motive, intent, and plan. Williams v. State, 20 So. 3d 722, 2009 Miss. App. LEXIS 375 (Miss. Ct. App. 2009), cert. denied, 27 So. 3d 404, 2010 Miss. LEXIS 86 (Miss. 2010).

In a prosecution for selling cocaine to an undercover informant, defendant's prior conviction for possessing cocaine within 1,500 feet of a school was admissible in accordance with Miss. R. Evid. 404(b) with respect to intent as well as Miss. R. Evid. 609 to impeach defendant's claim of a set-up and law enforcement conspiracy. The trial judge conducted a Peterson analysis and a Miss. R. Evid. 403 balancing test on the record. Young v. State, 13 So. 3d 339, 2009 Miss. App. LEXIS 129 (Miss. Ct. App. 2009).

In defendant's trial on charges of armed robbery, kidnapping, and possession of a firearm as a convicted felon, evidence that defendant was in a stolen vehicle when arrested was properly introduced to explain why he was arrested, how his picture came to be part of the photograph lineup, and how he ultimately was linked with the crimes charged. Furthermore, this evidence was essential to provide the jury with a complete story of the events that led to the identification of defendant as the person who perpetrated the crimes charged. Williams v. State, 991 So. 2d 593, 2008 Miss. LEXIS 399 (Miss. 2008).

When considering "other crime" evidence concerning drug activity and drugs being found in the possession of defendant, as well as the fact that the police were familiar with defendant because of past juvenile matters, the probative value of this relevant evidence was not substantially outweighed by danger of unfair prejudice, and thus the trial judge did not abuse her discretion in allowing it. Givens v. State, 967 So. 2d 1, 2007 Miss. LEXIS 494 (Miss. 2007).

Trial court did not abuse its discretion in admitting defendant's statement that he drove in the middle of the road because it was part of the story of the crime and it was so interrelated with the manslaughter charge against defendant, which arose from the victim's death from an automobile accident with defendant, that it constituted a closely related series of occurrences; however, even though it was error for the prosecution to elicit testimony from the officer that defendant had committed a crime by driving in the middle of the road, the trial court cured the error by advising the jury to disregard the testimony. Bell v. State, 963 So. 2d 1124, 2007 Miss. LEXIS 400 (Miss. 2007).

Defendant's conviction for murdering the victim by deliberate design was proper under Miss. R. Evid. 404(a) because, once defendant testified regarding her trait of peacefulness with others, she then opened the door for the prosecutor to question her regarding other instances in which she was either charged or convicted of crimes against others. Council v. State, 976 So. 2d 889, 2007 Miss. App. LEXIS 297 (Miss. Ct. App. 2007), cert. dismissed, 977 So. 2d 343, 2008 Miss. LEXIS 74 (Miss. 2008).

Sufficient evidence supported defendant's conviction for felony shoplifting under Miss. Code Ann. § 97-23-93 based on two prior misdemeanor shoplifting offenses because the trial court was not required to give a sua sponte instruction to buffer the alleged damage done by the presentation of the prior misdemeanor convictions, and Miss. R. Evid. 105 placed the burden on trial counsel to request a limiting instruction regarding Miss. R. Evid. 404(b)evidence. Biggs v. State, 942 So. 2d 185, 2006 Miss. App. LEXIS 1 (Miss. Ct. App.), cert. denied, 942 So. 2d 164, 2006 Miss. LEXIS 715 (Miss. 2006).

Defendant's argument that the trial court erred by not dismissing the indictment or granting a mistrial when it allowed the testimony of prior of defendant stealing a church air conditioner was procedurally barred because he did not object to the prosecutor's question on Miss. R. Evid. 404(b) grounds; the issue was without merit because defendant had already elicited from the officer evidence that defendant had been charged with theft of an air conditioner. Magee v. State, 966 So. 2d 173, 2007 Miss. App. LEXIS 120 (Miss. Ct. App.), cert. denied, 966 So. 2d 172, 2007 Miss. LEXIS 567 (Miss. 2007).

Trial judge did not abuse her discretion by admitting stolen car report, pursuant to Miss. R. Evid. 404(b), where defendant was on trial for rape and sexual battery committed in a car, and the car was an integral part of the events that took place, and the stolen car report was admitted to show opportunity for defendant, who did not own a car, to commit the crimes charged, and the jury was presented with evidence that showed that the stolen car report resulted from the relationship between Townsend and his girlfriend, and not a rampant crime spree. Townsend v. State, 933 So. 2d 986, 2005 Miss. App. LEXIS 1005 (Miss. Ct. App. 2005), cert. denied, 933 So. 2d 982, 2006 Miss. LEXIS 371 (Miss. 2006).

Where proof of other crimes or acts of a defendant is offered into evidence pursuant to Miss. R. Evid. 404(b), it is still subject to the requirement that its probative value substantially outweigh the danger of unfair prejudice under Miss. R. Evid. 403. Jones v. State, 913 So. 2d 436, 2005 Miss. App. LEXIS 304 (Miss. Ct. App. 2005).

Fair minded jurors could have accepted defendant's assertion that there was no common plan to commit a carjacking in Mississippi, and that he was merely a bystander. They also could have inferred from his actions of stealing a car earlier, on the same date, with his companions that did conduct the carjacking, that he was an active participant; thus, his admission to the earlier theft was admissible under Miss. R. Evid. 404(b), and the evidence was sufficient for the trial court to deny his motions for a directed verdict and for judgment notwithstanding the verdict. Washington v. State, 912 So. 2d 996, 2005 Miss. App. LEXIS 195 (Miss. Ct. App. 2005).

Defendant's conviction for burglary was affirmed; the admission of evidence that defendant had threatened an unidentified individual earlier in the day was proper under Miss. R. Evid. 404(b) as the evidence was an integral part of the telling of the complete story, and aided the jury in understanding the circumstances leading to the commission of the crime. Moore v. State, 921 So. 2d 381, 2005 Miss. App. LEXIS 662 (Miss. Ct. App. 2005), cert. denied, 926 So. 2d 922, 2006 Miss. LEXIS 166 (Miss. 2006).

Trial court did not abuse its discretion in admitting the evidence of prior convictions for domestic abuse and evidence of other prior because the evidence was not introduced to prove the character of defendant, but to show a continuing pattern of violence against the victim which resulted in her death, going towards defendant's motive and intent. Additionally, although the evidence of prior domestic abuse convictions and other was prejudicial, the trial court did not abuse its discretion in finding that the probative value of the evidence outweighed the possible prejudicial effect. Moses v. State, 893 So. 2d 258, 2004 Miss. App. LEXIS 1066 (Miss. Ct. App. 2004).

Trial court did not err in allowing the limited possession evidence into evidence at defendant's trial for charges of distribution of cocaine, as the trial court balanced the weight of the evidence under Miss. R. Evid. 403 and found that it was relevant to show the existence of a plan, and the jury was given a limiting instruction to minimize any prejudice to defendant. Nobles v. State, 879 So. 2d 1067, 2004 Miss. App. LEXIS 746 (Miss. Ct. App. 2004).

Where officers received a report of a robbery in a nearby state and were warned to be on the lookout (BOLO), and where they then pursued defendant who hit three police cars during the chase, in defendant's trial on counts of assaulting a police officer, even though defendant had not yet been convicted for robbery, the trial judge did not abuse his discretion in admitting the BOLO warning and the gun recovered from defendant into evidence, because those items were essential to the State's presentation of a complete and coherent story to the jury; further, the trial judge did not err in not giving, sua sponte, a limiting instruction. Conerly v. State, 879 So. 2d 1101, 2004 Miss. App. LEXIS 762 (Miss. Ct. App. 2004).

Defendant's counsel was not ineffective for failing to request a severance of the two charges against defendant as the acts could be tried together under Miss. Code Ann. § 99-7-2 as defendant sold the same drug to the same undercover officer within 72 hours, and the evidence of both crimes would have been able to have been used against defendant under Miss. R. Evid. 404(b) if the charges had been severed. . Watkins v. State, 874 So. 2d 486, 2004 Miss. App. LEXIS 485 (Miss. Ct. App. 2004).

In defendant's capital murder case, defendant's right to a fair trial was not violated by the trial court's admission of testimony about the sexual assault of the victim, which defendant was not charged with, that occurred in the moments preceding her murder, where sexual molestation was integrally so related to her murder that one could not coherently present the facts of her demise without reference to it, and the testimony described part of the res gestae of the crime charged and helped shed light on defendant's motive. McGowen v. State, 859 So. 2d 320, 2003 Miss. LEXIS 413 (Miss. 2003).

Reversal of defendant's capital murder conviction was required in a case where defendant was indicted separately for each of four murders, because cumulative evidence of photographs, autopsy diagrams, and testimony regarding the other individual victims was neither relevant nor necessary to the case being tried, and was highly prejudicial to defendant. Flowers v. State, 842 So. 2d 531, 2003 Miss. LEXIS 149 (Miss. 2003).

Cumulative evidence of photographs, the autopsy diagrams and the testimony regarding the other individual victims were neither relevant nor necessary to the case sub judice, and were, therefore, highly prejudicial to defendant. The State's pattern of continuously referring to the killing of the other three victims throughout the entire guilt phase denied defendant his fundamental right to a fair trial. Flowers v. State, 2003 Miss. LEXIS 67 (Miss. Feb. 20, 2003), op. withdrawn, sub. op., 842 So. 2d 531, 2003 Miss. LEXIS 149 (Miss. 2003).

In defendant's wire fraud case, defendant called an attorney as a witness, and questioned the attorney on direct examination, with nothing asked or answered that was alleged to have provided an opening for evidence about the Alabama indictment. Instead, it was answers during the prosecutor's cross-examination that purportedly created invitations for evidence about the foreign indictment; although admission of evidence of the Alabama indictment was error, it was cumulative to proper evidence from other witnesses, and did not prejudice defendant. McGee v. State, 853 So. 2d 125, 2003 Miss. App. LEXIS 159 (Miss. Ct. App.), cert. denied, 852 So. 2d 577, 2003 Miss. App. LEXIS 834 (Miss. Ct. App. 2003).

Defendant's filing of a false police report that the gun defendant allegedly used in the murder had been stolen before the murder occurred was not admissible as character evidence against defendant, but instead was admissible to show defendant's knowledge and lack of mistake or accident. Montana v. State, 822 So. 2d 954, 2002 Miss. LEXIS 220 (Miss. 2002).

Other crimes evidence regarding a conspiracy to kill another person for insurance proceeds in the same manner as the victim was killed clearly demonstrated that defendant could have acted according to a predetermined plan to kill the victim and the evidence was admissible under Miss. R. Evid. 404(b). Leedom v. State, 796 So. 2d 1010, 2001 Miss. LEXIS 241 (Miss. 2001).

The existence of other crime evidence showing that defendant had essentially the same plan and preparation to kill another person as the way the victim was killed tended to make more probable the possibility that she and co-conspirator were acting according to a predetermined plan or agreement to kill the victim than without such evidence, particularly in light of defendant's defense that co-conspirator was solely responsible for the fire that killed the victim. Leedom v. State, 796 So. 2d 1010, 2001 Miss. LEXIS 241 (Miss. 2001).

Testimony by a police officer that he had heard the defendant speak and had pulled him over on one occasion following the incident at issue did not constitute other crimes evidence as the officer did not mention his reason for pulling the defendant over. Washington v. State, 794 So. 2d 253, 2001 Miss. App. LEXIS 60 (Miss. Ct. App. 2001).

In a prosecution for murder, the prosecutor violated the rule where the state elected to indict the defendant separately for four murders and contested the defendant's motion to consolidate the four murder indictments into one trial, but then repeatedly and unnecessarily cited to the killing of the other three victims throughout the guilt phase proceedings. Flowers v. State, 773 So. 2d 309, 2000 Miss. LEXIS 266 (Miss. 2000).

In a prosecution for the sale of less than one ounce of marijuana, evidence that the defendant took the marijuana he sold to a state's witness from a large bag of marijuana did not constitute "other crimes" evidence; it was a component of the crime for which he was charged and eventually convicted. Westbrook v. State, 770 So. 2d 1038, 2000 Miss. App. LEXIS 500 (Miss. Ct. App. 2000).

In a prosecution for a single murder, the defendant was denied a fair trial where the prosecution engaged in a pattern of repeatedly and unnecessarily referring to the killing of three victims throughout the guilt phase proceedings. Flowers v. State, 2000 Miss. LEXIS 116 (Miss. May 11, 2000), op. withdrawn, sub. op., 773 So. 2d 309, 2000 Miss. LEXIS 266 (Miss. 2000).

The admission of defendant's prior felony conviction and the trial court's failure to instruct the jury sua sponte were reversible error in violation of M.R.E. 403 and 404 and the holding in Smith v. State, 656 So. 2d 95, 99 (Miss. 1995). Jasper v. State, 759 So. 2d 1136, 1999 Miss. LEXIS 377 (Miss. 1999).

In a murder prosecution, the state was properly permitted to introduce evidence pertaining to another murder since, without the information concerning the fact that the defendant had murdered both the victim and another, it would have been an incomplete and nonsensical story to the jurors; the evidence was necessary information to allow the jury to get a full and complete picture of the facts as they existed at the time of the crime, as the transactions in sequence were interrelated in time, place, and fact. Smothers v. State, 756 So. 2d 779, 1999 Miss. App. LEXIS 261 (Miss. Ct. App. 1999).

In a prosecution for a contract murder, it was not error for a witness to testify that the defendant instructed him and another person to kill an individual who saw them receive payment for their crime since such a request was a part of the entire transaction. Saunders v. State, 733 So. 2d 325, 1998 Miss. App. LEXIS 1115 (Miss. Ct. App. 1998).

Where defense counsel elicited testimony from the defendant that he had no prior convictions, the state was properly permitted to cross-examine the defendant with regard to a prior conviction for aggravated assault; although that prior conviction was not otherwise admissible, it was admissible to rebut the defendant's testimony. Booker v. State, 745 So. 2d 850, 1998 Miss. App. LEXIS 1055 (Miss. Ct. App. 1998).

In a prosecution for possession of a controlled substance with intent to distribute, evidence of an earlier conviction for the same offense was admissible to show intent. Bryant v. State, 746 So. 2d 853, 1998 Miss. App. LEXIS 1027 (Miss. Ct. App. 1998).

Testimony of a prior crime was properly admitted where it was introduced to show that the defendant had planned and intended to commit a similar crime to the one charged in the indictment. Haley v. State, 737 So. 2d 371, 1998 Miss. App. LEXIS 976 (Miss. Ct. App. 1998).

It was error for the court to permit a witness to testify regarding a statement made by the defendant on the day before the murder at issue to the effect that he was a "dangerous man" who loved money and would do anything for it since the statement was clearly character evidence and was not evidence of any specific crime, wrong, or act. Banks v. State, 725 So. 2d 711, 1997 Miss. LEXIS 702 (Miss. 1997).

Defendant's statement about being preoccupied with money was not evidence of any specific crime, wrong, or act, and trial court erred in permitting prosecutor's attempt to show statement was excepted from rule because it showed "state of mind." Banks v. State, 725 So. 2d 711, 1997 Miss. LEXIS 702 (Miss. 1997).

Where an assault on a third person was integrally related to time, place, and fact to the aggravated assault which the jury found the defendant to have committed on the victim, the assault on the third person was properly introduced into evidence, especially as such evidence tended to rebut the defendant's claim of self-defense. Edwards v. State, 723 So. 2d 1221, 1998 Miss. App. LEXIS 959 (Miss. Ct. App. 1998).

In a prosecution for murder, it was not error for the court to permit the introduction of evidence of a prior burglary in which the alleged murder weapon was stolen. Underwood v. State, 708 So. 2d 18, 1998 Miss. LEXIS 45 (Miss. 1998).

Trial court has a great deal of discretion in declining to make a blanket ruling in limine on admissibility of prior . Wilcher v. State, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

Subdivision (b) of this rule did not prohibit admission of evidence of alcoholic beverages, failing to yield to blue lights, resisting arrest and reckless driving to prove officer acted within his authority in arresting defendants, since testimony did not come in to show that defendants were acting in conformity with another episode; there was only one episode, the one in which defendants were stopped and ultimately arrested for possession of cocaine with intent to distribute. Jackson v. State, 689 So. 2d 760, 1997 Miss. LEXIS 39 (Miss. 1997), superseded, Monroe v. Monroe, 745 So. 2d 249, 1999 Miss. LEXIS 229 (Miss. 1999).

Trial court did not err in refusing to suppress statements relating to defendant's drug use on night of murders, where State sought to introduce evidence to show discrepancies which arose during defendant's interrogation, not to show his character or that he was acting in conformity therewith. Brown v. State, 690 So. 2d 276, 1996 Miss. LEXIS 681 (Miss. 1996), cert. denied, 522 U.S. 849, 118 S. Ct. 136, 139 L. Ed. 2d 85, 1997 U.S. LEXIS 5165 (U.S. 1997), rev'd, 2017 Miss. LEXIS 524 (Miss. Oct. 24, 2017).

Generally, evidence of crime other than that charged in indictment is not admissible against accused; however, where another crime or act is so interrelated to the charged crime as to constitute a single transaction or occurrence or a closely related series of transactions or occurrences, proof of the other crime or act is admissible. Townsend v. State, 681 So. 2d 497, 1996 Miss. LEXIS 414 (Miss. 1996).

Where other illegal substances were found at the same time, same place, same bag, as the illegal substance listed on indictment form, the other substances were interwoven or inseparable from the charged offense, and were therefore admissible. Townsend v. State, 681 So. 2d 497, 1996 Miss. LEXIS 414 (Miss. 1996).

Because defendant raised an entrapment defense, officer's testimony that he had prior information that defendant sold drugs was admissible to show predisposition, regardless of whether defendant was ultimately given an entrapment instruction; moreover, defense counsel could not complain of alleged "predisposition evidence" which he solicited from officer on cross-examination. Walls v. State, 672 So. 2d 1227, 1996 Miss. LEXIS 139 (Miss. 1996).

Evidence of the burning of murder victim's house was not offered to show defendant's character and that she acted in conformity therewith; rather, decision to return and burn victim's house was an integral part of the story surrounding victim's death, and the evidence was properly admitted as showing intent, plan, knowledge and identity. Ballenger v. State, 667 So. 2d 1242, 1995 Miss. LEXIS 451 (Miss. 1995), cert. denied, 518 U.S. 1025, 116 S. Ct. 2565, 135 L. Ed. 2d 1082, 1996 U.S. LEXIS 4177 (U.S. 1996).

Evidence that murder defendant had burglarized house on day preceding robbery and shooting at pawnshop was admissible, where it was not introduced in order to show bad character, but to prove identity and opportunity. Davis v. State, 660 So. 2d 1228, 1995 Miss. LEXIS 287 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785, 1996 U.S. LEXIS 3101 (U.S. 1996).

Evidence of prior involvement in the drug trade is admissible under subdivision (b) of this rule to prove intent to distribute. Holland v. State, 656 So. 2d 1192, 1995 Miss. LEXIS 261 (Miss. 1995).

Evidence of prior sales of drugs, offered to show intent to distribute, is properly admissible if trial court finds its probative value outweighs its prejudicial effect, and if evidence is accompanied by a proper limiting instruction. Smith v. State, 656 So. 2d 95, 1995 Miss. LEXIS 260 (Miss. 1995), overruled in part, Brown v. State, 890 So. 2d 901, 2004 Miss. LEXIS 1104 (Miss. 2004).

Evidence regarding murder defendant's earlier escape from jail was necessary to tell a rational and coherent story as to defendant's presence at a particular house and need to avoid discovery; it was relevant to show motive behind killing of individual who had been sent to check on house. Duplantis v. State, 644 So. 2d 1235, 1994 Miss. LEXIS 529 (Miss. 1994), cert. denied, 514 U.S. 1123, 115 S. Ct. 1990, 131 L. Ed. 2d 876, 1995 U.S. LEXIS 3453 (U.S. 1995).

Trial court did not err in admitting evidence of murder defendant's cocaine use, since evidence was introduced not in order to show bad character, but to help establish defendant's motive for committing the crime. Conner v. State, 632 So. 2d 1239, 1993 Miss. LEXIS 541 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276, 1994 U.S. LEXIS 7088 (U.S. 1994), overruled, Weatherspoon v. State, 732 So. 2d 158, 1999 Miss. LEXIS 4 (Miss. 1999).

Past criminal history, or drug use, of witness and her husband were not relevant, since witness and her husband were not on trial. Johnston v. State, 618 So. 2d 90, 1993 Miss. LEXIS 181 (Miss. 1993).

Evidence of sexual activity which took place in jail was integrally related to beating death of inmate, and was therefore properly submitted to jury at murder trial. Hurns v. State, 616 So. 2d 313, 1993 Miss. LEXIS 121 (Miss. 1993).

Court in action for fraud and negligence in connection with pre-sale residential termite inspection erred in failing to compel answer to interrogatory asking defendant to identify every person for whom it had performed a pre-sale termite inspection in the past five years, since evidence of similar occurrences was relevant and admissible to show absence of mistake or accident, and plan or intent. Dawkins v. Redd Pest Control Co., 607 So. 2d 1232, 1992 Miss. LEXIS 622 (Miss. 1992).

Admission in evidence of lack of inspection sticker and driver's license was error, but was harmless as it affected no substantial right of defendant; evidence was clear that accident was not the result of lack of driver's license or inspection sticker, but of defendant's driving while intoxicated. Hewlett v. State, 607 So. 2d 1097, 1992 Miss. LEXIS 451 (Miss. 1992).

Trial court erred in admitting testimony that defendant had requested a lift to an area near where murder victim was found, purportedly to pick up a package of marijuana which he had previously hidden there, since there was no basis to

State's contention that defendant wanted to revisit crime scene to determine whether it had been discovered; error was harmless, however, because other crimes evidence was attempted possession of marijuana, and since defendant was on trial for murder, any prejudicial effect would be minimal. Parker v. State, 606 So. 2d 1132, 1992 Miss. LEXIS 563 (Miss. 1992), overruled in part, Goff v. State, 14 So. 3d 625, 2009 Miss. LEXIS 273 (Miss. 2009).

Upon direct examination, defendant did nothing to "open the door" to State's use of prior drug conviction, prior drug arrest, and other concerning drug activity to impeach his credibility, and trial court committed reversible error in allowing State to elicit such testimony. Spraggins v. State, 606 So. 2d 592, 1992 Miss. LEXIS 480 (Miss. 1992).

Sheriff's testimony regarding defendant's arrest for driving an unlicensed vehicle was admissible to show identity and to link defendant to unlicensed car seen in vicinity of package store at time of murder. Willie v. State, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

Trial court in drug prosecution did not err in allowing district attorney to cross-examine defense witness as to whether he had ever been indicted for possession of cocaine, as this was admissible to show bias on part of witness. Bradley v. State, 562 So. 2d 1276, 1990 Miss. LEXIS 267 (Miss. 1990).

Statement of alleged child sexual abuse victim as to occasions, other than one for which defendant was being tried, in which defendant had exposed himself to children was not admissible under subdivision (b) of this rule. Mitchell v. State, 539 So. 2d 1366, 1989 Miss. LEXIS 141 (Miss. 1989), overruled in part, Derouen v. State, 994 So. 2d 748, 2008 Miss. LEXIS 587 (Miss. 2008).

Evidence of break-up between defendant and murder victim was properly admitted to show motive; however, evidence that defendant rammed his vehicle into car which victim was driving was improperly admitted, since it was improperly used to show that defendant acted in conformity with his prior alleged . Edlin v. State, 533 So. 2d 403, 1988 Miss. LEXIS 420 (Miss. 1988), cert. denied, 489 U.S. 1086, 109 S. Ct. 1547, 103 L. Ed. 2d 851, 1989 U.S. LEXIS 1410 (U.S. 1989).

Evidence concerning defendant's participation in forging of check was closely interrelated to crime of uttering charged in his indictment, and was therefore correctly admitted. Hartfield v. State, 532 So. 2d 1237, 1988 Miss. LEXIS 456 (Miss. 1988).

Trial court did not abuse its discretion in admitting testimony concerning defendant's prior attempts to kill her husband, where testimony was admitted as going to show defendant's intent to kill her husband. May v. State, 524 So. 2d 957, 1988 Miss. LEXIS 191 (Miss. 1988).

Court at murder trial did not err in allowing evidence of murder of victim's husband, where that crime preceded and directly led to murder charged in case at bar; husband's murder was interrelated and inseparable from that of his wife, such that her murder was part of the same transaction, and evidence of first murder clearly bore on defendant's motive for second. Lockett v. State, 517 So. 2d 1346, 1987 Miss. LEXIS 2823 (Miss. 1987), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895, 1988 U.S. LEXIS 2792 (U.S. 1988).

Evidence of defendant's murder of wife was so interrelated and interconnected in time to murder of husband as to constitute a single or interconnected transaction; furthermore, killing of wife was clearly motivated by defendant's desire to effect a successful escape from his murder of husband, and thus mention of her fate was relevant to establish an unlawful motive in killing of husband. Lockett v. State, 517 So. 2d 1317, 1987 Miss. LEXIS 2854 (Miss. 1987).

**Preservation for review.**

Landlords did not preserve an appellate objection to the admission of testimony and photographs based on Miss. R. Evid. 404 because the landlords' objections to this evidence were made for other reasons. Lang v. Beasley, 159 So. 3d 593, 2014 Miss. App. LEXIS 491 (Miss. Ct. App. 2014), cert. denied, 158 So. 3d 1153, 2015 Miss. LEXIS 143 (Miss. 2015).

Defendant did not object under the rule when the prosecution presented the evidence at issue, and thus the issue was procedurally barred. Wilson v. State, 149 So. 3d 544, 2014 Miss. App. LEXIS 354 (Miss. Ct. App. 2014).

Defendant's murder conviction was appropriate because his argument that he was prejudiced by information about his bad character under Miss. R. Evid. 404(a) was procedurally barred since he failed to object to information that the State elicited about his bad character, which was his statement that he wanted to kill the man who had killed his sister. Ross v. State, 22 So. 3d 400, 2009 Miss. App. LEXIS 861 (Miss. Ct. App. 2009).

Defendant failed to make any contemporaneous objects to prior bad act testimony at trial and thus he was procedurally barred from raising the issue on appeal; in any event, the court found no error because defendant opened the door to the evidence. Hodges v. State, 14 So. 3d 786, 2009 Miss. App. LEXIS 491 (Miss. Ct. App. 2009).

Defendant's failure to contemporaneously object to the admission of bad act evidence at trial, as required by Miss. R. Evid. 103, effectively waived the issue on appeal, and in light of governing case law, the court did not find that the State's attempted introduction of the evidence substantially affected defendant's right to a fair trial when defendant failed to object. Butler v. State, 16 So. 3d 751, 2009 Miss. App. LEXIS 485 (Miss. Ct. App. 2009).

Defendant's conviction for burglary of a dwelling was proper where he argued that evidence of his drug use was inadmissible under Miss. R. Evid. 404(b) or more prejudicial than probative under Miss. R. Evid. 403, but never objected to the admission of the evidence as required by Miss. R. Evid. 103. Therefore, the issue was not preserved for appellate review. Busick v. State, 906 So. 2d 846, 2005 Miss. App. LEXIS 57 (Miss. Ct. App. 2005), cert. denied, 2005 Miss. LEXIS 396 (Miss. June 23, 2005).

Appellate court did not review whether a Miss. R. Evid. 404(b) motion was properly denied because an objection to the admission of evidence regarding an undercover drug buy was not specific as to Rule 404(b); the objection dealt with a lack of personal knowledge only. Dixon v. State, 953 So. 2d 1117, 2006 Miss. App. LEXIS 434 (Miss. Ct. App. 2006), aff'd, 953 So. 2d 1108, 2007 Miss. LEXIS 210 (Miss. 2007).

Where defendant failed to object to the State's questioning regarding defendant's use of a stolen vehicle during a burglary, under Miss. R. Evid. 404(b), the issue was not preserved for appellate review. Cheeks v. State, 843 So. 2d 87, 2003 Miss. App. LEXIS 138 (Miss. Ct. App. 2003).

**Prior arrest.**

Prosecution did not violate the pre-trial ruling barring mention of defendant's prior arrests in authenticating the fingerprint card used to identify defendant's prints because unless the authenticity of the fingerprint card was stipulated to, there had to be information that there was a database and the composition of that database; the actions of the circuit court in allowing the evidence were consistent with Miss. R. Evid. 102. Williams v. State, 919 So. 2d 250, 2005 Miss. App. LEXIS 443 (Miss. Ct. App. 2005).

In a prosecution for murder, the court properly allowed the introduction of evidence that, 15 days before the murder, the defendant was charged with domestic violence and resisting arrest arising from an incident in which he threatened the victim with a knife in her apartment; the trial judge did not abuse his discretion by ruling that the prior conviction was "interconnected" with the charged crime and was, therefore, admissible where (1) a knife was involved in both crimes, (2) the defendant was alleged to have committed the murder within two hours of his release from prison on the domestic violence conviction, and (3) an allegation was made that he expressed his intention to seek revenge upon his victim while in prison. Stallworth v. State, 797 So. 2d 905, 2001 Miss. LEXIS 60 (Miss. 2001).

In the sentencing phase of a prosecution for murder, it was reversible error for the state to cross examine the defendant's mother regarding the defendant's arrest for rape which did not lead to a conviction since the mother did not testify that the defendant's character was good, that he had never raped anyone, that he had never been incarcerated, or that the prospect of a prolonged period of incarceration would change him for the better and, consequently, her direct examination testimony in no way opened the door to the state to ask such improper and prejudicial question. Edwards v. State, 737 So. 2d 275, 1999 Miss. LEXIS 80 (Miss. 1999).

**Prior assault.**

Reversible error resulted when the circuit court admitted into evidence four offense reports of defendant's prior without first determining whether the State offered all the evidence for a permissible purpose and without first scrutinizing the additional allegations contained within the reports for undue prejudice; since the circuit court admitted the entire contents of the offense reports without determining whether the additional details contained within met the criteria set forth in the Mississippi Rules of Evidence, the circuit court abused its discretion by admitting the evidence. Johnson v. State, 204 So. 3d 817, 2015 Miss. App. LEXIS 665 (Miss. Ct. App. 2015), rev'd, 204 So. 3d 763, 2016 Miss. LEXIS 487 (Miss. 2016).

Evidence of defendant's prior conviction for simple battery was erroneously admitted since: (1) it was not introduced to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but was introduced in part as character evidence; (2) insofar as the evidence was introduced to impeach defendant about whether he was a violent person, defendant's credibility in that regard was not a material issue; (3) it was impermissible for the State to first put defendant's character at issue; and (4) the prejudicial effect of the testimony far outweighed its probative value. Gilmore v. State, 119 So. 3d 278, 2013 Miss. LEXIS 361 (Miss. 2013).

In defendant's trial on a charge of aggravated assault for stabbing the woman with whom he lived, the trial court erred in permitting the prosecutor to inquire into the details of defendant's previous conviction for aggravated assault for shooting a woman. The error was not harmless because evidence of defendant's prior conviction for the same crime of aggravated assault was highly prejudicial and because it permitted the exact inference that Miss. R. Evid. 404(b) sought to prevent. Thomas v. State, 19 So. 3d 130, 2009 Miss. App. LEXIS 192 (Miss. Ct. App.), cert. denied, 19 So. 3d 82, 2009 Miss. LEXIS 485 (Miss. 2009).

In defendant's trial on a charge of aggravated assault for stabbing the woman with whom he lived, the trial court erred in permitting the prosecutor to inquire into the details of his previous conviction for aggravated assault for shooting a woman. Although the prosecutor argued that the evidence was admissible under Miss. R. Evid. 404(b) to show motive, opportunity, or intent because it was evidence that defendant liked to assault women, there was no proof that defendant's conviction for shooting another woman years earlier had any effect upon his motive, opportunity, or intent to stab his current victim. Thomas v. State, 19 So. 3d 130, 2009 Miss. App. LEXIS 192 (Miss. Ct. App.), cert. denied, 19 So. 3d 82, 2009 Miss. LEXIS 485 (Miss. 2009).

In defendant's aggravated assault case, a court properly allowed evidence of defendant's assault on the victim, which occurred the day before the charged incident, because his actions were relevant to his motive for tracking the victim down and assaulting her again the following day, they pertained to the continuing act of violence to the extent that defendant ultimately accomplished a series of interrelated criminal acts, and the evidence was not offered to show defendant's character, but was offered as part of the very actions for which he was indicted. In addition, the evidence of the prior incident was properly admitted as its probative value was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Jones v. State, 920 So. 2d 465, 2006 Miss. LEXIS 65 (Miss. 2006).

Defendant's conviction for aggravated domestic violence against his girlfriend was appropriate because defendant's statements in which he alluded to prior domestic violence were admissible under Miss. R. Evid. 404(b) to show the absence of an accident; additionally, the circuit court did not abuse its discretion when it found that the evidence was more probative then prejudicial. Fugate v. State, 951

So. 2d 604, 2007 Miss. App. LEXIS 145 (Miss. Ct. App. 2007).

In an aggravated assault case, a court erred by admitting evidence of defendant's prior aggravated assault conviction because the State's argument was that defendant did not act in self-defense in the current instance because his prior conviction for assault evidenced a lack of intent to act in self-defense. That line of logic represented precisely the sort of unfair prejudice prohibited by Miss. R. Evid. 404 and Miss. R. Evid. 609. Walker v. State, 2005 Miss. App. LEXIS 728 (Miss. Ct. App. Oct. 11, 2005), op. withdrawn, sub. op., 936 So. 2d 424, 2006 Miss. App. LEXIS 550 (Miss. Ct. App. 2006).

In his murder trial, defendant's defense was that he had accidentally shot his wife. Defendant's son's testimony regarding defendant and his wife's history of domestic violence contradicted defendant's defense by showing no accident and a common scheme of physical violence; as such, there was no error in admitting the son's testimony. Marbra v. State, 904 So. 2d 1169, 2004 Miss. App. LEXIS 1040 (Miss. Ct. App. 2004).

In a prosecution for aggravated assault arising from a shooting, in which the defendant alleged self-defense, it was error to permit the introduction of evidence of a prior shooting by the defendant as such evidence was inadmissible character evidence; a contrary result was not required by the fact that the defendant first introduced the evidence because the trial court denied a motion in limine to exclude the evidence and the defendant made a strategic decision to introduce the evidence himself based on his knowledge of that ruling. McCullough v. State, 750 So. 2d 1212, 1999 Miss. LEXIS 326 (Miss. 1999).

**Prior drug sales.**

Trial court did not abuse its discretion in admitting defendant's prior drug convictions into evidence to show defendant's intent to sell the marijuana found during a traffic stop in the rented car defendant was driving as it was within the trial court's discretion to find that the evidence of defendant's prior drug convictions was not overly prejudicial compared to its probative value. Moreover, the court gave the jury a limiting instruction stating that the jury could only use the evidence of the prior convictions to show the intent element. Johnson v. State, 252 So. 3d 50, 2018 Miss. App. LEXIS 143 (Miss. Ct. App. 2018).

Circuit court properly denied defendant's post-trial motions because a failed purchase attempt was not exculpatory where defendant had no pills to sell to a confidential informant (CI), not that he refused to sell her pills, the inference that the CI had previously purchased pills from defendant could have been reasonably drawn from the testimony, the jury was instructed to disregard counsels' statements during closing argument, the statements made by the State during closing did not seek to introduce evidence of other crimes, wrongs, or , and there was no indication of ineffective assistance of defendant's counsel in the record. Nitin Malik v. State, 249 So. 3d 416, 2017 Miss. App. LEXIS 668 (Miss. Ct. App. 2017), cert. denied, 247 So. 3d 1263, 2018 Miss. LEXIS 322 (Miss. 2018).

Defendant was not entitled to a mistrial when a witness who, when questioned by defendant about the identification, or misidentification, of defendant by the witness, stated that defendant was the person who gave the witness cocaine and that the witness recognized defendant because the witness had gotten cocaine from defendant in the past. The State of Mississippi did not elicit the improper statement, the testimony was more expansive than the question asked, and the trial judge instructed the jury to disregard the reference to prior . Straight v. State, 205 So. 3d 1089, 2016 Miss. App. LEXIS 763 (Miss. Ct. App. 2016).

In defendant's trial on a charge of possession of cocaine with intent to distribute, a circuit court properly found evidence of defendant's two prior convictions involving the transfer of a controlled substance was admissible, pursuant to Miss. R. Evid. 404, because the prior convictions were evidence of intent and the circuit court instructed the jury on the use of such evidence. Hosey v. State, 77 So. 3d 507, 2011 Miss. App. LEXIS 348 (Miss. Ct. App. 2011), cert. denied, 78 So. 3d 906, 2012 Miss. LEXIS 19 (Miss. 2012).

Where defendant was charged with drug offenses stemming from a transaction with a confidential informant, the informant was permitted to testify as to another transaction in which she owed twenty dollars to defendant for giving his sister crack cocaine. This testimony was not presented to prove that defendant was guilty of the crimes charged, but rather to tell the complete story of the underlying transactions to the crimes charged. Gray v. State, 921 So. 2d 393, 2006 Miss. App. LEXIS 81 (Miss. Ct. App. 2006).

Defendant's conviction for two counts of selling a controlled substance was affirmed as the trial court did not abuse its discretion by allowing an officer testify as to a prior drug sale as it went to motive and intent as required by Miss. R. Evid. 404(b), was accompanied by a limiting instruction and passed muster under Miss. R. Evid. 403. Pena v. State, 932 So. 2d 89, 2006 Miss. App. LEXIS 475 (Miss. Ct. App. 2006).

In defendant's case, evidence of his prior drug activity was admissible under Miss. R. Evid. 404(b) because defendant presented an entrapment defense, but the trial court erred in not conducting a Miss. R. Evid. 403 inquiry before admitting the convictions into evidence. However, the trial court's error was harmless because (1) the trial court gave a limiting instruction to the jury regarding the purpose for which those convictions could be considered, and specifically instructed the jury it could not consider the convictions in determining whether defendant was guilty of the crime for which he was on trial; and (2) overwhelming evidence of defendant's guilt was presented at trial. Tate v. State, 912 So. 2d 919, 2005 Miss. LEXIS 194 (Miss. 2005).

In light of defendant's testimony that he did not engage in marijuana commerce, the trial court did not abuse its discretion in ruling that defendant had opened the door for cross-examination on his drug-related activities. Moreover, defendant did not show prejudice or that a substantial right had been adversely affected by that ruling. Tate v. State, 912 So. 2d 919, 2005 Miss. LEXIS 194 (Miss. 2005).

Defendant's conviction for possession with intent to distribute marijuana was upheld, because the trial court did not err in admitting defendant's prior conviction for sale of cocaine as proof of an intent to distribute under Miss. R. Evid. 404(b), and the trial court correctly gave a limiting instruction in an effort to minimize any prejudice. Clarke v. State, 859 So. 2d 1021, 2003 Miss. App. LEXIS 841 (Miss. Ct. App. 2003).

Pursuant to Miss. R. Evid. 404(b), 403, the trial court did not err in admitting the passenger's testimony that the passenger had known defendant for a long time, that defendant regularly dealt drugs, that passenger knew defendant would sell the drugs that the trooper found in the truck, and that the passenger testified about prior drug sales. Smith v. State, 839 So. 2d 489, 2003 Miss. LEXIS 65 (Miss. 2003).

Previous involvement with drugs can be admitted on the issue of intent to distribute; thus, the trial court did not err in denying defendant's motion in limine regarding the exclusion of statements discussing prior and it properly instructed the jury as to the limits on its consideration of such acts. White v. State, 2002 Miss. LEXIS 311 (Miss. Oct. 24, 2002), op. withdrawn, sub. op., 2003 Miss. LEXIS 208 (Miss. Apr. 10, 2003), op. withdrawn, sub. op., 842 So. 2d 565, 2003 Miss. LEXIS 166 (Miss. 2003).

In a prosecution for possession of cocaine with intent to sell, evidence of a recent actual sale of cocaine by the defendant was properly admitted into evidence to show intent. Scruggs v. State, 756 So. 2d 817, 2000 Miss. App. LEXIS 38 (Miss. Ct. App. 2000).

In a prosecution for unlawful possession of cocaine with intent to distribute within 1500 feet of a church, the court properly permitted the introduction into evidence of a recent prior drug sale in order to show intent, motive. and knowledge. Swington v. State, 742 So. 2d 1106, 1999 Miss. LEXIS 204 (Miss. 1999).

**Prior drug use.**

It was not plain error to admit hearsay testimony on defendant's prior drug use because (1) defendant did not object and the trial court was not required to exclude the testimony sua sponte, (2) the testimony could have been admissible under

Miss. R. Evid. 404(b)(2) had defendant objected, and (3) defendant's counsel elicited the same testimony from defendant. Pinter v. State, 221 So. 3d 378, 2017 Miss. App. LEXIS 337 (Miss. Ct. App. 2017).

While on the stand in his own defense, defendant admitted to having been previously convicted of a drug offense and that he was on probation when the sale in question occurred; even though defendant admitted to a prior drug crime conviction, the lower court called for a limiting instruction and polled each member of the jury to make certain they would not consider this previous conviction in determining his guilt or innocence, so that any prejudice resulting from any of these statements, the most prejudicial of which was made by defendant himself, was cured upon the polling of the jury and the addition of a limiting instruction. Forrest v. State, 876 So. 2d 400, 2003 Miss. App. LEXIS 939 (Miss. Ct. App. 2003).

In a prosecution for possession of more than one ounce of marijuana with the intent to distribute, evidence of defendant's prior misdemeanor conviction for possession of marijuana and witnesses' accounts of his prior marijuana sales to them were properly admitted under Miss. R. Evid. 404 and 403 to show his intent to distribute, and the trial court gave a proper limiting instruction, albeit not the one defendant requested. White v. State, 842 So. 2d 565, 2003 Miss. LEXIS 166 (Miss. 2003).

It was reversible error for the court to allow the introduction into evidence that a urine sample obtained from the defendant the day after the shooting at issue tested positive for marijuana where the state did not use such evidence to attack the defendant's veracity. Ainsworth v. State, 756 So. 2d 826, 2000 Miss. App. LEXIS 33 (Miss. Ct. App. 2000).

In a prosecution for burglary, the state was properly permitted to introduce the defendant's confession in which he admitted to having smoked crack cocaine prior to the burglary and to having entered the building in search of money with which to purchase more crack cocaine since the statement that he had smoked crack shortly before breaking into the building was part of the entire transaction, and since the statement also established a motive for committing the crime. Fikes v. State, 749 So. 2d 1107, 1999 Miss. App. LEXIS 544 (Miss. Ct. App. 1999).

**Prior sexual offenses.**

Trial court properly admitted prior-bad-acts evidence because there was a very strong similarity between the prior acts as described by the witnesses and those described by the victim and defendant's remote in time argument lacked merit. Anderson v. State, 293 So. 3d 279, 2019 Miss. App. LEXIS 440 (Miss. Ct. App. 2019), cert. denied, 291 So. 3d 1112, 2020 Miss. LEXIS 133 (Miss. 2020).

During defendant's trial on charges of touching a child for lustful purposes, the trial court did not err by allowing a witness to testify that defendant had touched him inappropriately approximately 20 years earlier because the defense theory was to cast doubt on the victim's credibility, the witness's testimony tended to prove that the victim was not mistaken about his allegations and that defendant had a common plan to take advantage of his proximity to a young developing boy and gratify his lust by touching the victim's penis and buttocks. It was within the trial court's discretion to find that the witness's testimony was admissible for those purposes, and that its probative value outweighed its prejudicial effect. Blackwell v. State, 273 So. 3d 801, 2019 Miss. App. LEXIS 224 (Miss. Ct. App. 2019).

In an action for touching a child for lustful purposes, the trial court did not err in admitting evidence of defendant's prior abuse of his former stepdaughter because defendant's motives and opportunities were similar – he used a position of trust, while alone with his stepchildren, to sexually abuse them. McGrath v. State, 271 So. 3d 437, 2019 Miss. LEXIS 163 (Miss. 2019).

Circuit court did not abuse its discretion in admitting evidence relating to incidents with other children because the very occurrence of the prior incidents was disputed, and the victims were of tender years and had difficulty relating the incidents; thus the introduction of hearsay evidence relating to the other incidents was not unnecessary. Alford v. State, 238 So. 3d 11, 2018 Miss. App. LEXIS 51 (Miss. Ct. App. 2018).

It was error to deny defendant's motion in limine and trial objections regarding evidence of a highly prejudicial and minimally probative nine-year old uncharged statutory rape, and evidence of defendant making sexual advances on an adult woman was completely devoid of any relevance or probative value to defendant's charges of illegal sexual conduct with an underage female. Moreover, it was error to admit evidence relating to an indictment in another county because it was not necessary to tell a full story, nor was it integrally related in time, place, or fact. White v. State, 228 So. 3d 893, 2017 Miss. App. LEXIS 81 (Miss. Ct. App.), cert. denied, 229 So. 3d 118, 2017 Miss. LEXIS 389 (Miss. 2017).

Trial court did not err in admitting evidence concerning two prior convictions, as the trial judge explained in detail why she found the evidence probative and discussed the potential for prejudice, which she found ameliorated by cautionary instructions. Hubbard v. State, 176 So. 3d 1181, 2015 Miss. App. LEXIS 536 (Miss. Ct. App. 2015), cert. denied, 204 So. 3d 290, 2016 Miss. LEXIS 466 (Miss. 2016).

Although it appeared that defendant contended that the testimony of a former stepdaughter regarding his sexual abuse and rape of her after he had been already convicted of sexual battery was improperly admitted because he was never convicted of a crime for the subsequent abuse of the former stepdaughter, prior submitted under this rule did not require a conviction. Washington v. State, 184 So. 3d 977, 2015 Miss. App. LEXIS 434 (Miss. Ct. App. 2015), cert. denied, 202 So. 3d 1264, 2016 Miss. LEXIS 270 (Miss. 2016).

At trial for fondling and sexual battery, it was not error to allow a videotape of the child victim's interview to be admitted into evidence without redacting a portion in which the victim was asked whether he had any knowledge of defendant's committing similar offenses with other children, as the victim did not make a conclusive statement about any other incident. Hodgin v. State, 964 So. 2d 492, 2007 Miss. LEXIS 406 (Miss. 2007).

Admission of a towel allegedly stained with defendant's semen was improper in a statutory rape case because, although the evidence was admissible under Miss. R. Evid. 404(b), it was not authenticated or conclusively linked to defendant through biological testing. Walker v. State, 878 So. 2d 913, 2004 Miss. LEXIS 589 (Miss. 2004).

Defendant's conviction for sexual battery was appropriate because prior sexual acts of defendant were not excluded under Miss. R. Evid. 404(b) to show his lustful disposition towards the victim and the probability of his having committed the offense charged. Larson v. State, 957 So. 2d 1005, 2006 Miss. App. LEXIS 814 (Miss. Ct. App. 2006), cert. denied, 958 So. 2d 1232, 2007 Miss. LEXIS 318 (Miss. 2007).

During defendant's trial for the sexual battery of a seven-year-old girl, the trial court did not err in admitting alleged prior into evidence pursuant to Miss. R. Evid. 404(b); the were prior instances where defendant touched the victim in an inappropriate manner. McClure v. State, 941 So. 2d 896, 2006 Miss. App. LEXIS 818 (Miss. Ct. App. 2006).

In a trial for statutory rape, evidence that defendant had asked the victim to don a white t-shirt, and nothing else, on other occasions was inadmissible to prove defendant guilty of the charge; however, the trial court properly ruled that the evidence was more probative than prejudicial. Miley v. State, 935 So. 2d 998, 2006 Miss. LEXIS 410 (Miss. 2006).

There is a clear line of cases authorizing a trial court in the prosecution of a sexual offense to permit evidence of past sexual crimes of the accused; thus, it was not error to admit evidence of defendant's past sexual offenses. Therefore, there could be no claim of ineffective assistance of counsel premised on the failure of trial counsel to object. Barrett v. State, 886 So. 2d 22, 2004 Miss. App. LEXIS 484 (Miss. Ct. App.), cert. denied, 887 So. 2d 183, 2004 Miss. LEXIS 1371 (Miss. 2004).

Evidence of an accused's prior sexual crimes was allowed in the prosecution of a sexual offense where the trial court determined that such evidence was proper to show the lustful disposition of the defendant toward the prosecuting witness, and the probability of his having committed the offense charged. Henry v. State, 816 So. 2d 443, 2002 Miss. App. LEXIS 220 (Miss. Ct. App. 2002).

Trial court committed reversible error in defendant's trial for sexually abusing a young boy by allowing the testimony of a young girl who was allegedly previously sexually molested by defendant since the girl's testimony was inadmissible because evidence of a defendant's prior sexual misbehavior with other children may not be admitted to prove defendant's guilt. Earnest v. State, 805 So. 2d 599, 2002 Miss. App. LEXIS 2 (Miss. Ct. App. 2002).

It was not error to permit testimony of previous sexual offenses that took place over a period of several months prior to defendant's actually engaging in sexual intercourse with the victim, defendant's stepdaughter. Crawford v. State, 754 So. 2d 1211, 2000 Miss. LEXIS 8 (Miss. 2000).

**Prior similar convictions.**

Admission of defendant's prior convictions for armed robberies constituted reversible error at defendant's trial for armed robbery because the evidence did not have a sufficient connection to have probative value on the issue of identity, as the prior armed robberies were not so peculiar and distinctive to establish that defendant had committed a signature crime. Birkley v. State, 203 So. 3d 689, 2016 Miss. App. LEXIS 709 (Miss. Ct. App. 2016).

Trial court did not abuse its discretion in permitting a witness to testify about defendant's prior crimes because the evidence was admissible for a permissible purpose since it was relevant to the circumstances of the disclosure of the crime immediately after it happened; the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice because the testimony was relevant and probative, and any prejudice was limited by its limited nature and its limited use. Young v. State, 194 So. 3d 904, 2016 Miss. App. LEXIS 438 (Miss. Ct. App. 2016).

Defendant's conviction for burglary was inappropriate because the prosecutor impermissibly used defendant's prior conviction for attempted grand larceny as evidence of defendant's predisposition to steal to prove the element of intent of the indicted offense. Using the evidence for such a purpose ran afoul of the prohibition on the use of predisposition evidence found in Miss. R. Evid. 404(a). Robinson v. State, 42 So. 3d 598, 2010 Miss. App. LEXIS 86 (Miss. Ct. App. 2010).

In convictions including the possession of, and conspiracy to possess illegal amounts of pseudoephedrine intending to use them in an unlawful manner, evidence of defendant's prior drug-related conviction was not prejudicial under Miss. R. Evid. 403, but was properly admitted to show knowledge, intent, and motive under Miss. R. Evid. 404(b). Gales v. State, 29 So. 3d 65, 2009 Miss. App. LEXIS 629 (Miss. Ct. App. 2009).

Trial court did not err by admitting evidence of defendant's prior convictions under Miss. R. Evid. 404(b) during the State's closing argument because a sentencing order for his prior convictions was properly admitted. Barlow v. State, 8 So. 3d 196, 2008 Miss. App. LEXIS 471 (Miss. Ct. App. 2008), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 204 (Miss. 2009).

Defendant argued that the only reason he was at the victim's house was to obtain help after his vehicle broke down; however, defendant's prior convictions for burglary and attempted burglary tended to prove, along with other facts, that defendant's intent was to burglarize the house, not to obtain help. But, the underlying facts of the six prior convictions were irrelevant to the issue of intent, and the trial court would have erred if it had admitted such evidence; thus, under Miss. R. Evid. 403 and 404, the trial court did not err in admitting defendant's prior convictions to show intent and in not introducing the particulars of each prior conviction into evidence. Jones v. State, 904 So. 2d 149, 2005 Miss. LEXIS 221 (Miss. 2005).

Defendant's conviction for burglary was reversed, and the matter was remanded for a new trial; while evidence of defendant's other convictions of burglary and burglary-related crimes could be admissible to show his intent, simply allowing the circuit clerk to read the convictions was improper as the jury could rely on the evidence to determine that defendant should be convicted because he had a character trait or propensity to commit burglary. Jones v. State, 905 So. 2d 644, 2004 Miss. App. LEXIS 481 (Miss. Ct. App. 2004), rev'd, 904 So. 2d 149, 2005 Miss. LEXIS 221 (Miss. 2005).

Felony shoplifting is somewhat akin to felony driving under the influence (DUI) in that both rely on multiple prior convictions for the same offending conduct to raise the level of offense from a misdemeanor to a felony; thus, the trial court properly dealt with the problems arising under Miss. R. Evid. 404(b) by instructing the jury that it could not consider evidence of defendant's prior shoplifting convictions as evidence of defendant's guilt in the instant case. Bufkin v. State, 867 So. 2d 285, 2004 Miss. App. LEXIS 191 (Miss. Ct. App. 2004).

In a prosecution for unlawful possession of cocaine with intent to distribute within 1500 feet of a church, the court properly permitted the introduction into evidence of a prior conviction for unlawful sale of cocaine in order to show intent. Swington v. State, 742 So. 2d 1106, 1999 Miss. LEXIS 204 (Miss. 1999).

**Prior violence.**

Trial court did not err by admitting evidence of defendant's prior because the State introduced the evidence for noncharacter purposes to show motive, intent, and a common scheme or plan, as defendant's former paramour testified that once she rejected defendant, he became violent. A detective testified that the victim stated that she was filing for a divorce from defendant, as a result he became upset and violent with her. Taylor v. State, — So. 3d —, 2019 Miss. App. LEXIS 34 (Miss. Ct. App. Jan. 22, 2019).

Trial court did not abuse its discretion in allowing a witness to testify as to the 2009 domestic-violence incidents because the witness's testimony was probative as to defendant's state of mind, intent, and motive for the murder; and it was an integral part of the story not only to show state of mind, intent, and motive, but also to explain the witness's testimony that defendant was not supposed to be at the victim's house. Affleck v. State, 210 So. 3d 1067, 2015 Miss. App. LEXIS 675 (Miss. Ct. App. 2015), cert. denied, 203 So. 3d 598, 2016 Miss. LEXIS 388 (Miss. 2016), cert. denied, 2016 Miss. LEXIS 391 (Miss. Sept. 15, 2016), cert. denied, 580 U.S. 1128, 137 S. Ct. 1091, 197 L. Ed. 2d 201, 2017 U.S. LEXIS 1278 (U.S. 2017).

Trial court did not abuse its discretion by allowing a witness to testify at defendant's trial for domestic aggravated assault that the witness was a former paramour of defendant and that, a few months prior to the crime for which defendant was tried, the witness was the victim of an assault by defendant. The testimony was offered to prove the knowledge, intent, lack of mistake, plan, and motive of defendant in committing the assault for which defendant was tried. Hoskins v. State, 186 So. 3d 898, 2015 Miss. App. LEXIS 424 (Miss. Ct. App. 2015), cert. denied, 186 So. 3d 854, 2016 Miss. LEXIS 120 (Miss. 2016).

Evidence was admissible to show state of mind, plan, and motive, as defendant's past violence toward men was probative in this regard, and there was no violation of the rule, plus the probative value far outweighed any danger of unfair prejudice. Wilson v. State, 149 So. 3d 544, 2014 Miss. App. LEXIS 354 (Miss. Ct. App. 2014).

Trial court did not err in admitting three photographs depicting the prior abuse of the victim by defendant because the evidence was relevant to show motive, opportunity, intent, and absence of mistake; and the trial court found that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice to defendant, did not confuse the issues, and did not mislead the jury. Clark v. State, 122 So. 3d 129, 2013 Miss. App. LEXIS 533 (Miss. Ct. App. 2013).

Defendant's manslaughter conviction was proper because, assuming for the sake of discussion that a witness's testimony was not irrelevant, it would have been confusing and misleading to the jury; the jury would have been led to believe that because the victim was verbally aggressive with the witness approximately four years earlier, he was more likely to have been the initial aggressor for the current series of events, Miss. R. Evid. 404(a). Accordingly, the nonexistent probative value of the witness's testimony would have been outweighed by the massive prejudicial effect that would have stemmed from misleading the jury. Booker v. State, 64 So. 3d 988, 2010 Miss. App. LEXIS 329 (Miss. Ct. App. 2010), aff'd, 64 So. 3d 965, 2011 Miss. LEXIS 316 (Miss. 2011).

In a case in which defendant was convicted of capital murder and the defense had sought to exclude evidence that defendant had previously committed acts of violence against the victim's mother, the trial court did not abuse its discretion in allowing the testimony. The court allowed the prosecution to ask questions about defendant's prior conduct, and, in his trial testimony, defendant admitted that he had taken some aggression out on the mother, including hitting her. Logan v. State, 42 So. 3d 594, 2010 Miss. App. LEXIS 83 (Miss. Ct. App.), cert. denied, 49 So. 3d 106, 2010 Miss. LEXIS 458 (Miss. 2010).

Witness's juvenile court record was offered for general impeachment purposes, which was not permitted, and the record was not offered to show bias or interest in testifying and thus the trial court properly refused to allow the witness to be cross-examined thereby; the witness's prior instances of violence were inadmissible under Miss. R. Evid. 608(b) and the evidence was also inadmissible under Miss. R. Evid. 404(a), as it was offered to show that he was a violent person to create an inference that he acted in conformity with his propensity for violence. Williams v. State, 994 So. 2d 808, 2008 Miss. App. LEXIS 183 (Miss. Ct. App.), cert. denied, 998 So. 2d 1010, 2008 Miss. LEXIS 665 (Miss. 2008).

**Rebuttal of assertions of good character.**

State of Mississippi was permitted to impeach defense witnesses, who testified at a sentencing hearing as to defendant's good character, by asking if the witnesses were aware that defendant had pleaded guilty to a felony charge of credit-card fraud. Batiste v. State, 121 So. 3d 808, 2013 Miss. LEXIS 295 (Miss. 2013), cert. denied, 572 U.S. 1117, 134 S. Ct. 2287, 189 L. Ed. 2d 178, 2014 U.S. LEXIS 3424 (U.S. 2014).

Trial court did not abuse its discretion by allowing the state to introduce evidence of a conviction that was over 10 years old because defense counsel elicited testimony from defendant's sister indicating that defendant was a peaceable, law-abiding citizen; the prosecution was entitled to rebut the sister's testimony with evidence of defendant's 1980 conviction for possession of stolen property. Magee v. State, 966 So. 2d 173, 2007 Miss. App. LEXIS 120 (Miss. Ct. App.), cert. denied, 966 So. 2d 172, 2007 Miss. LEXIS 567 (Miss. 2007).

Defendant opened the door to questioning of defendant regarding the existence of a restraining order prohibiting defendant from having contact with a 15-year-old statutory rape victim by denying contact with the victim; trial court did not err in admitting evidence regarding the order and defendant's violations thereof despite having previously ruled such evidence inadmissible. Farrish v. State, 840 So. 2d 820, 2003 Miss. App. LEXIS 232 (Miss. Ct. App. 2003).

In a capital murder prosecution where child abuse was the predicate offense, the trial court did not prevent defendant from presenting a defense in ruling that defendant's eliciting of evidence of his good conduct with his children would allow the State to prove his nonpayment of child support. Kolberg v. State, 829 So. 2d 29, 2002 Miss. LEXIS 268 (Miss. 2002), cert. denied, 538 U.S. 981, 123 S. Ct. 1787, 155 L. Ed. 2d 672, 2003 U.S. LEXIS 3010 (U.S. 2003), overruled in part, Harrell v. State, 134 So. 3d 266, 2014 Miss. LEXIS 52 (Miss. 2014), overruled in part, Rowsey v. State, 188 So. 3d 486, 2015 Miss. LEXIS 573 (Miss. 2015).

By testifying that he was a decorated police officer and by stating that his character and integrity had never been questioned, the defendant placed his performance as a police officer in question; therefore, the state was properly permitted to cross examine the defendant with regard to suits against him for brutality. Morgan v. State, 741 So. 2d 246, 1999 Miss. LEXIS 256 (Miss. 1999).

**Recorded statement.**

Trial court did not abuse its discretion in admitting a recorded statement, even though defendant's motion in limine had been granted under Miss. R. Evid. 404(b), as defense counsel urged the recording's admission without first seeking to have the statement redacted, where she preferred that the recorded statement be played for the jury and characterized the statement as the best evidence of defendant's conversation with a police sergeant. Melton v. State, 118 So. 3d 605, 2012 Miss. App. LEXIS 618 (Miss. Ct. App. 2012), cert. denied, 117 So. 3d 330, 2013 Miss. LEXIS 375 (Miss. 2013).

**Remoteness.**

A three month time span was not so substantial as to defeat the argument that the defendant's motive for murdering the victim was to get back at her husband for firing him from his employment. Puckett v. State, 737 So. 2d 322, 1999 Miss. LEXIS 122 (Miss. 1999).

**Res gestae.**

Evidence that defendant assaulted a man who attempted to help the victim by offering to retrieve her cellphone was properly admitted because it showed the res gestae of defendant's criminal conduct. Turner v. State, 292 So. 3d 1006, 2020 Miss. App. LEXIS 84 (Miss. Ct. App. 2020).

**Series of transactions.**

In defendant's trial on charges of violating Miss. Code Ann. § 97-11-53, inducement to influence a public official, the trial court did not err in allowing a property owner to testify about prior bribe amounts accepted by defendant because the owner's statements about the prior payments to defendant were part of a videotaped conversation regarding the total price to be paid for the bribes at issue, which were given for defendant's aid in securing other city council members' approval of a hotel project. Under an exception to Miss. R. Evid. 404(b), proof of another crime was admissible where it was so interrelated with the crime at issue as to constitute a single transaction. Edmonson v. State, 906 So. 2d 73, 2004 Miss. App. LEXIS 1124 (Miss. Ct. App. 2004).

Defendant's confession to a contemporaneous burglary was properly admitted during a trial for armed robbery because it showed identity, and the two crimes were so interrelated that they were part of the same transaction or occurrence; exclusion under Miss. R. Evid. 403 was not required because the confession was highly probative. Weaver v. State, 852 So. 2d 82, 2003 Miss. App. LEXIS 541 (Miss. Ct. App. 2003).

In a prosecution for uttering a forgery where the defendant took a check belonging to the victim and cashed it at a store, references to other checks taken by the defendant at the same time were unavoidable, even by the defense, and were so closely related as to constitute a series of transactions. Dillard v. State, 811 So. 2d 389, 2001 Miss. App. LEXIS 63 (Miss. Ct. App. 2001).

**Sex offenses.**

In the sexual battery case of the seven-year-old victim, the evidence of the other acts of sexual abuse perpetrated by defendant against the victim was admissible to prove his lustful, lascivious disposition toward the victim; and, although the evidence was presented in a manner that left the jury with relatively little basis for distinguishing the substantive evidence of guilt from other acts evidence, the error was harmless as the victim was the only accuser in the case, and the jury clearly found her testimony that defendant abused her to be credible. McCammon v. State, 299 So. 3d 873, 2020 Miss. App. LEXIS 28 (Miss. Ct. App.), cert. denied, 299 So. 3d 794, 2020 Miss. LEXIS 297 (Miss. 2020).

Circuit court did not err by allowing the alleged minor victim to testify in defendant's trial for statutory rape that defendant repeatedly touched the victim's chest before their relationship turned sexual because defendant's touching the victim's chest before defendant began their sexual relationship was evidence of defendant's intent, plan, preparation, motive, and opportunity as to the crime in question. Day v. State, 285 So. 3d 171, 2019 Miss. App. LEXIS 559 (Miss. Ct. App. 2019).

Trial court did not err in admitting evidence of defendant's interactions with two others under Miss. R. Evid. 404(b), as the testimony demonstrating defendant behaved similarly with two others by using a cell phone application to change his phone number, disguising himself as a female, sending sexually explicit text messages, sending inappropriate pictures, and targeting high-school age boys, was introduced to show knowledge, preparation, motive, and absence of mistake. Strickland v. State, 220 So. 3d 1027, 2016 Miss. App. LEXIS 453 (Miss. Ct. App. 2016), cert. denied, 220 So. 3d 980, 2017 Miss. LEXIS 274 (Miss. 2017).

In a child pornography case, post-conviction relief was not warranted because evidence such as pictures and appellant's browsing history were admissible under this rule due to the fact that it showed that he did not download the pictures by accident. Renfrow v. State, 202 So. 3d 633, 2016 Miss. App. LEXIS 285 (Miss. Ct. App. 2016), cert. denied, 209 So. 3d 433, 2017 Miss. LEXIS 61 (Miss. 2017).

In defendant's trial on charges of molestation and enticement of a child for sexual purposes, the trial court did not abuse its discretion in allowing the testimony of defendant's two nephews, regarding sexual abuse defendant inflicted upon them for a limited purpose, Miss. R. Evid. 404(b), even though the allegations were remote in time and not identical to the current allegations, because the trial court applied the Miss. R. Evid. 403 filter and provided appropriate limiting instructions to the jury about the limited purpose for which it could use the prior-sexual-acts testimony; the State offered the nephews' testimony to show defendant's "pedophilic activity with young and developing males" and his use of intimidation to keep the victims silent. Westbrook v. State, 109 So. 3d 609, 2013 Miss. App. LEXIS 117 (Miss. Ct. App. 2013).

Evidence of a sexual offense, other than the one charged, which involves a victim other than the victim of the charged offense for which an accused is on trial, if properly admitted under Miss. R. Evid. 404(b), filtered through Miss. R. Evid. 403, and accompanied by an appropriately-drafted limiting or cautionary instruction to the jury, should not be considered a per se error. Derouen v. State, 994 So. 2d 748, 2008 Miss. LEXIS 587 (Miss. 2008).

At a trial for burglary of a dwelling and attempted rape, testimony that defendant was seen masturbating in a public place two to three hours before the incident in question was admissible because the evidence: (1) went to establish defendant's motive, state of mind, intent, and plan; and (2) was not unduly prejudicial in light of all the evidence produced at trial. Johnson v. State, 994 So. 2d 831, 2008 Miss. App. LEXIS 305 (Miss. Ct. App.), cert. denied, 998 So. 2d 1010, 2008 Miss. LEXIS 632 (Miss. 2008).

Changing of physical and legal custody of the parties' son from the mother to the father was proper under Miss. R. Evid. 404(b) because evidence that the mother's new husband had exposed himself to others in the past was relevant to demonstrate that subsequent indecent exposures were not inadvertent or accidental. C.A.M.F. v. J.B.M., 972 So. 2d 656, 2007 Miss. App. LEXIS 289 (Miss. Ct. App. 2007), cert. denied, 973 So. 2d 244, 2008 Miss. LEXIS 33 (Miss. 2008).

In defendant's trial for statutory rape, the circuit court did not violate Miss. R. Evid. 404 when when it admitted audiotapes and the victim's testimony regarding allegations of prior committed by defendant. The circuit judge admitted the audiotapes and testimony of the victim for the limited purpose of showing that defendant exhibited a lustful and lascivious disposition towards the victim. Fisackerly v. State, 880 So. 2d 368, 2004 Miss. App. LEXIS 809 (Miss. Ct. App. 2004).

In a case where defendant father and defendant adopted son were convicted of conspiracy to commit sexual battery, sexual battery, and contributing to the delinquency of a minor, because the abuse of the victim and the abuse of another child occurred at the same compound over the same period of time and all of the abuse allegedly involved defendant son, any error in allowing the second abuse victim to testify at the first victim's trial, Miss. R. Evid. 404(b), was harmless considering the overwhelming evidence of defendant son's guilt. King v. State, 857 So. 2d 702, 2003 Miss. LEXIS 450 (Miss. 2003).

In a case where defendant father and defendant adopted son were convicted of conspiracy to commit sexual battery, sexual battery, and contributing to the delinquency of a minor, despite defendant son's allegations to the contrary, the record clearly showed that the jury was properly instructed that the testimony of the second abuse victim and the correctional nurse was limited to determining the truth and veracity of defendant son's testimony and that the witnesses' testimony could not be used to arrive at a decision regarding the guilty testimony of defendant son for the charged crimes, Miss. R. Evid. 404(b). King v. State, 857 So. 2d 702, 2003 Miss. LEXIS 450 (Miss. 2003).

In a case where defendant father and defendant adopted son were convicted of conspiracy to commit sexual battery, sexual battery, and contributing to the delinquency of a minor, because defendant son testified that he had never engaged in any sexual act with defendant father, pursuant to Miss. R. Evid. 403 and 404(b), the testimony from a correctional nurse regarding a sexual act was probative and a proper subject for rebuttal. King v. State, 857 So. 2d 702, 2003 Miss. LEXIS 450 (Miss. 2003).

In a case where defendant father and defendant adopted son were convicted of conspiracy to commit sexual battery, sexual battery, and contributing to the delinquency of a minor, because the trial judge had previously heard argument, outside the presence of the jury, on the reliability of the child victim's statements, which described sexual contact with defendant father, and the victim had previously testified regarding the statement, although perhaps cumulative, allowing defendant father's other son to testify to the victim's statement was not erroneous under Miss. R. Evid. 803(25) and 801(d)(1)(B), especially since the son had solicited the statement from the victim, and defense attorneys had attacked the victim's credibility; thus, Miss. R. Evid. 404(b) was not violated. King v. State, 857 So. 2d 702, 2003 Miss. LEXIS 450 (Miss. 2003).

Trial court committed reversible error in admitting the testimony of the alleged child sexual abuse victim's grandmother that she had overheard defendant's son say to the alleged victim "[defendant] only does it to you and me" because the statement referred to the alleged molestation of a child other than the alleged victim. Earnest v. State, 805 So. 2d 599, 2002 Miss. App. LEXIS 2 (Miss. Ct. App. 2002).

In a prosecution for capital rape arising from an ongoing sexual relationship between the 37 year old defendant and a 13 year old friend of his daughter, evidence of acts engaged in by the defendant and the victim prior to the crime at issue were properly admitted into evidence in corroboration of the offense charged, to show the intimate relation between the parties, the lustful disposition of defendant toward the victim, and the probability of his having committed the offense charged. Tompkins v. State, 759 So. 2d 471, 2000 Miss. App. LEXIS 117 (Miss. Ct. App. 2000).

In a prosecution for a sex offense, evidence is generally admissible which shows or tends to show prior offenses of the same kind committed by the defendant with the prosecuting witness. Barbetta v. State, 738 So. 2d 258, 1999 Miss. App. LEXIS 27 (Miss. Ct. App. 1999).

In a prosecution for sexual battery and touching a child for lustful purpose, it was reversible error for the court to permit the introduction of evidence of improper conduct by the defendant with other girls; such evidence was extremely prejudicial, and the defendant did not open the door to such evidence. Lambert v. State, 724 So. 2d 392, 1998 Miss. LEXIS 592 (Miss. 1998), overruled in part, Derouen v. State, 994 So. 2d 748, 2008 Miss. LEXIS 587 (Miss. 2008).

**Subsequent conduct.**

Evidence that defendant filed a false police report, reporting a gun stolen, was admissible in murder trial as relevant to show knowledge and absence of mistake or accident. Montana v. State, 2002 Miss. LEXIS 172 (Miss. May 9, 2002), op. withdrawn, sub. op., 822 So. 2d 954, 2002 Miss. LEXIS 220 (Miss. 2002).

In a prosecution for armed robbery, it was not error for the court to allow the introduction of evidence pertaining to the defendant's attempted armed robbery of the victim's two companions, which occurred immediately after the robbery of the victim, since the testimony concerning the attempted robbery tended to establish evidence of a greater likelihood of correct identification of the suspect by the three witnesses and the possible prejudicial effect of such testimony was nullified by the fact that testimony to each crime came from the same mouth. King v. State, 772 So. 2d 1076, 2000 Miss. App. LEXIS 517 (Miss. Ct. App. 2000).

The trial court erred by allowing the prosecution to introduce evidence that the defendant used the money taken from his murder victim to purchase crack cocaine after the robbery and murder. Watts v. State, 717 So. 2d 314, 1998 Miss. LEXIS 346 (Miss. 1998).

The introduction into evidence of a subsequent assault committed by the defendant in a murder prosecution was proper since the evidence was not introduced to show that the defendant acted in conformity with his subsequent behavior and was, instead, introduced to show how the victim of the assault was able to identify a knife and a revolver and to show that he was in possession of those weapons shortly after the murder. Smith v. State, 724 So. 2d 280, 1998 Miss. LEXIS 589 (Miss. 1998).

**Videotapes.**

There was no abuse of discretion by admitting into evidence a video of the victim sleeping recorded on defendant's phone because the trial court heard testimony from both parties regarding the validity and veracity of the cell phone video recording and found that the video was more probative than prejudicial; defendant failed to show how the admission of the video adversely affected a substantial right. Marion v. State, 281 So. 3d 174, 2019 Miss. App. LEXIS 91 (Miss. Ct. App. 2019).

Trial court did not err under Miss. R. Evid. 404(b) in admitting a portion of a surveillance videotape that showed defendant passing a bag to an undercover agent, who examined it and passed it to a confidential informant, because even if the video did show evidence of a crime, such as an attempted sale, it was part of the same transaction as the subsequent drug sales. Watson v. State, 19 So. 3d 747, 2008 Miss. App. LEXIS 692 (Miss. Ct. App. 2008), cert. denied, 19 So. 3d 82, 2009 Miss. LEXIS 503 (Miss. 2009), cert. denied, 559 U.S. 981, 130 S. Ct. 1708, 176 L. Ed. 2d 195, 2010 U.S. LEXIS 2141 (U.S. 2010).

Where a casino had a customer arrested for disorderly conduct, and there was no videotape evidence, the court ruled that when good character and reputation are in issue, such as in a false imprisonment case, or in cases involving malicious prosecution, character evidence is admissible. Alpha Gulf Coast, Inc. v. Jackson, 801 So. 2d 709, 2001 Miss. LEXIS 319 (Miss. 2001).

In a case where defendant was convicted of fondling the 15-year-old victim, a trial judge was acutely aware of the potentially prejudicial character of a videotape found in defendant's home depicting a young male engaged in a sexually explicit act and was careful to admit the tape only to rebut the claim of accident pursuant to Miss. R. Evid. 404(b); where the trial judge allowed no questioning about the age of the young male in the video, did not allow the state to mention the related charges against defendant for possession of the videotape, and gave a limiting instruction to the jury on the use of the evidence, the trial judge on balance acted prudently and within his discretion in admitting the videotape to refute defendant's claim that if he touched the victim he did so accidentally. Mingo v. State, 944 So. 2d 18, 2006 Miss. LEXIS 679 (Miss. 2006).

In a prosecution for sale of a controlled substance, a videotape of a subsequent apparent drug transaction between the defendant and a police officer was properly introduced where there was no audio to the videotape, the videotape was not described as depicting a drug transaction, and the police officer testified that he used the videotape along with photographs to identify the defendant. Lard v. State, 749 So. 2d 276, 1999 Miss. App. LEXIS 563 (Miss. Ct. App. 1999).

**Illustrative cases.**

Because defendant failed to establish the victim as the initial aggressor, evidence of a prior incident in which the victim stalked defendant outside of his home was irrelevant and properly excluded. Turner v. State, 292 So. 3d 1006, 2020 Miss. App. LEXIS 84 (Miss. Ct. App. 2020).

Trial court did not abuse its discretion in overruling defendant's motion for a mistrial because the natural and probable effect of the prosecutor's comments during closing argument about his involvement in other crimes did not create an unjust prejudice that influenced the jury's decision to convict, and the evidence for his conviction was overwhelming; the prosecutor did not mention any specific prior crimes or victims, and defendant had actually been found guilty of his prior crimes. Gales v. State, 299 So. 3d 861, 2020 Miss. App. LEXIS 19 (Miss. Ct. App.), cert. denied, 300 So. 3d 43, 2020 Miss. LEXIS 314 (Miss. 2020).

Trial court did not err by admitting evidence of the victim's threats to defendant because it was relevant to show defendant's motive and intent to kill the victim, as by defendant's own admission, during the altercation the victim threatened to report defendant to her employer. The testimony also tended to show who was the aggressor in the shooting. Byrd v. State, 294 So. 3d 86, 2019 Miss. App. LEXIS 269 (Miss. Ct. App. 2019).

Trial court did not abuse its discretion by admitting evidence of defendant's other because the purposes of the witnesses' testimony was to show defendant's plan or scheme, as he saw young girls, tried to talk to them, and went after them through a window. The testimony was also probative as to the identity of the victim's assailant. Sullivan v. State, 281 So. 3d 1146, 2019 Miss. App. LEXIS 267 (Miss. Ct. App. 2019).

Trial court committed reversible error by admitting into evidence an undated, grainy Facebook image taken of the defendant holding what appeared to be a handgun, years before the alleged crime, through the testimony of a witness who denied ever having seen defendant's Facebook page or the photograph in question. Coleman v. State, 269 So. 3d 88, 2018 Miss. LEXIS 430 (Miss. 2018).

Circuit court did not abuse its discretion, at defendant's trial for sexual battery and gratification of lust, by admitting testimony by a witness other than the alleged minor victim that defendant also sexually abused the witness when the witness was a child because the evidence's probative value outweighed its prejudice. The circuit court also provided the jury an appropriate limiting instruction about the limited purpose for which it could consider the prior-bad-acts evidence. Shoemaker v. State, 256 So. 3d 604, 2018 Miss. App. LEXIS 105 (Miss. Ct. App.), cert. denied, 256 So. 3d 593, 2018 Miss. LEXIS 449 (Miss. 2018).

State of Mississippi was allowed to present defendant's written statement, in which defendant admitted robbing a restaurant and committing an armed carjacking of someone driving a maroon Impala on the same evening within a short time of the charged offense of robbing a restaurant, to show defendant's plan and motive in committing a string of armed robberies and to prove defendant's identity. The evidence's probative value was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Horton v. State, 253 So. 3d 334, 2018 Miss. App. LEXIS 42 (Miss. Ct. App.), cert. denied, 252 So. 3d 595, 2018 Miss. LEXIS 390 (Miss. 2018).

Trial court did not err by denying defendant's motion in limine to preclude evidence of other acts, crimes or wrongs because the conversation between defendant and a confidential informant was part of a series of occurrences that culminated in defendant's arrest, the statements at issue were part of the entire conversation between the two, and were connected with the crime and included within the same transaction as the drug sale. Sarrett v. State, 250 So. 3d 477, 2017 Miss. App. LEXIS 682 (Miss. Ct. App. 2017).

In a case in which a jury convicted defendant of the capital murder of a sheriff, the trial court did not abuse its discretion in admitting evidence of defendant's prior . Such evidence demonstrated defendant's motive to flee from law enforcement. Williams v. State, 234 So. 3d 1278, 2017 Miss. LEXIS 388 (Miss. 2017).

Trial court did not err in admitting allegations of prior , as the prior were sufficiently similar to the current charges to be admissible, in that the inappropriate contact occurred between defendant and underage students while the students were in high school where defendant was a faculty member and some of the conduct occurred on school property. Roberson v. State, 287 So. 3d 219, 2017 Miss. App. LEXIS 526 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 67, 2018 Miss. LEXIS 239 (Miss. 2018).

Use of defendant's prior convictions to enhance defendant's sentence did not violate Miss. R. Evid. 404(b). Defendant's prior convictions were admitted only as a basis for enhancing his sentence, which is "another purpose" not prohibited by rule 404(b). Collins v. State, 232 So. 3d 739, 2017 Miss. App. LEXIS 297 (Miss. Ct. App. 2017), cert. denied, 2017 Miss. LEXIS 525 (Miss. Oct. 20, 2017), cert. denied, 229 So. 3d 123, 2017 Miss. LEXIS 493 (Miss. 2017).

In a case in which a jury found defendant guilty of aggravated domestic violence, the trial court properly admitted evidence of defendant's prior . The trial court found that all four prior offenses were very serious and akin to what happened in this case and therefore probative. Johnson v. State, 204 So. 3d 763, 2016 Miss. LEXIS 487 (Miss. 2016).

State appeared to be trying to show that the history of could not be attributed to a history of mental disorders, because there was none, thereby undermining the defense witness's opinion that defendant was delusional; the questioning on was not to imply guilt for the current crime, and the record did not support defendant's claim of ineffective assistance of counsel. Collins v. State, 221 So. 3d 366, 2016 Miss. App. LEXIS 710 (Miss. Ct. App. 2016), cert. denied, 220 So. 3d 975, 2017 Miss. LEXIS 258 (Miss. 2017).

Trial court properly allowed evidence of defendant's prior disciplinary violations and the prosecutor's closing arguments because defendant's direct examination opened the door to cross-examination about his prior disciplinary violations where they were relevant and probative with respect to his claim that he acted in self-defense and out of fear, and any "unfair prejudice" was minimal, even assuming that the trial judge erred by not offering a limiting instruction, the error was harmless and did not deprive defendant of a fair trial, the prosecutor's comments during closing were within the bounds of legitimate argument and in response to defense counsel's arguments, and defendant failed to show that his counsel was ineffective. Curry v. State, 202 So. 3d 294, 2016 Miss. App. LEXIS 635 (Miss. Ct. App. 2016).

Trial court properly convicted and sentenced defendant for gratification of lust against his minor female cousin (the victim) because the substantial similarities between the victim's allegations and defendant's inappropriate conduct with two other minors clearly showed that their testimony was admissible to prove defendant's use his position of trust to take advantage of young girls, motive, intent, knowledge, and absence of mistake or accident, the probative value of that evidence was not substantially outweighed by the danger of unfair prejudice, and the jury was properly instructed that it could consider the testimony only for specific purposes. Boggs v. State, 188 So. 3d 515, 2016 Miss. LEXIS 147 (Miss. 2016).

Trial court did not abuse its discretion in allowing defendant's two stepdaughters to testify at defendant's trial for the molestation of defendant's granddaughter that defendant molested them when they were children because the evidence of similar acts under similar circumstances was admissible to show motive, opportunity, intent, knowledge, and absence of mistake, and an appropriate limiting instruction concerning their testimonies was given. Harris v. State, 165 So. 3d 473, 2015 Miss. App. LEXIS 162 (Miss. Ct. App. 2015).

Testimony of an ex-girlfriend's mother that defendant called her and stated that he had nothing to lose and was coming to teach her daughter a lesson for breaking up with him, and that indicated defendant had nothing to live for was admissible because it was necessary to prove defendant's state of mind, and its probative value in establishing the crime was not substantially outweighed by the danger of unfair prejudice. Moss v. State, 190 So. 3d 9, 2015 Miss. App. LEXIS 645 (Miss. Ct. App. 2015).

Murder victim's discussions with a family member and a close friend on the eve and morning of the victim's death regarding the victim's intent to stop financing defendant, who was the victim's stepgrandchild, were relevant for the jury to review and were admissible as they did not go to defendant's character. Jones v. State, 179 So. 3d 1193, 2015 Miss. App. LEXIS 343 (Miss. Ct. App. 2015), cert. denied, 181 So. 3d 1010, 2016 Miss. LEXIS 14 (Miss. 2016).

Although defendant argued that his trial counsel was ineffective because he failed to obtain a ruling on his pretrial motion in limine to exclude evidence pursuant to Miss. R. Evid. 404(b) and to prohibit witness statements and a written narrative by a deputy from being shown to the jury, defendant did not cite, and the appellate court did not find, any instance in which such evidence was admitted or the witness statements or narrative were shown to the jury. Accordingly, the issue was without merit. Johnson v. State, 191 So. 3d 732, 2015 Miss. App. LEXIS 469 (Miss. Ct. App. 2015), cert. denied, 202 So. 3d 209, 2016 Miss. LEXIS 219 (Miss. 2016), cert. denied, 580 U.S. 1071, 137 S. Ct. 670, 196 L. Ed. 2d 556, 2017 U.S. LEXIS 81 (U.S. 2017).

Trial court's ruling excluding the murder victim's toxicology report, which showed drugs and alcohol in the victim's system at the time of the victim's death, was not an abuse of discretion because evidence of the victim's intoxication was irrelevant as defendant did not claim that defendant killed the victim in self-defense, but that defendant did not kill the victim - that the victim's death was an accident or suicide. Kuebler v. State, 205 So. 3d 623, 2015 Miss. App. LEXIS 461 (Miss. Ct. App. 2015), rev'd, 204 So. 3d 1220, 2016 Miss. LEXIS 462 (Miss. 2016).

Trial court did not abuse its discretion by allowing a police officer's testimony and a photograph of some white powder on a tray, a razor blade, and a rolled up bill of money found in defendant's apartment because there was no testimony that the powder belonged to defendant, or that defendant used it that night. Moreover, the court did not abuse its discretion by allowing police officers to testify about defendant's belligerence, including defendant's use of racial slurs, outside of defendant's apartment, and kicking out the window of a patrol car when questioned by the police. Kuebler v. State, 205 So. 3d 623, 2015 Miss. App. LEXIS 461 (Miss. Ct. App. 2015), rev'd, 204 So. 3d 1220, 2016 Miss. LEXIS 462 (Miss. 2016).

Trial court did not err in allowing the State to mention defendant's prior DUI's during an officer's testimony because the State's questions were crafted to get to the reason why defendant refused to take the field sobriety and breathalyzer test, which was relevant and admissible; the evidence was admitted to show knowledge and intent because the State mentioned defendant's prior experience with field sobriety and breathalyzer tests to prove he knew he was intoxicated and would fail the tests. Snyder v. State, 174 So. 3d 331, 2015 Miss. App. LEXIS 457 (Miss. Ct. App. 2015).

Defendant's convictions for murder, aggravated assault, and felon in possession of a firearm were proper because there was no error in the exclusion of evidence concerning defendant's blood-alcohol content. The toxicology results were cumulative to the witness testimony establishing that the victim had been drinking that evening and went to the store to get more beer and no evidence presented at trial reflected that the victim possessed a propensity for violence when drinking, or that defendant was aware of any propensity for violence by the victim. Anderson v. State, 185 So. 3d 1015, 2014 Miss. App. LEXIS 597 (Miss. Ct. App. 2014), aff'd, 185 So. 3d 966, 2015 Miss. LEXIS 567 (Miss. 2015).

It was not error to admit evidence that defendant offered an officer money not to pursue drug charges against defendant because (1) the evidence was limited to defendant's voluntary statements to the officer, without discussion or elaboration, including whether defendant was charged with and convicted of bribery, (2) the testimony was not used to show defendant acted in conformity with defendant's character, and (3) the testimony was probative of defendant's knowledge or consciousness of factual guilt. Beal v. State, 134 So. 3d 383, 2014 Miss. App. LEXIS 125 (Miss. Ct. App. 2014).

Trial court did not abuse its discretion when it allowed the victim to testify that she was certain that defendant had touched her inappropriately approximately one year before the event that led to defendant's conviction for touching a child for lustful purposes, because the victim testified that she was certain about what had happened and defendant's attorney's cross examination created a question of fact for the jury to resolve. Gerhold v. State, 127 So. 3d 1116, 2013 Miss. App. LEXIS 241 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 17 (Miss. 2014).

In a prosecution for gratification of lust involving two minors, testimony establishing defendant's pattern of molesting prepubescent girls while they were sleeping was properly admitted because it was relevant to issues of motive, pattern or practice, and absence of mistake, and the trial court found its probative value outweighed its prejudicial effect. O'Connor v. State, 120 So. 3d 390, 2013 Miss. LEXIS 353 (Miss. 2013).

Where trial counsel stipulated that defendant was a convicted felon, but did not object to the introduction of defendant's three prior convictions in violation of Miss. R. Evid. 403 and Rule 404(b), the trial court committed plain error in admitting the evidence; therefore, defendant was entitled to a new trial. Herrington v. State, 102 So. 3d 1241, 2012 Miss. App. LEXIS 791 (Miss. Ct. App. 2012).

Circuit court did not err in admitting into evidence a farmer's practices prior to his first termination because the farmer presented evidence regarding his relationship with a corporation prior to his first termination; because the farmer introduced evidence of his business relations with the corporation that occurred before his first termination, he could not complain that the corporation introduced its own evidence from the same time period. Harrison v. Walker, 91 So. 3d 41, 2011 Miss. App. LEXIS 395 (Miss. Ct. App. 2011), cert. denied, 95 So. 3d 654, 2012 Miss. LEXIS 333 (Miss. 2012).

Circuit court's admission of a farmer's practices prior to his first termination by a corporation did not violate Miss. R. Evid. 404 because evidence of the farmer's poor performance was relevant to the corporation's defense of the farmer's claim that it had entered into the contract with him for the sole purpose of convincing him to refinance his defaulted loan with another lender and wipe the loan from its books; the farmer failed to show that evidence of his prior performance had to be excluded under Miss. R. Evid. 403. Harrison v. Walker, 91 So. 3d 41, 2011 Miss. App. LEXIS 395 (Miss. Ct. App. 2011), cert. denied, 95 So. 3d 654, 2012 Miss. LEXIS 333 (Miss. 2012).

Trial court did not prevent defendant from presenting his theory of defendant – that during defendant's suicide attempt, the victim tried to wrestle defendant's gun away from him, leading to the accidental discharge that killed the victim – as defendant's proffered testimony relating to his prior suicide attempts was too vague and unspecific to support admission under Miss. R. Evid. 404(b). Specifically, defendant failed to provide evidence as to identifable time periods during which his alleged suicide attempts took place. Adams v. State, 62 So. 3d 432, 2011 Miss. App. LEXIS 66 (Miss. Ct. App. 2011).

Defendant's conviction for the possession of at least 2, but less than 10, dosage units of hydrocodone in violation of Miss. Code Ann. § 41-29-139(c) was appropriate because the trial court did not err in admitting the recorded statement that he provided to an officer. The probative value of the evidence was not outweighed by its prejudicial effect under Miss. R. Evid. 404(a)(1) and (b) and defendant failed to consider that it was his attorney who agreed to have the statement pre-marked and who later suggested that it be entered into evidence. Sistrunk v. State, 48 So. 3d 557, 2010 Miss. App. LEXIS 159 (Miss. Ct. App.), cert. denied, 49 So. 3d 1139, 2010 Miss. LEXIS 629 (Miss. 2010).

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consider that it was his attorney who agreed to have the statement pre-marked and who later suggested that it be entered into evidence. Sistrunk v. State, 48 So. 3d 557, 2010 Miss. App. LEXIS 159 (Miss. Ct. App.), cert. denied, 49 So. 3d 1139, 2010 Miss. LEXIS 629 (Miss. 2010).

Wife's contention that the deposition testimony constituted impermissible character evidence under Miss. R. Evid. 404(a) also failed because the comment to Miss. R. Evid. 404 provided an exception to the prohibition against character evidence when character was a direct issue in a case, and in a child custody case, the character traits of parents were at issue in the chancellor's evaluation of the Albright factors. A parent's character traits could have been relevant in the Albright analysis under any of the factors, including moral fitness of the parents, physical and mental health of the parents, and the stability of the home environment. McCullough v. McCullough, 52 So. 3d 373, 2009 Miss. App. LEXIS 671 (Miss. Ct. App. 2009).

In defendant's arson case, testimony regarding an assault rifle was relevant to show that defendant might have been trying to intimidate another person into participating in the crime. The testimony regarding the possession of the rifle was relevant to show motive and intent and to present "the complete story of the crime." Bennett v. State, 18 So. 3d 272, 2009 Miss. App. LEXIS 139 (Miss. Ct. App.), cert. denied, 19 So. 3d 82, 2009 Miss. LEXIS 467 (Miss. 2009).

Defendant's convictions for capital murder, aggravated assault, and conspiracy to commit aggravated assault were appropriate because counsel was not ineffective in failing to object to testimony in which the weapon used during the incident was connected to defendant since the inadmissibility provisions of Miss. R. Evid. 404(b) were inapplicable; the subject evidence was offered to connect the murder weapon to the handgun stolen from a residence and the witness testified that defendant possessed some knowledge regarding that handgun. Such evidence could have been admissible under several of the exceptions to R. 404(b), including opportunity, intent, preparation, plan, or knowledge. Williams v. State, 3 So. 3d 105, 2009 Miss. LEXIS 68 (Miss. 2009).

Defendant's conviction for capital murder was appropriate because a statement presented to the jury did not imply that defendant spent time in a penitentiary and was not in violation of Miss. R. Evid. 404(b). It was neither evidence of a prior crime, wrong, or act, nor could it have been construed as admitted to prove defendant's character or acting in conformity therewith. Nelson v. State, 995 So. 2d 799, 2008 Miss. App. LEXIS 319 (Miss. Ct. App.), cert. denied, 999 So. 2d 374, 2008 Miss. LEXIS 660 (Miss. 2008).

As to the issue of the existence of a confidential relationship between a testator and a beneficiary, the evidence at the heirs' trial against the decedent's beneficiary pertained to events that occurred post-execution, and character evidence was irrelevant to a determination of whether a confidential relationship existed between the two. Thus, the trial court did not err in excluding the evidence, Miss. R. Evid. 404(b). In re Will of Boyles, 990 So. 2d 230, 2008 Miss. App. LEXIS 167 (Miss. Ct. App.), cert. denied, 994 So. 2d 186, 2008 Miss. LEXIS 462 (Miss. 2008).

Defendant's conviction for burglary of a dwelling was proper because there was no unfair prejudice in a detective's testimony; likewise, his testimony did not raise any evidence of defendant's other crimes or under Miss. R. Evid. 404(b). Actually, the detective testified that during his encounter with defendant he was not engaged in any illegal conduct. Denham v. State, 966 So. 2d 894, 2007 Miss. App. LEXIS 707 (Miss. Ct. App. 2007).

In a manslaughter case, the State did not introduce any evidence of prior concerning defendant's prior stabbing of her step-father; the record only showed that such testimony came in through the defense. Brown v. State, 970 So. 2d 1300, 2007 Miss. App. LEXIS 826 (Miss. Ct. App. 2007).

Trial court did not abuse its discretion by admitting into evidence misdemeanor charge affidavits of the victim against defendant because the prosecutor argued that the evidence was offered to establish motive for the victim's murder, and the trial court concluded that the prejudicial effect of the testimony did not outweigh its probative value. Jones v. State, 962 So. 2d 1263, 2007 Miss. LEXIS 473 (Miss. 2007).

Defendant's capital murder convictions were proper where the hearsay testimony of the declarant's sister about declarant's involvement with defendant in an insurance scam was correctly admitted pursuant to Miss. R. Evid. 403, 404(b), and 804(b)(5) because the declarant was unavailable and because the trial court made a thorough and proper balancing review on the record, applying the testimony to the five requirements for admission of hearsay, stating its findings on each requirement, and finding the testimony more probative than prejudicial; there was no evidence to support that the trial court abused its discretion in allowing the testimony. Rubenstein v. State, 2005 Miss. LEXIS 789 (Miss. Dec. 1, 2005), op. withdrawn, 2006 Miss. LEXIS 424 (Miss. Aug. 10, 2006), sub. op., 941 So. 2d 735, 2006 Miss. LEXIS 411 (Miss. 2006).

Trial court did not abuse its discretion by allowing the prosecutor to introduce into evidence four separate instances in which the girlfriend had filed domestic violence charges against defendant because the evidence was admitted to rebut defendant's allegation that the incident was an accident and as evidence of motive; the evidence was highly relevant to show motive and absence of accident. Taylor v. State, 954 So. 2d 944, 2007 Miss. LEXIS 183 (Miss. 2007).

In a murder case, evidence of a victim's violent behavior was properly excluded because defendant was not arguing that the victim was the initial aggressor. Clemons v. State, 952 So. 2d 314, 2007 Miss. App. LEXIS 174 (Miss. Ct. App. 2007), overruled in part, Williams v. State, 32 So. 3d 486, 2010 Miss. LEXIS 202 (Miss. 2010).

Defendant's murder conviction was proper under Miss. R. Evid. 404(b) because an officer's testimony was necessary to present a complete story of how defendant reappeared at a gas station on consecutive nights and how defendant ended up in custody where a detective seized his clothing for DNA testing. Bailey v. State, 956 So. 2d 1016, 2007 Miss. App. LEXIS 112 (Miss. Ct. App.), cert. denied, 957 So. 2d 1004, 2007 Miss. LEXIS 301 (Miss. 2007).

Grant of summary judgment in favor of the casino in the patron's action after she slipped and fell on water at a buffet table was inappropriate because competent testimony concerning prior instances of water in the same spot where the patron fell created a genuine issue of material fact that precluded granting summary judgment for the casino; thus, it was erroneous for the circuit court to have excluded that evidence under Miss. R. Evid. 404(b). Lockwood v. Isle of Capri Corp., 962 So. 2d 645, 2007 Miss. App. LEXIS 44 (Miss. Ct. App.), cert. denied, 962 So. 2d 38, 2007 Miss. LEXIS 465 (Miss. 2007).

Prosecutor's statement that co-defendants had "been jumping on a lot of people lately" during closing arguments did not violate Miss. R. Evid. 404(b), and was not improper because the prosecutor was referring to a statement from a co-defendant that was admitted into evidence. Shumpert v. State, 935 So. 2d 962, 2006 Miss. LEXIS 352 (Miss. 2006).

Trial court erred and the case was remanded when it admitted evidence that a former client, who was suing his former attorney for assault, had previously threatened to break a physician's leg; the attorney had admitted that the client did not physically threaten him thus, pursuant to Miss. R. Evid. 404(a), the client's tendency towards aggressive behavior was not a pertinent character trait and the client's threat to break a physician's leg did not fall under any category of rule 404(b). Walker v. Benz, 914 So. 2d 1262, 2005 Miss. App. LEXIS 903 (Miss. Ct. App. 2005).

As to his conviction for murder, defendant did not demonstrate that the outcome of his trial would have been different if his counsel had objected to the district attorney's leading questions to deputies and the district attorney's eliciting of prior testimony from the victim's family members and a neighbor. He merely asserted that had counsel been as diligent with objections on said matters, he would have received a fair trial, and that statement did not satisfy the prejudice prong of Strickland; defendant's account of the events that led to the victim's death was not corroborated by any of the eyewitnesses, the physical evidence refuted his account that the victim was shot accidentally during a close struggle, and because he was hopelessly guilty, he was not entitled to a new trial on grounds counsel was ineffective. Jones v. State, 911 So. 2d 556, 2005 Miss. App. LEXIS 231 (Miss. Ct. App.), cert. denied, 920 So. 2d 1008, 2005 Miss. LEXIS 599 (Miss. 2005).

Defendant's conviction for capital murder was proper where the trial court properly refused defendant's proffered jury instruction because he was not entitled to a jury instruction that emphasized the evidence of his peaceful character, Miss. Code Ann. § 99-17-35. However, he was entitled to offer his good character as evidence of the improbability that he had committed the act charged, Miss. R. Evid. 404(a)(1). Brink v. State, 888 So. 2d 437, 2004 Miss. App. LEXIS 559 (Miss. Ct. App. 2004), cert. denied, 888 So. 2d 1177, 2004 Miss. LEXIS 1475 (Miss. 2004), cert. denied, 544 U.S. 986, 125 S. Ct. 1858, 161 L. Ed. 2d 744, 2005 U.S. LEXIS 3129 (U.S. 2005).

Felony shoplifting is somewhat akin to felony driving under the influence (DUI) in that both rely on multiple prior convictions for the same offending conduct to raise the level of offense from a misdemeanor to a felony; thus, the trial court properly dealt with the problems arising under Miss. R. Evid. 404(b) by instructing the jury that it could not consider evidence of defendant's prior shoplifting convictions as evidence of defendant's guilt in the instant case. Bufkin v. State, 867 So. 2d 285, 2004 Miss. App. LEXIS 191 (Miss. Ct. App. 2004).

In a murder trial, the trial court properly declined to enter a sua sponte limiting instruction on prior offered under Miss. R. Evid. 404(b), as the evidence was not offered for that reason, but rather to show the victim's state of mind under Miss. R. Evid. 803 and 804, and the limiting instruction rule was therefore not applicable. Reed v. State, 863 So. 2d 981, 2003 Miss. App. LEXIS 1197 (Miss. Ct. App. 2003).

Testimony from a murder victim's sister that showed defendant's propensity to using vulgar street vernacular in describing situations did not violate Miss. R. Evid. 404(a) because it was not character evidence offered to prove defendant's conformity therewith, and did not violate Rule 404(b) because it was not about any other crimes, wrongs, or acts committed by defendant. Moore v. State, 859 So. 2d 379, 2003 Miss. LEXIS 654 (Miss. 2003).

In a suit against a bar for furnishing alcohol to a minor who later caused an auto accident, the trial court properly excluded evidence of prior sales of alcohol to minors by the bar, as there was no purpose for such evidence other than to show that the bar had a propensity to sell alcohol to minors. Moore v. K&J Enters., 856 So. 2d 621, 2003 Miss. App. LEXIS 594 (Miss. Ct. App. 2003), cert. dismissed, 2004 Miss. LEXIS 198 (Miss. Feb. 12, 2004).

Although at trial, a defendant's objection to character evidence was based on Miss. R. Evid. 404(b) and on appeal his objection was based on Miss. R. Evid. 404(a), the language of Miss. R. Evid. 103(a)(1) allowed the objection either way, because the specific ground was apparent from the context. Kolberg v. State, 829 So. 2d 29, 2002 Miss. LEXIS 268 (Miss. 2002), cert. denied, 538 U.S. 981, 123 S. Ct. 1787, 155 L. Ed. 2d 672, 2003 U.S. LEXIS 3010 (U.S. 2003), overruled in part, Harrell v. State, 134 So. 3d 266, 2014 Miss. LEXIS 52 (Miss. 2014), overruled in part, Rowsey v. State, 188 So. 3d 486, 2015 Miss. LEXIS 573 (Miss. 2015).

Trial court, in case where defendant was accused of fondling a minor child, did not err in admitting testimony of defendant's sexual relations with two women since the sexual relations were intertwined with the fondling of the minor child. Todd v. State, 806 So. 2d 1086, 2001 Miss. LEXIS 305 (Miss. 2001).

In a prosecution for sexual battery arising from an incident in which the victim was attacked in her bedroom by an intruder who leapt out of her closet and put a towel over her face so that she never saw his face, the court properly allowed the introduction of evidence of an incident on the previous day in which another woman was attacked in a similar manner but was able to identify the defendant as the perpetrator since the similarities between the incidents were outstanding and the testimony by the other woman showed that the defendant had opportunity, preparation, knowledge, and identity all under very similar circumstances. Adams v. State, 794 So. 2d 1049, 2001 Miss. App. LEXIS 170 (Miss. Ct. App. 2001).

In a prosecution for distribution of cocaine, the state was properly permitted to present rebuttal testimony by a confidential informant regarding a prior sale to her of cocaine by the defendant following the defendant's own testimony that she never before sold cocaine to anyone, especially as the trial court gave a limiting instruction to the jury, directing it on how to consider appropriately the prior sales of cocaine, and explained that this testimony was presented only for the purpose of attacking the defendant's credibility. Scott v. State, 796 So. 2d 959, 2001 Miss. LEXIS 116 (Miss. 2001).

In a prosecution for murder, the court did not err in admitting evidence that the defnedant put a gun to the head of a friend of the victim and ordered him to leave, as the testimony showed the defendant's preparation and intent and thereby served to differentiate between accident, manslaughter, and murder. Reynolds v. State, 784 So. 2d 929, 2001 Miss. LEXIS 115 (Miss. 2001).

The defendant was not entitled to reversal of his conviction for armed robbery where (1) the defendant's coperpetrator testified that the defendant had threatened him while they were in jail awaiting trial, (2) the defendant's objection to this testimony was sustained, and (3) the jury was instructed to disregard the statement. Hall v. State, 785 So. 2d 302, 2001 Miss. App. LEXIS 80 (Miss. Ct. App. 2001).

In a prosecution for negligently causing the death of another while driving a motor vehicle at a time when the defendant was under the influence of alcohol, there was no reversible error where the defendant testified that she had consumed a number of beers prior to the accident, but had not consumed a sufficient quantity to have impaired her ability to properly operate her automobile, and the prosecutor then asked her whether she made it a practice to routinely consume quantities of alcoholic beverages; although evidence tending to indicate that the defendant made a practice of consuming excessive quantities of alcohol on a regular basis might have run afoul of the exclusionary rule announced in subsection (b) and the trial court probably erred in failing to sustain defense counsel's objections to such questioning, the inquiries were met with flat denials and no attempt was made by the state to contradict those denials or to impeach the defendant's credibility on that point. Langdon v. State, 798 So. 2d 550, 2001 Miss. App. LEXIS 77 (Miss. Ct. App. 2001).

In an action against a restaurant arising from a motor vehicle accident caused by an intoxicated minor who was alleged to have purchased beer at the restaurant, the trial court properly excluded evidence of other sales of alcohol to minors, since the only conceivable purpose for such testimony was to show that the restaurant sold alcohol to minors. Delahoussaye v. Mary Mahoney's, Inc., 783 So. 2d 666, 2001 Miss. LEXIS 39 (Miss. 2001).

In a prosecution for murder in which the defendant claimed that she killed her husband in self-defense, the court properly permitted the introduction of evidence of prior fights between the defendant and her husband in which she cut his hands with a knife and shot at him as such evidence was relevant to motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Wooten v. State, 811 So. 2d 355, 2001 Miss. App. LEXIS 45 (Miss. Ct. App. 2001).

In a prosecution for murder, the trial court properly permitted the introduction of evidence that the defendant threatened to "shoot up" a witness's apartment if the witness did not give a shotgun to him since such evidence was relevant to show motive and intent to commit the crime at issue. Davis v. State, 2000 Miss. LEXIS 162 (Miss. June 29, 2000).

In a prosecution in which the state theorized that robbery was the motive for the murder at issue, it was not error for the court to permit introduction of evidence that the defendant was in financial difficulty, that she owed the sheriff's department the sum of $1,000 to $2,000 for inmates she had working in her business, that she had gone through an inheritance and had become broke in the previous month and that she had written checks in the amount of $4,000 on her parent's business account without their knowledge. Wilhite v. State, 791 So. 2d 231, 2000 Miss. App. LEXIS 302 (Miss. Ct. App. 2000).

In a prosecution for felony child abuse, the trial court properly allowed the introduction of evidence of prior injuries sustained by the child, notwithstanding that such injuries did not result in the indictment of the defendant, since such evidence showed a continuous and purposeful course of criminal abuse and negated testimony that the injuries to the child in the charged incident were the result of a fall. Bradford v. State, 759 So. 2d 434, 2000 Miss. App. LEXIS 31 (Miss. Ct. App. 2000).

In a prosecution for murder, the court properly allowed the introduction of evidence of the defendant's prior plans and attempts to kill the victim (her husband) as such evidence showed intent. Alford v. State, 2000 Miss. App. LEXIS 39 (Miss. Ct. App. Feb. 1, 2000), op. withdrawn, sub. op., 760 So. 2d 48, 2000 Miss. App. LEXIS 230 (Miss. Ct. App. 2000).

In a prosecution for murder, it was not error to introduce evidence that the defendant took items from the murder scene since such evidence was not offered to show his bad character and that he acted in conformity therewith and, instead, was offered to show that he was present at the crime scene, to corroborate his statements, and to show the various events that transpired around the time of the murder. Odom v. State, 769 So. 2d 189, 2000 Miss. App. LEXIS 160 (Miss. Ct. App. 2000).

In a prosecution for auto burglary, evidence that the arresting officer saw the defendant and his coperpetrator near another vehicle and that they left the area when the officer shined his car lights on them was properly admitted into evidence since the defendant's acts were so interrelated as to constitute a single transaction or occurrence and the evidence was necessary to tell the complete story so as not to confuse the jury. Hall v. State, 760 So. 2d 817, 2000 Miss. App. LEXIS 202 (Miss. Ct. App. 2000).

Where the defendant in a murder prosecution attempted to portray himself as someone who would not sell drugs, was not violent, would not tell a lie, and who was scared of the victim and his gang, the state was entitled to present evidence of prior by the defendant. Riddley v. State, 1999 Miss. App. LEXIS 237 (Miss. Ct. App. Apr. 20, 1999), op. withdrawn, sub. op., 1999 Miss. App. LEXIS 541 (Miss. Ct. App. Aug. 24, 1999).

In a prosecution for defrauding the state government and uttering forgery, the court improperly allowed the introduction into evidence of extensive records of forged receipts for repaired vehicles that the police seized from the defendant's house since such receipts were not the basis of the charges against the defendant and were highly prejudicial. Logan v. State, 1999 Miss. App. LEXIS 182 (Miss. Ct. App. Apr. 20, 1999), rev'd, 2000 Miss. LEXIS 128 (Miss. May 25, 2000).

In a prosecution for defrauding the state government and uttering forgery, the court improperly allowed a state witness to testify regarding stolen property found on the defendant's property since character was not an element of the indicted charges and, therefore, specific instances of conduct were not relevant or admissible. Logan v. State, 1999 Miss. App. LEXIS 182 (Miss. Ct. App. Apr. 20, 1999), rev'd, 2000 Miss. LEXIS 128 (Miss. May 25, 2000).

In a prosecution for murder, it was not error to allow a witness to testify regarding prior drug sales by the defendant since (1) such testimony arguably supported the witness's identification of the defendant, and (2) such testimony was intertwined with the instant crime in that the homicide grew out of the defendant's drug dealing. Bennett v. State, 738 So. 2d 300, 1999 Miss. App. LEXIS 134 (Miss. Ct. App. 1999), overruled in part, White v. State, 785 So. 2d 1059, 2001 Miss. LEXIS 44 (Miss. 2001).

Testimony by the defendant that, on the last time he saw his wife and children, he helped them out of their car and kissed his wife goodbye did not open the door to the district attorney's use of any alleged prior acts of verbal or physical abuse against his family. Kelly v. State, 735 So. 2d 1071, 1999 Miss. App. LEXIS 133 (Miss. Ct. App. 1999).

In a murder prosecution, evidence of an assault committed shortly after the murder was properly admitted since the testimony was relevant to show how the assault victim was able to identify a knife and revolver used in the assault and since the reason for such testimony was to show that the defendants were in possession of a knife and a revolver (the possible murder weapon) shortly after the murder. Smith v. State, 729 So. 2d 1191, 1998 Miss. LEXIS 590 (Miss. 1998), cert. denied, 527 U.S. 1043, 119 S. Ct. 2410, 144 L. Ed. 2d 808, 1999 U.S. LEXIS 4551 (U.S. 1999).

In a prosecution for murder, the court properly permitted the introduction of evidence that the defendant threatened the life of a witness shortly after the murder since the evidence was not admitted as character evidence indicative of a propensity to commit murder, but directly as evidence of the crime charged since the threat was made in the midst of a description of the murder and included a display of the murder weapon. Bell v. State, 725 So. 2d 836, 1998 Miss. LEXIS 305 (Miss. 1998), cert. denied, 526 U.S. 1122, 119 S. Ct. 1777, 143 L. Ed. 2d 805, 1999 U.S. LEXIS 3380 (U.S. 1999).

A witness was properly permitted to testify to the defendant's bad reputation for peace and violence where the defendant put his character into issue by placing witnesses on the stand to testify that he was not violent and that he would not hurt anyone who did not first do something to him. Bell v. State, 725 So. 2d 836, 1998 Miss. LEXIS 305 (Miss. 1998), cert. denied, 526 U.S. 1122, 119 S. Ct. 1777, 143 L. Ed. 2d 805, 1999 U.S. LEXIS 3380 (U.S. 1999).

Trial court's admission of testimony of alleged sexual acts with third party not contained in indictment, over defendant's objection, constituted reversible error. Nicholson v. State, 704 So. 2d 81, 1997 Miss. LEXIS 506 (Miss. 1997).

Trial court did not err in refusing to grant mistrial when witness testified to threats made against him by defendant a few days prior to killing of defendant's wife; witness inadvertently exceeded testimonial bounds of court order, and prosecution did not intend to sway jury with repeated references to defendant's character trait for violence. Marks v. State, 532 So. 2d 976, 1988 Miss. LEXIS 425 (Miss. 1988).

## RESEARCH REFERENCES

**ALR.**

Admissibility, in Rape Case, of Evidence that Accused Raped, or Attempted to Rape Person Other than Prosecutrix – Prior Offenses. 86 A.L.R.5th 59.

Admissibility, in rape case, of evidence that accused raped, or attempted to rape, person other than prosecutrix – offenses unspecified as to time. 88 A.L.R.5th 429.

Admissibility of evidence of other crimes, wrongs, or acts under Rule 404(b) of the Federal Rules of Evidence, in civil cases. 171 A.L.R. Fed. 483.

**Law Reviews.**

Ryan, Other Crimes, Wrongs, or Acts Evidence in Mississippi Courts, 19 Miss C.L. Rev. 345 (Spring, 1999).

Hewes, Skirting the Mississippi Rules of Evidence 404 Character Prohibition: Allowing Prior Drug Sales to Come in under the Guise of "Intent" in Prosecutions for Possession with Intent to Sell, 69 Miss. L.J. 499 (Fall, 1999).

Navigating the Maze of Evidence of Character and Other Crimes, Wrongs or Acts; Mississippi Rules of Evidence 404 & 405 in Criminal Cases, 71 Miss. L.J. 835, Spring, 2002.

### Rule 405. Methods of proving character.

(a) *By reputation or opinion.* — When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

(b) *By specific instances of conduct.* — When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

**HISTORY: Restyled effective July 1, 2016.**

## ADVISORY COMMITTEE NOTE

The language of Rule 405 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Once the question of admissibility of character evidence is resolved under Rule 404, it is necessary to turn to Rule 405 for the correct methodology. Rule 405 provides two basic methods of proving character. One method, pursuant to Rule 405(b) is reserved for those cases in which character is an essential part of the issue. In this situation, proof of specific instances of conduct may be introduced into evidence. Evidence of specific conduct is limited to cases in which character is an issue.

405(a) provides the methods for proving character in cases in which character is an issue but more importantly in cases in which character evidence is being used inferentially. If permissible under Rule 404, the character evidence may be proved by opinion or reputation. Mississippi common law previously permitted such evidence to be introduced through reputation evidence. *Rogers v. State,* 204 Miss. 891, 36 So. 2d 155 (1948). Recognizing that reputation evidence is nothing more than the opinion of a selected group, Rule 405 broadens the methodology to allow proof of character by opinion.

While 405(a) limits proof of character to reputation or opinion evidence on direct examination, it does provide that the witness may be cross-examined regarding specific acts of conduct. There are two sound reasons for permitting this type of cross examination. If the witness on cross-examination professes no knowledge about specific acts, his qualifications to state opinion or reputation are impugned. If the witness admits knowledge of specific bad acts, then he has been impeached. *Magee v. State,* 198 Miss. 642, 22 So. 2d 245 (1945). ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

In general.
Illustrative cases.

**In general.**

A criminal defendant can offer his good character into evidence; however, prosecution can then rebut defendant's evidence of character. Davis v. State, 660 So. 2d 1228, 1995 Miss. LEXIS 287 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785, 1996 U.S. LEXIS 3101 (U.S. 1996).

Evidence of specific acts of the deceased toward third parties are not admissible to show bad character of the deceased or non-conformity therewith. Russell v. State, 607 So. 2d 1107, 1992 Miss. LEXIS 474 (Miss. 1992).

**Illustrative cases.**

Although the victim's violent nature would have been relevant to defendant's charge of murder and claim of self-defense, the trial court did not err when it excluded evidence of the victim's prior convictions as defendant failed to introduce those specific instances during direct or cross-examination; notwithstanding the procedural bar, the victim's prior convictions did not have any impact on the defense because the record did not support defendant's allegations of previous violent encounters with the victim; and defendant could not have considered the victim's violent past when he decided to shoot the victim as defendant was unaware of the victim's prior convictions. Jenkins v. State, 253 So. 3d 349, 2018 Miss. App. LEXIS 68 (Miss. Ct. App.), cert. denied, 252 So. 3d 596, 2018 Miss. LEXIS 387 (Miss. 2018).

Although defendant was authorized to offer specific instances of his murder victim's threats in order to support his claim of self-defense, as he failed to proffer any details of the alleged prior threats and the alleged prior violent instances were not clear, there could be no abuse of discretion with respect to the trial court's evidentiary rulings. Davis v. State, 130 So. 3d 1141, 2013 Miss. App. LEXIS 490 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 578, 2014 Miss. LEXIS 73 (Miss. 2014).

Changing of physical and legal custody of the parties' son from the mother to the father was proper under Miss. R. Evid. 405(b) because evidence of the mother's new husband's past conduct was introduced to demonstrate his general character as that character related to the new husband's and the mother's moral fitness, as well as to demonstrate that the new husband's presence in the custodial home constituted a material and adverse change in circumstances. C.A.M.F. v. J.B.M., 972 So. 2d 656, 2007 Miss. App. LEXIS 289 (Miss. Ct. App. 2007), cert. denied, 973 So. 2d 244, 2008 Miss. LEXIS 33 (Miss. 2008).

In a murder prosecution, while proof of the victim's actual violent acts might have been admissible, defendant was not entitled to prove that the victim once bluffed others about pulling a gun: whether the victim acted violently when there was no danger was not probative that he was a violent man likely to start a confrontation when the stakes were much higher. Hester v. State, 841 So. 2d 158, 2002 Miss. App. LEXIS 569 (Miss. Ct. App. 2002), cert. denied, 840 So. 2d 716, 2003 Miss. LEXIS 174 (Miss. 2003), cert. denied, 2003 Miss. App. LEXIS 343 (Miss. Ct. App. Mar. 27, 2003).

Trial court did not abuse its discretion by allowing the state to introduce evidence of a conviction that was over 10 years old because defense counsel elicited testimony from defendant's sister indicating that defendant was a peaceable, law-abiding citizen; the prosecution was entitled to rebut the sister's testimony with evidence of defendant's 1980 conviction for possession of stolen property. Magee v. State, 966 So. 2d 173, 2007 Miss. App. LEXIS 120 (Miss. Ct. App.), cert. denied, 966 So. 2d 172, 2007 Miss. LEXIS 567 (Miss. 2007).

Assuming that the defendant had a legitimate claim of self defense, testimony regarding specific instances of the victim's violent nature should have been admitted in accordance with Rule 405(b); however, any error was harmless, as proof of the victim's violent nature was ultimately admitted. Jackson v. State, 784 So. 2d 180, 2001 Miss. LEXIS 124 (Miss. 2001), cert. denied, 534 U.S. 1139, 122 S. Ct. 1088, 151 L. Ed. 2d 987, 2002 U.S. LEXIS 807 (U.S. 2002).

In a prosecution for murder, the defendant was properly precluded from presenting evidence of a verbal argument between the victim and a third person earlier on the day of the crime at issue and that the defendant put a stop to the argument, notwithstanding the assertion that such evidence proved his peaceful nature and the victim's violent nature. McGee v. State, 820 So. 2d 700, 2000 Miss. App. LEXIS 417 (Miss. Ct. App. 2000).

In a prosecution for defrauding the state government and uttering forgery, the court improperly allowed a state witness to testify regarding stolen property found on the defendant's property since character was not an element of the indicted charges and, therefore, specific instances of conduct were not relevant or admissible. Logan v. State, 1999 Miss. App. LEXIS 182 (Miss. Ct. App. Apr. 20, 1999), rev'd, 2000 Miss. LEXIS 128 (Miss. May 25, 2000).

In a prosecution for aggravated assault, it was not reversible error for the court to exclude evidence of 18 and 20 year old prior convictions of the victim for assault and carrying a concealed weapon where several witnesses testified that the victim was less than stable, had mental problems, and tested positive for cocaine and there was evidence that the victim had a reputation for being violent and for violence while inebriated. Richburg v. State, 724 So. 2d 444, 1998 Miss. App. LEXIS 992 (Miss. Ct. App. 1998).

Trial court's admission of testimony of alleged sexual acts with third party not contained in indictment, over defendant's objection, constituted reversible error. Nicholson v. State, 704 So. 2d 81, 1997 Miss. LEXIS 506 (Miss. 1997).

Where manslaughter defendant alleged self-defense, trial court erred in excluding witness's testimony that he had seen victim in fights before; specific instances of victim's conduct were admissible, since character trait of violence was an essential element of defendant's defense. Newsom v. State, 629 So. 2d 611, 1993 Miss. LEXIS 601 (Miss. 1993).

Wife's propensity for violence with a butcher knife was an essential element of husband's defense of justifiable homicide, and husband was entitled to offer evidence of specific instances of his wife's conduct, particularly one of like kind and quality occurring but two weeks before the night of her shooting. Heidel v. State, 587 So. 2d 835, 1991 Miss. LEXIS 646 (Miss. 1991).

## RESEARCH REFERENCES

**Law Reviews.**

Navigating the Maze of Evidence of Character and Other Crimes, Wrongs or Acts; Mississippi Rules of Evidence 404 & 405 in Criminal Cases, 71 Miss. L.J. 835, Spring, 2002.

## Rule 406. Habit; routine practice.

Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

**HISTORY: Restyled effective July 1, 2016.**

## ADVISORY COMMITTEE NOTE

The language of Rule 406 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Habit is considered to be an individual's usual method or manner of doing things. Routine practice refers to a group or institution's habit. *See* McCormick, *Evidence,*3rd Ed., 162. Thus, we speak of a person's habit and the routine practice or custom of an institution. Mississippi has long recognized that under appropriate circumstances habit and custom are relevant evidence. Under Rule 406, evidence of habit or routine practice can be used as circumstantial evidence. A party may introduce evidence of a person's habit to imply that he probably acted in this instance in conformity with his habit.

In Mississippi under the common law such evidence would be inadmissible if there were no eyewitnesses. Rule 406 specifically provides to the contrary. *See* FRE 406, Advisory Committee Note.

The evidence that a business acted in

conformity with its routine practice is relevant. Of course, rebuttal is always permitted. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

Intoxication.
Illustrative cases.

**Intoxication.**

Four prior convictions for public intoxication spanning a three and one-half year period were of insufficient regularity to rise to the level of "habit" evidence, and, therefore, evidence of such conviction was inadmissible under the rule. Donald v. Triple S Well Serv., 708 So. 2d 1318, 1998 Miss. LEXIS 98 (Miss. 1998).

The plaintiff was entitled to a new trial in an action to recover for personal injuries sustained on the job where the defendant failed to establish that anyone had ever observed the plaintiff taking a drink or acting in an impaired or intoxicated manner on the job, but such innuendo blanketed the entire proceeding. Donald v. Triple S Well Serv., 708 So. 2d 1318, 1998 Miss. LEXIS 98 (Miss. 1998).

**Illustrative cases.**

Although the notary did not have a specific recollection of notarizing the deed of trust, her testimony as to her standard practices was competent evidence that she acted in conformity with those practices on this particular occasion; while the notary admitted she failed to record her notarization of the deed of trust in her notarial register, it did not invalidate the acknowledgment. Matthews v. Whitney Bank, 282 So. 3d 786, 2019 Miss. App. LEXIS 414 (Miss. Ct. App. 2019).

Circuit court did not abuse its discretion by failing to grant a writ of certiorari, pursuant to Miss. Code Ann. § 11-51-93, based on an affidavit submitted by petitioner regarding broad statements made by a county prosecutor as to the prosecutor's memory about in absentia traffic tickets in general; the circuit court did not rule the affidavit was not relevant or admissible, within the meaning of Miss. R. Evid. 406, rather the circuit court found the affidavit alone was insufficient to grant certiorari. Abraham v. State, 61 So. 3d 199, 2010 Miss. App. LEXIS 645 (Miss. Ct. App. 2010).

In a premises liability case in which a customer used a stepladder present in a retailer's store to retrieve an item from a top shelf and fell, evidence that it was the retailer's practice to leave defective stepladders returned by customers on the sales floor was not admissible under Miss. R. Evid. 403 because it would have left the jury to speculate that the ladder from which the customer fell was such a defective ladder. Gaines v. K-Mart Corp., 860 So. 2d 1214, 2003 Miss. LEXIS 821 (Miss. 2003).

Course of conduct evidence introduced by plaintiff was relevant and was not substantially more prejudicial than probative; as defendants were sued for punitive damages based on an allegedly bad faith failure to pay, evidence which tended to prove defendants had a routine practice of bad faith dealings with other companies became important and relevant. Hans Constr. Co. v. Drummond, 653 So. 2d 253, 1995 Miss. LEXIS 144 (Miss. 1995).

## Rule 407. Subsequent remedial measures.

When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- negligence;
- culpable conduct;
- a defect in a product or its design; or
- a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or – if disputed – proving ownership, control, or the feasibility of precautionary measures.

**HISTORY: Amended effective July 1, 2011; restyled effective July 1, 2016.**

## ADVISORY COMMITTEE NOTE

The language of Rule 407 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. The Rule has been restructured, adding a list of bullet points. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 407 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

This rule prohibits evidence of subsequent repairs to be introduced for the purpose of proving negligence or liability, including products liability. However, it may be admitted into evidence for another purpose. The second sentence of the rule discusses its limitations. The rule mentions ownership, control, feasibility and impeachment as admissible purposes, but this is not an exclusive list of permitted grounds, only an illustrative list.

The primary reason for this rule is a sound one. If such evidence were admissible on the issue of culpability, then the person responsible would have less incentive to correct the defect. By excluding subsequent repairs and remedies, the rule encourages the owner to render the property safer, or at least does not discourage repairs. The rule applies only to remedial changes made after the occurrence that produced the damages giving rise to the action. Evidence of measures taken by the defendant before the "event" causing "injury or harm" does not fall within the exclusionary scope of Rule 407 even if they occurred after the manufacture or design of the product. Courts applying Rule 407 have excluded evidence of subsequent repairs, installation of safety devices, changes in company rules, and discharge of employees. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

Admission for other purpose.
Illustrative cases.

**Admission for other purpose.**

Videotape footage and photographs of accident scene taken after subsequent measures had been completed to repair a rut on the highway where the accident occurred were properly admitted into evidence, as this evidence was introduced for the purpose of identifying the tortfeasor. Belmont Homes, Inc. v. Stewart, 792 So. 2d 229, 2001 Miss. LEXIS 192 (Miss. 2001).

**Illustrative cases.**

In a premises-liability case, defendants' summary judgment motion was properly granted as plaintiff failed to produce sufficient evidence that the therapy-pool steps constituted a dangerous condition, or that the health club had any knowledge of any dangerous condition because, except for the fact that it happened around the therapy pool, it was unclear whether the circumstances surrounding another health club member's fall in 2005 were substantially similar to those surrounding plaintiff's fall in 2008; evidence of any subsequent remedial measures would not have been admissible to imply any negligence; and the health club had signs posted around the pool area prior to plaintiff's fall warning that the pool surfaces were slippery when wet. Vivians v. Baptist Healthplex, 200 So. 3d 485, 2016 Miss. App. LEXIS 373 (Miss. Ct. App. 2016), rev'd, 234 So. 3d 304, 2017 Miss. LEXIS 264 (Miss. 2017).

In suit by a tenant against the housing authority, the government entity that managed an apartment complex, the housing authority was entitled to sovereign immunity because it had no notice about the danger the light posed before it fell as the long-term maintenance supervisor and the property manager for almost two decades both testified they were not aware of other light boxes falling before the tenant's; while the maintenance supervisor had previously replaced light boxes, he did not say it was because he knew they were too heavy, improperly installed or otherwise dangerous; and the fact a smaller, lighter fixture was put up after the other light fell did not prove the housing authority knew before the fixture fell that it was too heavy. Serrano v. Laurel Hous. Auth., 151 So. 3d 256, 2014 Miss. App. LEXIS 661 (Miss. Ct. App. 2014).

In a negligence suit against a railroad based on a collision between a train and pickup truck, the court properly granted the railroad's motion in limine and excluded, as a subsequent remedial measure, evidence of the railroad's alleged post-accident removal of vegetation nearing the crossing where the collision occurred. Estate of Bloodworth v. Ill. Cent. R.R. Co., 129 So. 3d 888, 2013 Miss. LEXIS 588 (Miss. 2013).

In a customer's action against an owner to recover for an injury she sustained when she fell at the owner's pharmacy, the trial court did not abuse its discretion by excluding the customer's second set of photographs, which showed changes that had been made to the carpet that led from the parking lot to the front door of the pharmacy, because they depicted subsequent remedial measures, and the impeachment exception to Rule 407 did not apply since the owner did not give any false testimony; because the owner did not dispute whether precautionary measures could be taken, and the customer was allowed to question him about her theory of the case, the feasibility of precautionary measures exception to Rule 407 did not apply, and the second set of photographs did not accurately depict the condition of the carpet at the time of the customer's fall. Manning v. Gruich, 46 So. 3d 392, 2010 Miss. App. LEXIS 576 (Miss. Ct. App. 2010).

In a negligence case, a trial court erred by excluding a post-accident eye doctor visit from evidence, as although this was a subsequent remedial measure covered by Miss. R. Evid. 407, an exception for impeachment existed; moreover, Miss. R. Evid. 403 did not warrant the exclusion of the evidence either since a driver's credibility was paramount since he was the only person who remembered what had occurred. Alexander v. Greer, 959 So. 2d 586, 2007 Miss. App. LEXIS 436 (Miss. Ct. App. 2007).

Rule for exclusion in Miss. R. Evid. 407 has a more liberal application; in addition, the exceptions mentioned in Rule 407 are more liberal as well. Alexander v. Greer, 959 So. 2d 586, 2007 Miss. App. LEXIS 436 (Miss. Ct. App. 2007).

While it may have been error for a trial court not to allow further questioning about a new type of mat used by an independent contractor in connection with oil well workovers, the error was not prejudicial because the company facing a wrongful death action, which hired the independent contractor, was able to get before the jury the fact that the contractor started using the new mat after the accident occurred. Coho Res., Inc. v. McCarthy, 829 So. 2d 1, 2002 Miss. LEXIS 208 (Miss. 2002).

Evidence that flashing light warning devices were installed at train crossing after date of accident was properly excluded in negligence action against railroad. Sawyer v. Illinois C. G. R. Co., 606 So. 2d 1069, 1992 Miss. LEXIS 466 (Miss. 1992).

Trial court did not err in barring evidence regarding the corporation's trim-ming of trees near the property owner's property as such evidence of a subsequent remedial measure was not admissible to show the corporation's alleged negligence, and while it would have been admissible to show the corporation's control over the power lines, the control of them was not an issue in the case. Redhead v. Entergy Miss., Inc., 828 So. 2d 801, 2001 Miss. App. LEXIS 421 (Miss. Ct. App. 2001), cert. dismissed, 2002 Miss. App. LEXIS 618 (Miss. Ct. App. Oct. 17, 2002).

### RESEARCH REFERENCES

**ALR.**

Admissibility of evidence of subsequent remedial measures under Rule 407 of Federal Rules of Evidence. 158 A.L.R. Fed. 609.

**Law Reviews.**

Navigating the Maze of Evidence of Character and Other Crimes, Wrongs or Acts; Mississippi Rules of Evidence 404 & 405 in Criminal Cases, 71 Miss. L.J. 835, Spring, 2002.

## Rule 408. Compromise offers and negotiations.

(a) *Prohibited uses.* — Evidence of the following is not admissible either to prove or disprove the validity or amount of a disputed claim:

(1) furnishing, promising, or offering – or accepting, promising to accept, or offering to accept – a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or a statement made during compromise negotiations about the claim.

(b) *Exceptions.* —

(1) The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

(2) This rule does not apply to otherwise discoverable evidence presented during compromise negotiations.

**HISTORY: Restyled effective July 1, 2016.**

### ADVISORY COMMITTEE NOTE

The language of Rule 408 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. The Rule has been restructured, adding subdivisions and additional paragraphs. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 408 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

Reference to "liability" has been deleted, on the ground that the deletion makes the rule flow better and easier to read, and because "liability" is covered by the broader term "validity." Courts have not made substantive decisions on the basis of any distinction between validity and liability. No change in current practice or in the coverage of the rule is intended.

Evidence of an offer to compromise a claim is not receivable in evidence as an admission of either the validity or invalidity of the claim. The rule is based on two reasons. First, the evidence is irrelevant, since the offer may be motivated by a desire for peace rather than by a recognition of liability. Secondly, public policy favors the out-of-court compromises and settlement of disputes. The same policy underlines M.R.C.P. 48 which provides that evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

Pre-rule practice in Mississippi was similar to the rule with one significant difference. Under Rule 408 statements of admission facts made in negotiations are excluded from evidence. In Mississippi, an admission made in a settlement negotiation has been admissible against the declarant. *See McNeer & Dood v. Norfleet,* 113 Miss. 611, 74 So. 577 (1917).

Rule 408 only excludes offers when the purpose is proving the validity or invalidity of the claim or amount. Therefore, an off er for another purpose may well be admissible at trial.

Also, it is important to note that offers which are made in settlement negotiations are not necessarily excluded if they are otherwise discoverable. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

Applicability.
Impeachment of witness.
Illustrative cases.

**Applicability.**

Since divorcing parties' property-settlement agreement was a binding contract between them concerning an agreed equitable division of their marital property, it was not a settlement or an offer to settle, such that Miss. R. Evid. 408 was inapplicable; accordingly, there was no merit to the wife's claim that the trial court erred in admitting the agreement into evidence. Wilson v. Wilson, 53 So. 3d 865, 2011 Miss. App. LEXIS 70 (Miss. Ct. App. 2011).

Trial court erred in excluding evidence of appraisal of property; appraisal was not part of an offer to compromise a disputed claim, where there was only a threat of an eminent domain proceeding, and appraisal was made before condemnation petition was filed and any need for negotiations had arisen. Morley v. Jackson Redevelopment Auth., 632 So. 2d 1284, 1994 Miss. LEXIS 75 (Miss. 1994).

**Impeachment of witness.**

A narcotics task force officer testified that defendant gave the officer names of people who sold drugs in an attempt to cut a deal under Miss. R. Evid. 408, and the trial court admitted the testimony to rebut defendant's assertion that defendant knew nothing about drugs; because the testimony was not offered as evidence of defendant's guilt but to discredit defendant, the trial court properly admitted the officer's rebuttal testimony. Smith v. State, 839 So. 2d 489, 2003 Miss. LEXIS 65 (Miss. 2003).

Whatever bias might be shown by the indications of interest by the victim in receiving some compensation from defendant, the appellate court found that it was within the trial judge's discretion to refuse to permit the matter to be explored before the jury. Armstead v. State, 805 So. 2d 592, 2001 Miss. App. LEXIS 485 (Miss. Ct. App. 2001).

In an action arising from a motor vehicle accident, a Petition for Authority to Settle and Compromise Doubtful Claim of Minor Child was properly introduced into evidence to impeach the credibility of the plaintiff's husband after he denied ever filing a claim on behalf of his minor child against his wife when, in fact, he had filed a claim and collected for the child; however, the trial court committed reversible error when it allowed the defendants' attorney to use the petition as substantive evidence during closing arguments. Martindale v. Wilbanks, 744 So. 2d 252, 1999 Miss. LEXIS 156 (Miss. 1999).

**Illustrative cases.**

Circuit judge did not abuse its discretion by admitting into evidence a written release which a property owner gave to the owner's sibling from any and all claims which the owner had against the sibling, including a then-pending criminal charge, in return for a sum of money because the owner offered the release to defend against the malicious-prosecution lawsuit which the sibling filed against the owner, not to prove that the sibling was guilty of embezzlement. Stratton v. Ussing, 176 So. 3d 162, 2015 Miss. App. LEXIS 527 (Miss. Ct. App. 2015).

Defendant's embezzlement conviction was proper where the trial court did not err in overruling his motion to suppress the statement he made at the police station pursuant to Miss. R. Evid. 408 because, even if the trial judge had not admitted the testimony regarding his statement at the station, there was substantial evidence with which to convict defendant. Crimm v. State, 888 So. 2d 1178, 2004 Miss. App. LEXIS 933 (Miss. Ct. App. 2004).

In an employment contract dispute, a court did not err in admitting a letter relating to the discontinuance of employment where, by its own statement, the employer acknowledged that the employment agreement was no longer in force. At best, the letter was mere "puffing" in an attempt by to downplay the significance of the employee's leaving the cardiology practice and any claims made by him during negotiations for "membership" regarding his right and eligibility for membership in the employer's organization. HeartSouth, PLLC v. Boyd, 865 So. 2d 1095, 2003 Miss. LEXIS 695 (Miss. 2003).

Negotiation offer was clearly inadmissible evidence to establish amount of compensation due in condemnation proceeding. State Highway Com. v. Warren, 530 So. 2d 704, 1988 Miss. LEXIS 422 (Miss. 1988).

## Rule 409. Offers to pay medical and similar expenses.

Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

**HISTORY: Restyled effective July 1, 2016.**

### ADVISORY COMMITTEE NOTE

The language of Rule 409 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

This rule fills a gap in Mississippi's evidence law. There exists no pre-rule Mississippi case on the relevance of offers by a defendant to pay plaintiff's medical expenses. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

### JUDICIAL DECISIONS

**Illustrative cases.**

Store manager's offer to pay medical bills of customer who fell in store aisle was clearly not admissible for the purpose of proving liability. Drennan v. Kroger Co., 672 So. 2d 1168, 1996 Miss. LEXIS 63 (Miss. 1996).

## Rule 410. Pleas, plea discussions, and related statements.

(a) *Prohibited uses.* — In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

(1) a guilty plea that was later withdrawn;

(2) a nolo contendere plea;

(3) a statement made during a proceeding on either of those pleas under a Mississippi statute or court rule; or

(4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.

(b) *Exceptions.* — The court may admit a statement described in Rule 410(a)(3) or (4):

(1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or

(2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.

**HISTORY: Restyled effective July 1, 2016.**

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 2017, the Advisory Committee Note to Rule 410 was amended to substitute a citation to the new Rule of Criminal Procedure for a superseded Uniform Rule of Circuit Court Practice.

Effective July 1, 2016, the Rule was amended as part of the general restyling of the Evidence Rules.

Effective June 16, 2016, the "Comment" was retitled "Advisory Committee Note."

## ADVISORY COMMITTEE NOTE

The language of Rule 410 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. The Rule has been restructured, adding subdivisions. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Under existing Mississippi law, a plea of *nolo contendere* by a defendant is not admissible against him later in either a civil case or a criminal case. *See Keys v. State* , 312 So. 2d 7 (Miss. 1975). (A plea of *nolo contendere* is only available in misdemeanor cases). Rule 410 is consistent with Mississippi law by rendering inadmissible both guilty pleas which are withdrawn and statements made in a judicial proceeding regarding a plea of guilty which is withdrawn or a plea of *nolo contendere. See Sanders v. State,* 435 So. 2d 1177 (Miss. 1983) and MRCrP 15.4.

The exceptions to this rule of inadmissibility are limited. The first exception covers situations in which the defendant testifies at trial that the prosecutor or police made a statement expressing doubt as to defendant's guilt. In such an instance, the state would be able to introduce the defendant's statement or plea to rebut his testimony.

["Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended July 1, 2016, to note restyling.]

## JUDICIAL DECISIONS

### ANALYSIS

Nolo contendere.
Plea negotiations.
Withdrawn pleas.

**Nolo contendere.**

Where an inmate argued that counsel was ineffective in allowing the inmate to plead guilty to being a felon in possession of a deadly weapon when the prior conviction was based upon a California nolo contendere plea to a marijuana possession charge, which the inmate argued could not be used against the inmate in the Mississippi charges, the inmate failed to establish a prima facie case of ineffective assistance of counsel because, inter alia, he admitted on the record that he had been convicted of a felony. Knight v. State, 983 So. 2d 348, 2008 Miss. App. LEXIS 145 (Miss. Ct. App.), cert. denied, 981 So. 2d 298, 2008 Miss. LEXIS 267 (Miss. 2008), cert. denied, 555 U.S. 998, 129 S. Ct. 492, 172 L. Ed. 2d 363, 2008 U.S. LEXIS 8079 (U.S. 2008).

**Plea negotiations.**

Where an air conditioning unit found in defendant's trunk had serial numbers matching those of a unit shoplifted from a store, the trial court's error in admitting testimony from a deputy about defendant's plea negotiations in violation of Miss. R. Evid. 410(4) was harmless. Jasper v. State, 871 So. 2d 729, 2004 Miss. LEXIS 438 (Miss. 2004).

While evidence that a plea offer was made by the prosecution and rejected by the defendant does not fall squarely under any of the four categories in the rule, it is clear that a prosecutor's statement regarding such an offer violates the spirit of the rule. Brooks v. State, 763 So. 2d 859, 2000 Miss. LEXIS 156 (Miss. 2000).

The only governmental officer with authority to enter into plea negotiations is the prosecuting attorney. Evans v. State, 725 So. 2d 613, 1997 Miss. LEXIS 389 (Miss. 1997), cert. denied, 525 U.S. 1133, 119 S. Ct. 1097, 143 L. Ed. 2d 34, 1999 U.S. LEXIS 1510 (U.S. 1999).

Murder defendant's confession was not made during plea negotiations, and it was therefore admissible; prosecuting attorney was the only governmental officer with authority to enter into plea negotiations, and defendant was not actually involved in plea negotiations but was cooperating in order to assure placement in a federal facility. Evans v. State, 725 So. 2d 613, 1997 Miss. LEXIS 389 (Miss. 1997), cert. denied, 525 U.S. 1133, 119 S. Ct. 1097, 143 L. Ed. 2d 34, 1999 U.S. LEXIS 1510 (U.S. 1999).

The defendant's confession was admissible under the rule on the basis that it was precipitated by plea negotiations where (1) the confession was not part of a discussion between the defendant and the prosecuting attorney, and (2) the confession was not made as part of a negotiation for a plea, but was made instead, as part of a negotiation to further the defendant's desires to be housed in a federal facility and to have visitation privileges with his girlfriend. Evans v. State, 725 So. 2d 613, 1997 Miss. LEXIS 389 (Miss. 1997), cert. denied, 525 U.S. 1133, 119 S. Ct. 1097, 143 L. Ed. 2d 34, 1999 U.S. LEXIS 1510 (U.S. 1999).

The defendant's expectation that he was negotiating a deal which would not be used against him at trial was reasonable, the statement was given in conjunction with plea negotiations, and the rule prohibited the admission of the statement at trial, notwithstanding that the statement was made to a law enforcement officer, although a prosecuting attorney was present, and the prosecuting attorney entered the room after the defendant was given his Miranda rights, where the statement was given in exchange for the state's promise not to seek the death penalty. Barnett v. State, 725 So. 2d 797, 1998 Miss. LEXIS 278 (Miss. 1998).

**Withdrawn pleas.**

The trial court erred in its interpretation of Rule 410 when it refused to allow the impeachment of a witness with a prior inconsistent statement from a withdrawn plea. Keys v. State, 739 So. 2d 455, 1999 Miss. App. LEXIS 217 (Miss. Ct. App. 1999).

## Rule 411. Liability insurance.

Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.

**HISTORY: Restyled effective July 1, 2016.**

### ADVISORY COMMITTEE NOTE

The language of Rule 411 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 411 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

One of the primary reasons for excluding evidence of insurance or the lack of it is to prevent the jury from deciding the case on improper grounds. Rule 411 reflects existing Mississippi practice. Evidence of the existence of defendant's insurance is irrelevant as to his negligence and admission of such evidence may be grounds for a mistrial. *See Mid-Continent Aircraft Corp. v. Whitehead,* 357 So. 2d 122 (Miss. 1978); *Petermann v. Gray,* 210 Miss. 438, 49 So. 2d 828 (1951). Evidence of liability insurance may be relevant for other purposes, such as proof of agency, ownership, or bias. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

### JUDICIAL DECISIONS

#### ANALYSIS

Construction.
Bias.
Ownership or control.

**Construction.**

While evidence of existence of liability insurance is not admissible upon issue of whether a party acted negligently or otherwise wrongfully, it may well be relevant to other issues, such as agency. Royal Oil Co. v. Wells, 500 So. 2d 439, 1986 Miss. LEXIS 2565 (Miss. 1986).

In a civil suit following an automobile accident in which both parties had the same liability insurer, the trial court abused its discretion under Miss. R. Civ. P. 42 by denying appellant's motion to sever appellant's breach of contract and bad faith claims against the insurer from appellee's property damages and medical claims against the insurer; appellant would be unduly prejudiced because the fact that she had liability insurance would be placed squarely before the jury in violation of Miss. R. Evid. 411. Hegwood v. Williamson, 949 So. 2d 728, 2007 Miss. LEXIS 4 (Miss. 2007).

**Bias.**

In a medical malpractice action, evidence that a doctor's experts were all members of the same insurer was properly not admitted because the probative value of the evidence that the doctor's experts could incur a financial penalty of $ 136 if the patient was successful on her claim was substantially outweighed by the danger of unfair prejudice resulting from the admission of evidence concerning the existence of a liability insurance policy. Wells v. Tucker, 997 So. 2d 908, 2008 Miss. LEXIS 480 (Miss. 2008).

Circuit court abused its discretion when it applied the Miss. R. Evid. 403 balancing test where, if the circuit court believed that the jury knew about the presence of insurance for the physician, then there could be no prejudicial effect in placing it before the jury; the evidence that the physician and his experts all belonged to the same mutual insurance company had some probative value and there would have been no prejudice in allowing the jury to hear that the physician had insurance. Wells v. Tucker, 997 So. 2d 925, 2007 Miss. App. LEXIS 594 (Miss. Ct. App. 2007), rev'd, 997 So. 2d 908, 2008 Miss. LEXIS 480 (Miss. 2008).

Trial court abused its discretion in not allowing a trial to be bifurcated in a contractor's action against a subcontractor and an insurance company, pursuant to Miss. R. Civ. P. 42 and Miss. R. Evid. 411, because the comment to Miss. R. Civ. P. 42 authorized a separate trial to avoid prejudice such as here where the jury would learn that the subcontractor was insured, and the issue of the amount of damages the contractor or subcontractor may owe one another was completely unrelated to the issues of whether there is insurance coverage provided by the insurance company. Capital City Ins. Co. v. G.B. "Boots" Smith Corp., 889 So. 2d 505, 2004 Miss. LEXIS 1329 (Miss. 2004).

Trial court erred in excluding evidence of liability insurance, where plaintiff offered the evidence of the existence of liability insurance in a good faith attempt to show the bias of defendant's expert. Mitchell v. Glimm, 819 So. 2d 548, 2002 Miss. App. LEXIS 162 (Miss. Ct. App. 2002).

**Ownership or control.**

In a action to recover for injuries sustained by the plaintiff while working on premises owned by the defendant, the court did not err in refusing to allow the introduction of a liability insurance policy for the limited purposes of showing that the defendant was the named insured for the restaurant located in the building as evidence of her control over the premises and impeaching her testimony that she had no involvement with the restaurant since it was undisputed that she owned the building; therefore, the fact of her control over the premises was not disputed. Vu v. Clayton, 1999 Miss. App. LEXIS 458 (Miss. Ct. App. July 20, 1999), rev'd, 765 So. 2d 1253, 2000 Miss. LEXIS 158 (Miss. 2000).

## Rule 412. Sex-offense cases: the victim's sexual behavior or predisposition.

(a) *Prohibited uses.* — The following is not admissible in a criminal case involving an alleged sexual offense:

(1) reputation or opinion evidence of a victim's past sexual behavior; and

(2) evidence of a victim's past sexual behavior other than reputation or opinion, except under subdivisions (b) and (c).

(b) *Exceptions.* — The court may admit evidence of:

(1) specific instances of a victim's past sexual behavior:

(A) with a person other than the defendant, if offered by the defendant to prove that someone else was the source of semen, pregnancy, disease, or injury;

(B) with the defendant, if offered by the defendant to prove consent; and

(C) if constitutionally required to be admitted; and

(2) false allegations of sexual offenses made at any time before trial by the victim.

(c) *Procedure to determine admissibility.* —

(1) *Motion.* A defendant who intends to offer evidence under subdivision (b) must:

(A) make a motion accompanied by an offer of proof describing the evidence;

(B) file the written motion and offer of proof at least 15 days before trial, unless the court sets a later time – including during trial – after determining:

(i) the evidence is newly discovered and with reasonable diligence could not have been discovered earlier; or

(ii) the issue is newly arisen; and

(C) serve all parties and the victim.

(2) *Hearing and order.*When the offer of proof is sufficient, the evidence may be admitted only if the court:

(A) conducts a hearing in chambers to determine admissibility of the evidence;

(B) allows the parties to offer relevant evidence and call witnesses – including the victim – at the hearing;

(C) if the relevance of the evidence depends on whether a fact exists, determines – at this or a later hearing – whether the fact exists, notwithstanding Rule 104(b);

(D) finds that the probative value of relevant evidence outweighs the danger of unfair prejudice, except this subparagraph (D) does not apply when the evidence is offered under subparagraph (b)(1)(C); and

(E) makes an order that specifies:

(i) the admissible evidence; and

(ii) the areas about which the victim may be examined.

(d) *Definitions.* — In this rule:

(1) "victim" includes an alleged victim; and

(2) "past sexual behavior" means sexual behavior other than the alleged offense.

**HISTORY: Amended effective March 1, 1989; restyled effective July 1, 2016.**

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective March 20, 1995, the Advisory Committee Note to Rule 412 was amended to note the repeal of a statute. 648-651 So.2d XXVI (West Miss. Cas. 1995).

Effective March 1, 1989, Rule 412 was amended to add the terms "pregnancy" and "disease" to 412(b)(2)(A) and to add a new subsection 412(b)(2)(C). 536-538 So. 2d XXXII (West Miss. Cas. 1989).

## ADVISORY COMMITTEE NOTE

The language of Rule 412 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. The Rule has been restructured, employing additional paragraphs, subparagraphs, and items. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

**(a)** Subdivision (a) is designed to protect the privacy of the alleged victim by excluding opinion or reputation evidence of the victim's past sexual experience. This rule is applicable in all criminal cases in which a defendant is accused of a sexual offense against another person. This includes, but is not limited to, offenses prohibited by M.C.A. § 97-3-95.

**(a)** Subdivision (a) also excludes other evidence of the victim's past sexual experience with some exceptions in subdivision (b). Specific instances of sexual conduct are admissible to determine whether the defendant is the source of semen, pregnancy, disease or injury. Furthermore, specific instances of sexual conduct between the alleged victim and the defendant are relevant on the issue of consent.

**(c)** Subdivision (c) provides that notice be given if the defendant intends to offer evidence of specific instances of the alleged victim's sexual conduct. The defendant does this by making a written motion to offer the evidence, which includes an offer of proof. The court then holds a hearing in chambers to decide the evidence's admissibility.

If otherwise admissible, nothing in this rule precludes evidence of past false allegations by the alleged victim of past sexual offenses. "Past false allegations" shall include any such allegations made prior to trial. This provision is intended to protect the defendant's Sixth Amendment rights.

Rule 412(a) and (b) adapts the language of Uniform Rule of Evidence 412. In its procedural requirements Rule 412 bears similarity to M.C.A. § 97-3-70 (repealed July 1, 1991 ), the Mississippi rape-shield law enacted in 1977. *See also* M.C.A. § 97-3-68; *Johnston v. State,* 376 So. 2d 1343 (Miss. 1979). ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

Construction.
Applicability.
Adultery.
Preclusion.
Relevance.
Right to confrontation.
Illustrative cases.

**Construction.**

Absence of victim's hymenal ring was a "disease or injury" within meaning of this rule. Goodson v. State, 566 So. 2d 1142, 1990 Miss. LEXIS 413 (Miss. 1990).

For purposes of this rule, "past sexual behavior" refers to sexual behavior occurring at any time in the past, i.e., prior to trial, and not only to sexual behavior prior to date of offense charged in indictment. Goodson v. State, 566 So. 2d 1142, 1990 Miss. LEXIS 413 (Miss. 1990).

**Applicability.**

In a case in which a jury acquitted defendant for one count of attempted sexual battery of his stepdaughter, but found him guilty of the lesser-included offense of fondling, the circuit court did not abuse its discretion in limiting defendant's cross-examination of the victim regarding her alleged fifty-one-year-old boyfriend. Williams v. State, 240 So. 3d 436, 2017 Miss. App. LEXIS 476 (Miss. Ct. App. 2017), cert. denied, 245 So. 3d 394, 2018 Miss. LEXIS 177 (Miss. 2018).

Defendant's conviction for sexual battery of a child by a person in a position of trust or authority over the child was proper because Miss. R. Evid. 412 was not improperly applied. Defendant failed to make any offer of proof as to a prior false sexual allegation; it was clear that evidence of any of the victim's prior sexual conduct would not fall under any other exception in R. 412; and even if defendant had made a proper offer of proof, the circuit court was entitled to deny the motion on the basis of its untimeliness and defendant's failure to serve the notice on the victim. Roberson v. State, 61 So. 3d 204, 2010 Miss. App. LEXIS 646 (Miss. Ct. App. 2010), cert. denied, 62 So. 3d 974, 2011 Miss. LEXIS 263 (Miss. 2011), cert. denied, 565 U.S. 983, 132 S. Ct. 507, 181 L. Ed. 2d 358, 2011 U.S. LEXIS 7779 (U.S. 2011).

In a sexual battery case, the evidence of a prior sexual relationship with defendant was properly excluded under Miss. R. Evid. 412(c)(1) because it was not relevant to determine whether the victim consented on the day of the offense, especially considering that the evidence showed that defendant broke into the victim's house during the night and entered her bedroom with a large knife in his hand. Goldman v. State, 9 So. 3d 394, 2008 Miss. App.

LEXIS 525 (Miss. Ct. App. 2008), cert. denied, 12 So. 3d 531, 2009 Miss. LEXIS 222 (Miss. 2009).

Evidence of the victim's past sexual behavior was properly excluded because defendant failed to comply with Miss. R. Evid. 412(c)(1) by filing a written notice that he intended to offer evidence of the victim's past sexual relationship with him within 15 days before trial. Goldman v. State, 9 So. 3d 394, 2008 Miss. App. LEXIS 525 (Miss. Ct. App. 2008), cert. denied, 12 So. 3d 531, 2009 Miss. LEXIS 222 (Miss. 2009).

Evidence that a child victim had allegedly caused injuries to his own rectum by sticking objects there was properly excluded in a sexual battery case because it was irrelevant under Miss. R. Evid. 401 and highly prejudicial under Miss. R. Evid. 403, and it was also a collateral issue that was too remote in time to rebut the charges based on the fact that it was a year before the charges in an indictment; case law under Miss. R. Evid. 412 was helpful in making this determination, despite the fact that the victim's actions did not constitute clear sexual activity. Mason v. State, 971 So. 2d 618, 2007 Miss. App. LEXIS 327 (Miss. Ct. App.), cert. denied, 973 So. 2d 244, 2007 Miss. LEXIS 701 (Miss. 2007).

Contemporaneous report of abuse was not relevant to defendant's sexual battery convictions where the cases were not related and only shared the same victim. Parker v. State, 825 So. 2d 59, 2002 Miss. App. LEXIS 473 (Miss. Ct. App. 2002).

Notice was not provided to the State 15 days prior to trial, and evidence that victim's accusations against her father and subsequent recantation constituted a prior false accusation did not qualify as an exception under subsection (c); thus, the testimony was procedurally barred from being admitted. Lofton v. State, 818 So. 2d 1229, 2002 Miss. App. LEXIS 314 (Miss. Ct. App. 2002).

A rape victim did not open the door to evidence of her prior sexual activity when she, in her testimony, referred to a young child living in the home as "my baby." Radcliff v. State, 736 So. 2d 1081, 1999 Miss. App. LEXIS 83 (Miss. Ct. App. 1999).

**Adultery.**

In a prosecution for sexual battery by the defendant of his wife's sister, the court properly precluded cross examination of the victim with regard to her alleged habit of dating married men since such evidence was not relevant to whether he was, with respect to the victim, the source of semen, pregnancy, disease, or injury. Waltman v. State, 734 So. 2d 324, 1999 Miss. App. LEXIS 57 (Miss. Ct. App. 1999).

**Preclusion.**

Rape shield rule did not apply to testimony of two witnesses to effect that victim had been in bed with a third person not defendant, since conflicting evidence of who actually caused injury during incident was outside scope of the rule. Amacker v. State, 676 So. 2d 909, 1996 Miss. LEXIS 310 (Miss. 1996).

**Relevance.**

Defendant was properly convicted of sexual battery of his 11-year-old cousin (the victim) and sentenced as a habitual offender to life imprisonment because the defense was given every opportunity available to impeach a witness's testimony, the defense failed to provide timely notice of its intent to submit evidence of the victim's prior sexual behavior, the status of the victim's grandfather (with whom she lived) as registered as a sex offender was irrelevant, a life sentence without parole was mandatory upon defendant's conviction, the jury was properly instructed regarding its duty, defendant failed to show any prejudice stemming from the delay in bringing him to trial, and the record did not show that counsel was ineffective. Keys v. State, 213 So. 3d 515, 2016 Miss. App. LEXIS 616 (Miss. Ct. App.), cert. denied, 205 So. 3d 1082, 2016 Miss. LEXIS 538 (Miss. 2016).

Trial court properly prohibited cross-examination on issue of rape victim's virginity, because whether victim was a virgin was irrelevant to whether she was raped. Heflin v. State, 643 So. 2d 512, 1994 Miss. LEXIS 470 (Miss. 1994), overruled, Owens v. State, 666 So. 2d 814, 1995 Miss. LEXIS 625 (Miss. 1995).

**Right to confrontation.**

Trial court permitted defendant to produce evidence of his sons' assault upon the victim through cross-examination of several other witnesses and the trial court's decision not to allow defendant to call the victim's stepbrothers did not deprive defendant of an ample opportunity to present his theory of the case. Caldwell v. State, 6 So. 3d 1076, 2009 Miss. LEXIS 75 (Miss. 2009).

**Illustrative cases.**

Trial court did not abuse its discretion in defendant's trial for sexual battery of minors by excluding questioning of one of the alleged victims about the sexual nature of the rule violations of the home for children where the victim lived and where defendant was a house parent. Furthermore, the jury still heard why the victim was regarded as "the bad one," the victim admitted to violating rules, and the victim admitted that the victim hated the home for children. Copes v. State, — So. 3d —, 2021 Miss. App. LEXIS 54 (Miss. Ct. App. Feb. 2, 2021), aff'd, 333 So. 3d 1, 2022 Miss. LEXIS 37 (Miss. 2022).

There was no merit to defendant's argument that the State's action of introducing the entire Child Advocacy Center video-recorded interview during the pretrial hearing but submitting a redacted version at trial precluded him from complying with the requirements of this rule to give notice by motion and offer of proof of the victim's past sexual behavior. Martin v. State, 266 So. 3d 652, 2018 Miss. App. LEXIS 558 (Miss. Ct. App. 2018), cert. denied, 265 So. 3d 181, 2019 Miss. LEXIS 128 (Miss. 2019).

In a sexual battery case, although defendant's counsel failed to file a written motion describing the evidence of the victim's past sexual behavior that she wanted to introduce at least 15 days before trial, counsel was not ineffective because the record did not indicate that, even if defendant's counsel timely filed the motion, the trial court would have found the offer of proof sufficient for a hearing; conducted a hearing; determined the evidence to be admissible; determined the evidence to be more probative than prejudicial; or admitted the evidence; and the trial court allowed defense counsel to make a showing as to why the evidence should be admitted notwithstanding her failure to comply with the notice requirement. Young v. State, 264 So. 3d 797, 2018 Miss. App. LEXIS 423 (Miss. Ct. App. 2018), cert. denied, 263 So. 3d 666, 2019 Miss. LEXIS 80 (Miss. 2019).

Any error in the trial court's denial of defendant's motion for in camera inspection of the sexual assault victim's medical records was harmless error because, even if another person was the source of the semen on the victim's pants, proof of prior sexual activity by the victim could not have negated the overwhelming evidence that defendant committed a statutory rape against the victim as defendant confessed to the crimes of kidnapping and statutory rape involving the victim, and the victim identified defendant as the perpetrator. Roberts v. State, 234 So. 3d 1251, 2017 Miss. LEXIS 383 (Miss. 2017).

In a sexual assault case where a witness was precluded from testifying about an alleged relationship between defendant and the victim, even though there was an improper comment made about the State's purported right to a fair trial, this was a comment made outside of the jury's presence in relation to the violation of discovery rules and Miss. R. Evid. 412. It was not shown how this prejudiced the defense. Randle v. State, 220 So. 3d 217, 2017 Miss. App. LEXIS 94 (Miss. Ct. App. 2017).

Trial court properly excluded the victim's testimony regarding two prior allegations of sexual assault against two separate individuals, as well as a prior allegation against defendant, because the evidence presented at the haring was insufficient to prove any false allegations occurred. Pustay v. State, 221 So. 3d 320, 2016 Miss. App. LEXIS 643 (Miss. Ct. App. 2016), cert. denied, 216 So. 3d 1150, 2017 Miss. LEXIS 232 (Miss. 2017).

Trial court properly excluded the victim's testimony that it was defendant's semen on a towel, because it tended to reflect more on the victim's character than the source of the semen under this rule. Pustay v. State, 221 So. 3d 320, 2016 Miss. App. LEXIS 643 (Miss. Ct. App. 2016), cert. denied, 216 So. 3d 1150, 2017 Miss. LEXIS 232 (Miss. 2017).

Trial court did not abuse its discretion in refusing to allow defendant to question the victim about specific instances of past sexual conduct because defendant failed to follow the notice and disclosure procedure required by subsection (b) and (c). Burgess v. State, 178 So. 3d 1266, 2015 Miss. LEXIS 570 (Miss. 2015).

In a prosecution of defendant for sexual battery and rape, the circuit court did not abuse its discretion in excluding evidence of victim's post-assault sexual activities with her boyfriend. The probative value of such evidence was outweighed by the prejudicial effect and would tend to mislead or confuse the jury. Holloway v. State, 196 So. 3d 962, 2015 Miss. App. LEXIS 466 (Miss. Ct. App. 2015), cert. denied, 202 So. 3d 611, 2016 Miss. LEXIS 308 (Miss. 2016).

In a statutory rape prosecution, it was not error to bar defense counsel from asking about specific instances of the victim's prior sexual conduct because (1) no motion and offer of proof was filed as required by Miss. R. Evid. 412(c), nor (2) did it appear this was newly discovered and could not have been obtained earlier with due diligence. Cage v. State, 149 So. 3d 1038, 2014 Miss. LEXIS 536 (Miss. 2014).

Trial court properly denied the defense attorney's request to introduce evidence of the alleged sexual assault victim's prior sexual activity or drug use at defendant's trial because defendant failed to follow the proper procedure in that the motion to offer evidence was not filed in a timely manner and no narrative was attached to the motion. McNair v. State, 134 So. 3d 845, 2014 Miss. App. LEXIS 159 (Miss. Ct. App. 2014).

In a statutory rape case, the prior sexual activity of a minor victim was properly excluded from evidence because defendant did not lay a proper predicate under Miss. R. Evid. 613; moreover, the exceptions to Miss. R. Evid. 412 did not apply, and defendant did not comply with the requirements of Rule 412. Ladd v. State, 969 So. 2d 141, 2007 Miss. App. LEXIS 762 (Miss. Ct. App. 2007).

In a postconviction petition involving a rape conviction, newly discovered evidence that a victim left a bar with a man fitting an inmate's description several days before an alleged rape was admissible because it was evidence of prior relations between the parties; therefore, a trial court should have granted the inmate's petition for relief. Hunt v. State, 877 So. 2d 503, 2004 Miss. App. LEXIS 18 (Miss. Ct. App.), cert. denied, 878 So. 2d 66, 2004 Miss. LEXIS 852 (Miss. 2004).

Defendant was not entitled to reversal of his conviction for fondling a child in violation of Miss. Code Ann. § 97-5-23 because, inter alia: (1) the evidence was sufficient to enable a reasonable juror to find defendant guilty beyond a reasonable doubt, (2) the trial court did not improperly limit cross-examination of the victim in violation of defendant's rights under USCS Const. Amend. 6 and Miss. Const. Art. III, § 26, because testimony concerning the victim's past sexual behavior was properly excluded under Miss. R. Evid. 412; (3) since defendant failed to object at trial to the qualification of an expert witness under Miss. R. Evid. 702, the issue was waived; and (4) under Miss. R. Evid. 615(3), the expert witness was properly allowed to remain in the court room so that she could base her opinion on facts learned at the trial pursuant to Miss. R. Evid. 703. Aguilar v. State, 955 So. 2d 386, 2006 Miss. App. LEXIS 903 (Miss. Ct. App. 2006).

Failure to give timely notice and qualify for an exception to Miss. R. Evid. 412 did not warrant a reversal of a trial court's decision to deny testimony regarding the sexual conduct of a victim; furthermore, failure to proffer testimony is a procedural bar to the issue on appeal. Blackmon v. State, 803 So. 2d 1253, 2002 Miss. App. LEXIS 22 (Miss. Ct. App. 2002).

The court properly disallowed evidence regarding a murder victim's past sexual contacts where the defendant proffered some hearsay and some direct evidence of the victim's past sexual contacts and, even assuming such contacts were true, the closest was approximately two weeks before her disappearance. Hughes v. State, 735 So. 2d 238, 1999 Miss. LEXIS 131 (Miss. 1999), cert. denied, 528 U.S. 1083, 120 S. Ct. 807, 145 L. Ed. 2d 680, 2000 U.S. LEXIS 242 (U.S. 2000).

Trial court erred in refusing to allow evidence offered by rape defendant to prove he was not the source of victim's vaginal injury; ruling, in effect, prevented defendant from putting on a defense amounting to anything more than a denial. Herrington v. State, 690 So. 2d 1132, 1997 Miss. LEXIS 8 (Miss. 1997).

Although defendant failed to make required written request fifteen days prior to trial, as to children's testimony regarding their alleged sexual relationships with a third party and existence and source of their venereal diseases, admissible evidence was nevertheless admitted and thus defendant could not show prejudice. Eakes v. State, 665 So. 2d 852, 1995 Miss. LEXIS 555 (Miss. 1995).

Evidence of rape victim's past sexual behavior should not have been excluded, where it was admissible to rebut inference that defendant was source of semen discovered and that semen was the result of a rape. Heflin v. State, 643 So. 2d 512, 1994 Miss. LEXIS 470 (Miss. 1994), overruled, Owens v. State, 666 So. 2d 814, 1995 Miss. LEXIS 625 (Miss. 1995).

Trial judge properly sustained State's objection to defendant's question about murder victim's past sexual behavior with her boyfriend; defendant's contention that this rule was designed solely to protect privacy of a living victim was meritless. Holland v. State, 587 So. 2d 848, 1991 Miss. LEXIS 648 (Miss. 1991).

### RESEARCH REFERENCES

**ALR.**

Admissibility in sex offense case, under Rule 412 of Federal Rules of Evidence, of evidence of victim's past sexual behavior. 166 A.L.R. Fed. 639.

# ARTICLE V. PRIVILEGES

## Rule 501. Privileges established by constitution or rule only.

Unless the federal or state constitution or these or other applicable rules provide otherwise, no person has a privilege to:

- refuse to be a witness;
- refuse to disclose any matter;
- refuse to produce an object or writing; or
- prevent another from being a witness, disclosing any matter, or producing an object or writing.

**HISTORY: Restyled effective July 1, 2016.**

### ADVISORY COMMITTEE HISTORICAL NOTE

Effective March 20, 1995, the Advisory Committee Note to Rule 501 was amended to delete the second paragraph. 648-651 So.2d XXVI (West Miss. Cas. 1995).

### ADVISORY COMMITTEE NOTE

The language of Rule 501 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. The Rule has been restructured, converting numbered paragraphs to a list of bullet points. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rules 501 through 505 are largely modeled on the draft version of the Federal Rules of Evidence which was originally approved by the United States Supreme Court. Before enacting the Federal Rules of Evidence, Congress deleted the rules concerning privilege on the ground that the rules invaded an area of state law. The federal courts, however, often refer to these deleted rules, which are now labeled Federal Standards. Although they have no binding effect on the federal courts, they do serve as guidelines. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

Construction.
Attorney-client privilege.

**Construction.**

Trial court did not err in admitting into evidence results of blood alcohol test performed on defendant without his consent, while he was unconscious; statutory privilege was inconsistent with Mississippi Rules of Evidence, and was therefore abrogated by this rule. Whitehurst v. State, 540 So. 2d 1319, 1989 Miss. LEXIS 136 (Miss. 1989).

**Attorney-client privilege.**

In a case in which a district court determined that Miss. Code. Ann. § 73-33-16 was not applicable in regard to a motion for a temporary stay of an order by the court, even if § 73-33-16 governed, it was still not entirely clear whether the Mississippi accountant-client privilege would apply in light of the Mississippi Supreme Court's holding that statutory privileges were abrogated by the adoption of Miss. R. Evid. 501. The movants had not asserted a privilege provided by the Constitution of the United States or Mississippi, and the Mississippi Rules of Evidence did not provide for an accountant-client privilege. Int'l Fire & Safety, Inc. v. H.C. Servs., 2007 U.S. Dist. LEXIS 84601 (S.D. Miss. Oct. 30, 2007).

## Rule 502. Lawyer-client privilege.

(a) *Definitions.* — In this rule:

(1) "Client" means a person, public officer, corporation, association, or any other public or private organization or entity:

(A) to whom a lawyer renders professional legal services; or

(B) who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(2) "Client's representative" means:

(A) one authorized to:

(i) obtain professional legal services on behalf of the client; or

(ii) act on behalf of the client on the legal advice rendered; or

(B) an employee of the client with information the lawyer needs to render legal services to the client.

(3) "Lawyer" means a person authorized – or who the client reasonably believes is authorized – to practice law in any state or nation.

(4) "Lawyer's representative" means one employed by the lawyer to assist the lawyer in rendering professional legal services.

(5) A communication is "confidential" if not intended to be disclosed to third persons other than those:

(A) to whom disclosure is made to further rendition of professional legal services to the client; or

(B) reasonably necessary to transmit the communication.

(6) "Lawyer-client privilege" means the protection that applicable law provides for confidential lawyer-client communications.

(7) "Work-product protection" means the protection that applicable law

provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

(b) *General rule of privilege.* — A client has a privilege to refuse to disclose – and to prevent others from disclosing – any confidential communication made to facilitate professional legal services to the client:

(1) between the client or the client's representative and the client's lawyer or the lawyer's representative;

(2) between the client's lawyer and the lawyer's representative;

(3) by the client, the client's representative, the client's lawyer, or the lawyer's representative to another lawyer or that lawyer's representative, if:

(A) the other lawyer represents another party in a pending case; and

(B) the communication concerns a matter of common interest;

(4) between the client's representatives or between the client and a client representative; or

(5) among lawyers and their representatives representing the same client.

(c) *Who may claim the privilege.* —

(1) The privilege may be claimed by:

(A) the client;

(B) the client's guardian or conservator;

(C) a deceased client's personal representative; or

(D) the successor, trustee, or similar representative of a corporate, associational, or other organizational client, whether in existence or not.

(d) *Exceptions.* — The privilege does not apply if:

(1) *Furtherance of crime or fraud.*The lawyer's services were sought or obtained to enable or aid anyone to plan or commit what the client knew – or reasonably should have known – was a crime or fraud;

(2) *Claimants through same deceased client.*The communication is relevant to an issue between parties who claim – by testate or intestate succession or by *inter vivas* transaction – through the same deceased client;

(3) *Breach of duty.* The communication is relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer;

(4) *Document attested by lawyer.* The communication is relevant to an issue about an attested document to which the lawyer is an attesting witness; or

(5) *Joint clients.*The communication:

(A) is offered in a case between or among clients who retained or consulted a lawyer in common;

(B) was made by any of the clients to the lawyer; and

(C) is relevant to a matter of common interest between two or more clients.

(e) *Limitations on Waiver.* — The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the lawyer-client privilege or work-product protection.

(1) *Disclosure Made in a Mississippi Proceeding: Scope of a Waiver.* When the disclosure is made in a Mississippi proceeding and waives the lawyer-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Mississippi proceeding only if:

(A) the waiver is intentional;

(B) the disclosed and undisclosed communications or information concern the same subject matter; and

(C) they ought in fairness to be considered together.

(2) *Inadvertent Disclosure.* When made in a Mississippi proceeding, the disclosure does not operate as a waiver in a Mississippi proceeding if:

(A) the disclosure is inadvertent:

(B) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(C) the holder promptly took reasonable steps to rectify the error, including (if applicable) following MRCP 26(b)(6)(B).

**HISTORY: Restyled effective July 1, 2016; amended effective July 1, 2020.**

## ADVISORY COMMITTEE NOTE

The language of Rule 502 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Subdivision (a) defines pertinent terms: who is a lawyer, who is a client, who are their representatives. These definitions clarify Mississippi law. The only existing statute relating to attorney-client relationship is M.C.A. § 73-3-37 which, among other things, includes a provision that one of an attorney's duties is "to maintain inviolate the confidence and, at every peril to themselves, to preserve the secrets of their clients . . . . "

The term "client" includes individuals, corporations and associations, and governmental bodies. Mississippi decisional law is in accord with Rule 502(a)(l) in that the privilege protects communications between an attorney and one who consults him with a view towards retaining him, but who eventually decides not to employ him. *See Perkins v. Guy,* 55 Miss. 153 (1877). The services provided by the attorney must be legal services in order to be cloaked with the privilege. Services which are strictly business or personal do not enjoy the privilege. *See McCormick, Evidence,* 92. The Mississippi court has not recognized the privilege in those cases in which the attorney is merely a scrivener. *Rogers v. State,* 266 So. 2d 10 (Miss. 1972).

Rule 502(a)(2) defines representatives of a client. This takes on particular significance in regards to corporate clients. This group of employees who may be a client's representatives is larger than the "control group". The "control group" was formerly one of the leading tests for determining which corporate employees had the benefit of the privilege. *See Upjohn Co. v. United States,* 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981), in which the Supreme Court construed the language of the Federal Rules of Evidence as invalidating the control group test and so rejected it.

The definition of lawyer in Rule 502(a)(3) covers any person licensed to practice law in any state or nation. It includes persons who are not lawyers but whom the client reasonably believes are lawyers.

The definition of representative of the lawyer in Rule 502(a)(4) is broadly designed to include the lawyer's employees and assistants. It also includes experts that the lawyer has hired to assist in the preparation of the case. It does not extend to an expert employed to be a witness. This conforms to existing Mississippi practice. *Dictum* in *Wilburn v. Williams,* 193 Miss. 831, 11 So. 2d 306 (1943), indicated that the court might have followed such a definition if the issue was before it.

A communication which takes place in the presence of a third party is not confidential unless it complies with the statement in Rule 502(a)(5). If the third party does not fall within these categories in this subdivision, his presence deems the communication not to be confidential. *See Taylor v. State,* 285 So. 2d 172 (Miss. 1973); *Ferrel v. State,* 208 Miss. 539, 45 So. 2d 127 (1950).

The test for confidentiality is intent. Thus, a communication made in public cannot be considered confidential. Intent can be inferred from the particular circumstances.

Rule 502(a)(6) and (7) define "lawyer-client privilege" and "work-product protection," but make no attempt to alter the law on whether a communication or information is protected under the lawyer-client privilege or work-product protection as an initial matter. Subdivision (e) governs the scope of waiver and the effect of inadvertent disclosure.

Subdivision (b) is a statement of the rule. The rule is drafted in such a way as to prevent eavesdroppers from testifying about the privileged communication. *See* the Advisory Committee Notes to Deleted FRE 503 [which is identical to U.R.E. 502(b)].

The privilege extends to statements made in multiple party cases in which different lawyers represent clients who have common interests. Each client has a privilege as to his own statements. The FRE Advisory Committee Notes to Deleted Rule 503 state that the rule is inapplicable in situations where there is no common interest to be promoted by a joint consultation or where the parties meet on a purely adversary basis.

Subdivision (b) provides that the privilege includes lawyer to client communications as well as client to lawyer communications. *See Barnes v. State,* 460 So. 2d 126, 131 (Miss. 1984).

Subdivision (c) establishes that the privilege belongs to the client or his personal representative. *Barnes v. State,* 460 So. 2d 126, 131 (Miss. 1984 ). The lawyer's claim is limited to one made on behalf of the client; he himself has no independent claim. *See United States v. Jones,* 517 F.2d 666 (5th Cir.1974).

Subdivision (d) excludes certain instances from the privilege. Rule 502(d)(1) does not extend the privilege to advice in aid of a future crime or fraud. The provision that the client knew or reasonably should have known of the criminal or fraudulent nature of the act is designed to protect the client who is mistakenly advised that a proposed action is lawful. *See* McCormick, *Evidence,* 75. Existing law in Mississippi on this point is unclear. Dicta in two 19th century cases suggest that the privilege did apply to protect statements regarding the client's motives in fraudulent schemes. *See Parkhurst v. McGraw,* 24 Miss. 134 (1852); *Lengsfield and Co. v. Richardson and May,* 52 Miss. 443 (1876). Additionally, the federal appellate court in *Hyde Construction Co. v. Koehring Co.,* 455 F.2d 337 (5th Cir. 1972), has determined that the Mississippi courts would allow the privilege when an attorney, acting as the client's alter ego, commits a tort or fraud. It is uncertain, if this is an accurate reflection of the scarce Mississippi law on the point, but clearly under Rule 502(d)(1) the privilege in such a case would not apply.

Rule 502(d)(2) permits no privilege when the adversaries in a case claim the privilege from the same deceased client. The general rule is that the privilege survives death and may be claimed by the deceased's representative. However, this rule makes no sense in some cases; for instance, in will contests when various parties claim to be the representative of the decedent. Only at the end of the litigation will the court have determined who is the deceased's successor, and until it has made that determination, neither party is entitled to invoke the privilege.

Rule 502(d)(3) permits the use of statements made between a lawyer and his client when a controversy later develops between them, such as in a dispute over attorney's fees or legal malpractice. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

Rule 502(e) addresses two main issues. The first is the effect of certain disclosures of matters protected by the lawyer-client privilege or as work product. The second is the concern over otherwise unnecessary litigation costs incurred to protect against inadvertent waiver – especially in cases involving electronic discovery – that often bear no proportionality to what is at stake in the case. See S. Saltzburg. M. Martin. & D. Capra 1 *Federal Rules of Evidence Manual* § 502.02[1] (11th ed. 2016) ("[T]he common-law rules on waiver of privilege and work product were responsible for rising costs of discovery. especially discovery of electronic information. In complex litigation the lawyers spend significant amounts of time and effort to preserve privilege and work product by screening protected documents from discovery .... Moreover. an enormous amount of expense was being put into document production in order to protect against inadvertent disclosure of privileged information. because the producing party risked a ruling that even a mistaken disclosure can result in a subject matter waiver. [L]awyers' fear of waiver led to extravagant claims of privilege. i.e., privilege claims often covered non-privileged material because lawyers were concerned about waiver if they underclaimed").

Rule 502(e)(1) provides that an *intentional* disclosure, if a waiver, generally results in a waiver only of the communication or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence. *See* Rule 502(e)(2). The language concerning subject matter waiver – "ought in fairness" – is taken from Rule 106, because the animating principle is the same. Under both rules, a party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation. An *inadvertent* disclosure of protected information can *never* result in a subject matter waiver.

Under Rule 502(e)(2)(B), considerations bearing on the reasonableness of a producing party's efforts include the number of documents to be reviewed and the time constraints for production. *See* Paul W. Grimm, Lisa Yurwit Bergstrom & Matthew P. Kraeuter, *Federal Rule of Evidence 502: Has It Lived Up to Its Potential?*, 17 Rich. J.L. & Tech. 8, ¶ 43 (2011) ("Determining whether reasonable precautions have been taken cannot be done in a vacuum, and considerations of how much is at stake in the litigation and the resources of the party that inadvertently produced the privileged or protected information are both appropriate and necessary . . . ."). A party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may effectively protect against a finding of waiver. *See Kandel v. Brother International Corp.*, 683 F.Supp.2d 1076 (C.D.Cal. 2010) (Party hired a consultant to scan its servers and archives and put documents into a database that could be reviewed. Counsel provided consultant and document review team with a protocol containing specific instructions on designating protected materials). *But see Peterson v. Bernardi,*262 F.R.D. 424 (D.N.J. 2009) (party took minimal steps to protect against inadvertent disclosure, and general statement that a privilege review was done, without any supporting details, was entitled to little weight). The rule does *not* require the producing party to engage in a post-production review, as that would increase the cost of discovery and impose the very thing the rule seeks to avoid. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently.

Under Rule 502(e)(2)(C), a party must act promptly *and* reasonably once it discovers its mistaken disclosure. While a party is not required to check after production to determine whether a mistake has been made, it must seek the return of the material once the party is on notice of the error. See S. Saltzburg, M. Martin, & D. Capra 1 *Federal Rules of Evidence Manual*§ 502.02[3][d] (11th ed. 2016) (An "innocent recipient of mistakenly disclosed confidential information could be put at a disadvantage if the disclosing party would sit on its right to get the information back. As time passes, the recipient could be entering the information into its own databases, providing it to its own experts, using it to inform pleadings, and so on. As time passes, it gets more costly to unring the bell struck by mistakenly disclosed information.")

Rule 502(e)(4) enables the use of confidentiality orders to limit the costs of privilege review, especially important in cases involving electronic discovery. The rule contemplates enforcement of 'claw-back' and 'quick peek' arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product. *See*

*Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003). For an example of a Rule 502(e)(4) order, *see* S. Saltzburg, M. Martin, & D. Capra 1*Federal Rules of Evidence Manual* § 502.02[3][g] (11th ed. 2016). A confidentiality order can cover intentional disclosures as well as mistaken ones. Under Rule 502(e)(5), an agreement on the effect of disclosure is binding only on the parties to the agreement; if incorporated into a court order under Rule 502(e)(4), it is binding in other proceedings as well.

["Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended July 1, 2016, to note restyling; amended effective July 1, 2020.]

## JUDICIAL DECISIONS

### ANALYSIS

Billing statements.
Joint representation exception.
Medical records.
Waiver.
Illustrative cases.

**Billing statements.**

While a simple invoice ordinarily is not privileged, itemized legal bills necessarily reveal confidential information and thus fall within the privilege. Hewes v. Langston, 853 So. 2d 1237, 2003 Miss. LEXIS 405 (Miss. 2003).

**Joint representation exception.**

Where Miss. R. Evid. 502 did not broadly construe the common interest privilege, defendants were not entitled to invoke the common interest privilege to withhold discovery documents because they had no pending suit with a common interest party. Further, to invoke the attorney-client privilege under Miss. R. Evid. 502(b), defendants had to provide identities of attorneys and representatives involved in the creation and dissemination of the documents to determine if the communications should be protected. United Investors Life Ins. Co. v. Nationwide Life Ins. Co., 233 F.R.D. 483, 2006 U.S. Dist. LEXIS 4640 (N.D. Miss. 2006).

In the former clients' malpractice action against the attorney who represented them in prior Phen-Fen litigation, the attorney's claim that attorney-client privilege prevented disclosure of information pertaining to the clients' settlement in the Phen-Fen litigation was properly rejected because the joint client exception to Miss. R. Evid. 502 regarding attorney-client privilege applied by virtue of the attorney's joint representation of 31 clients in the Phen-Fen litigation. Williamson v. Edmonds, 880 So. 2d 310, 2004 Miss. LEXIS 1031 (Miss. 2004).

**Medical records.**

If mental health records released by a defendant's attorney contain disclosures made to a mental health professional in preparation of the defendant's defense, then the records may be privileged; however, if the released records only show the defendant's prior confinement to a state hospital, the records may not be privileged. Crawford v. State, 716 So. 2d 1028, 1998 Miss. LEXIS 100 (Miss. 1998), cert. denied, 525 U.S. 1021, 119 S. Ct. 550, 142 L. Ed. 2d 458, 1998 U.S. LEXIS 7664 (U.S. 1998).

**Waiver.**

Defendants were not prejudiced in connection with sentences imposed relating to charges of tax evasion and filing false tax returns because, inter alia, the district court properly unsealed a portion of the record where the attorney-client privilege was waived by defendant's own actions regarding his prior counsel. United States v. Bolton, 2018 U.S. App. LEXIS 29378 (5th Cir. Miss. Oct. 18, 2018), op. withdrawn, sub. op., 2018 U.S. App. LEXIS 29894 (5th Cir. Miss. Oct. 23, 2018).

Petitioner did not impliedly waive attorney-client privilege by filing negligent misrepresentation lawsuit. A magistrate judge's order compelling disclosure of privileged materials constituted clear legal error because petitioner's complaint did not affirmatively rely on attorney-client communications to support any element of a legal claim or defense; it mentioned no attorneys, no attorney-client communications, and no attorney-client relationships. In re Itron, Inc., 883 F.3d 553, 2018 U.S. App. LEXIS 4136 (5th Cir. Miss. 2018).

Defendant insured employer's knowledge or lack of knowledge as to its rights to independent counsel was relevant to proving equitable estoppel on its counterclaim as to plaintiff insurer's duty to defend and indemnify, thus, under Miss. R. Evid. 502(b), the employer waived its attorney-client privilege as to factual issues such as the reasonableness of its reliance on alleged omissions from a reservation of rights letter. Liberty Mut. Ins. Co. v. Tedford, 644 F. Supp. 2d 753, 2009 U.S. Dist. LEXIS 9754 (N.D. Miss. 2009).

**Illustrative cases.**

Manufacturer of medical products was required to produce "attorney notifications" of product reactions because (1) the purpose of the notifications was to give medical information to company doctors, who were not clients or client representatives, (2) the notifications were sent in the ordinary course of business, and a substantial need for the notifications was shown. Fresenius Med. Care Holdings, Inc. v. Hood, 269 So. 3d 36, 2018 Miss. LEXIS 405 (Miss. 2018).

Facially, it did not appear that every single document subject to a subpoena would be excepted from the attorney-client privilege because of Miss. R. Evid. 502(d)(2). Because the subpoena sought all the attorney's files and records regarding his representation of the decedent, the attorney's work product was subject to the subpoena. Flechas v. Pitts, 138 So. 3d 907, 2014 Miss. LEXIS 231 (Miss. 2014).

In the client's tort action against the attorney and law firm, at oral argument, counsel for the client acknowledged that he did not receive the subject letter and therefore, the supreme court was not presented with evidence that the letter in question, not received by counsel, constituted a privileged communication to which the attorney-client privilege applied, Miss. R. Evid. 502(b). Baker Donelson Bearman Caldwell & Berkowitz, P.C. v. Seay, 42 So. 3d 474, 2010 Miss. LEXIS 291 (Miss. 2010).

Admission of a 911 call placed by defendant's divorce attorney after defendant told the attorney that he was going to kill the victim was not erroneous; the crime-fraud exception in Miss. R. Evid. 502(d)(1) applied and therefore the conversation between the defendant and the lawyer was not privileged. Shorter v. State, 33 So. 3d 512, 2009 Miss. App. LEXIS 830 (Miss. Ct. App. 2009).

In a suicide wrongful death case against a doctor, the court should have allowed the decedent's divorce attorney to testify about conversations with the doctor that concerned the discharge plan and its implementation because plaintiff's counsel voluntarily elicited testimony regarding the substance of privileged conversations and injected a material issue into the case. The discharge plan and its implementation was a material issue before the trial court. Young v. Guild, 2008 Miss. LEXIS 548 (Miss. Oct. 30, 2008), sub. op., op. withdrawn, 7 So. 3d 251, 2009 Miss. LEXIS 193 (Miss. 2009).

Bankruptcy court granted an insurance company's motion for an order compelling an attorney who prepared Chapter 7 debtors' schedules and represented them at the time they converted their case from one under Chapter 13 to one under Chapter 7 to produce a copy of his file pertaining to his representation of the debtors. The debtors were obligated to disclose all assets and liabilities as part of an honest financial reorganization, they had no reasonable expectation that information they gave to their attorney would be kept confidential, and even if the privilege existed, the debtors waived the privilege when one of them claimed that he acted on the advice of his former attorney to explain his decision to convert the case. In re Myers, 382 B.R. 304, 2008 Bankr. LEXIS 279 (Bankr. S.D. Miss. 2008).

Defendant's former attorney's testimony that he received a fraudulent certificate of title and a bill of sale from defendant for the stolen vehicle did not violate the attorney-client privilege because when defendant provided the documents to his attorney, there was no expectation of confidentiality or privilege concerning the documents or the fact that defendant provided them. The documents defendant provided were to be presented to the State as discovery under Miss. Unif. Cir. &

County Ct. Prac. R. 9.04(c)(2), the trial court, and the jurors in his defense, and therefore no privilege existed under Miss. R. Evid. 502. In addition, because the documents were counterfeit, defendant committed a crime under Miss. Code Ann. § 97-9-125 (Rev. 2006); by involving his attorney, any privilege or confidentiality was destroyed. Hayden v. State, 972 So. 2d 525, 2007 Miss. LEXIS 646 (Miss. 2007).

Defendants did not waive their right to invoke the attorney-client privilege under Miss. R. Evid. 502 or the work product doctrine under Fed. R. Civ. P. 26(b)(3), due to inadvertent disclosure of documents, because the sum of the factors of fairness weighed against plaintiff, and defendants requested the return of the documents immediately after realizing that there had been inadvertent production. United Investors Life Ins. Co. v. Nationwide Life Ins. Co., 233 F.R.D. 483, 2006 U.S. Dist. LEXIS 4640 (N.D. Miss. 2006).

Finding against the employer, a railroad, in the employee's asbestos-related claims originally brought under the Federal Employers Liability Act was appropriate under Miss. R. Evid. 502(d) because the railroad could not genuinely argue that the employees obtained counsel's services in order to commit perjury or perpetrate a fraud on the employer with respect to irrelevant information about an asbestos manufacturer's bankruptcy proceedings. Ill. Cent. R.R. v. Acuff, 950 So. 2d 947, 2006 Miss. LEXIS 386 (Miss. 2006), cert. denied, 549 U.S. 1280, 127 S. Ct. 1826, 167 L. Ed. 2d 321, 2007 U.S. LEXIS 3060 (U.S. 2007).

Requiring the attorney to respond to the lawyer's discovery requests would be tantamount to forcing her to reveal both a confidential communication and the identity of her client; the attorney was acting on information provided by a client and her attempts to pursue the motion at the bench were reasonable,were commendable, and belied any claim that she had a hidden agenda; the information or communication the attorney received from her client was privileged and the trial court could not compel the attorney to disclose either the identity of, or communication from, her client. Nester v. Jernigan, 908 So. 2d 145, 2005 Miss. LEXIS 467 (Miss. 2005).

In a civil suit against a church administration that arose from allegations of sexual abuse by a priest, the attorney-client privilege under Miss. R. Evid. 502(b) applied to documents that were transmitted between the administration and its attorney, and also to documents summarizing a litigation strategy. Roman Catholic Diocese v. Morrison, 905 So. 2d 1213, 2005 Miss. LEXIS 295 (Miss. 2005).

Where plaintiff alleged that (1) defendant lawyer met with plaintiff's husband, who worked for a telephone company, and improperly accessed her phone records as part of a conspiracy to gain access to her private records and those of a trial judge; and (2) the lawyer apparently had a role in the removal of the trial judge in tobacco litigation in which plaintiff was counsel, the circuit court did not abuse its discretion in reviewing allegedly privileged documents in camera to determine whether the crime-fraud exception to the attorney-client privilege or work-product doctrine was applicable. Hewes v. Langston, 848 So. 2d 800, 2003 Miss. LEXIS 300 (Miss.), op. withdrawn, sub. op., 853 So. 2d 1237, 2003 Miss. LEXIS 405 (Miss. 2003).

Attorney's memorandum to the office file and other attorneys noting a conversation with a third party was protected by the work-product doctrine, and the crime-fraud exception did not apply, as there was no proof of either a crime or fraud. Hewes v. Langston, 848 So. 2d 800, 2003 Miss. LEXIS 300 (Miss.), op. withdrawn, sub. op., 853 So. 2d 1237, 2003 Miss. LEXIS 405 (Miss. 2003).

In a medical negligence case, and an interlocutory appeal by the medical clinic, the personal representative specifically pled reliance on "former" attorney's advice as an element of the defense to the medical clinic's motion for summary judgment, and as a means to toll the statute of limitations. As such, the personal representative used the attorney-client privilege as a sword, and effectively waived the privilege as it related to the testimony the personal representative gave. Jackson Med. Clinic for Women, P.A. v. Moore, 836 So. 2d 767, 2003 Miss. LEXIS 54 (Miss. 2003).

There was no violation of the attorney-client privilege where the defendant sought postconviction relief on the ground that his trial attorney was deficient in his representation and the attorney testified as to the alleged deficiencies. Henderson v. State, 769 So. 2d 210, 2000 Miss. App. LEXIS 341 (Miss. Ct. App. 2000).

In a prosecution for felony driving under the influence, there was no violation of the attorney client privilege since no confidential information was surrendered where (1) the defendant testified that he asked for a breathalyzer test in front of several people and was refused, (2) the district attorney, on cross-examination, asked the defendant whether he ever told his lawyer who the people were who heard him ask for a breathalyzer test, and (3) an objection based on the attorney-client privilege was sustained, and the defendant did not answer the question. Phillips v. State, 783 So. 2d 731, 2000 Miss. App. LEXIS 343 (Miss. Ct. App. 2000).

Conversations between defendant's wife and police investigator did not violate defendant's attorney-client privilege, where there was no indication that defendant's wife informed prosecution of defendant's defense strategy. Dowbak v. State, 666 So. 2d 1377, 1996 Miss. LEXIS 6 (Miss. 1996).

Testimony of defendant's former attorney, as to what defendant said to polygraph examiner, did not fall within parameters of this rule, as the examiner was not defendant's lawyer or a representative. Flowers v. State, 601 So. 2d 828, 1992 Miss. LEXIS 305 (Miss. 1992).

## RESEARCH REFERENCES

**ALR.**

Application of Attorney-Client Privilege to Electronic Documents. 26 A.L.R.6th 287.

Construction and Application of Fiduciary Duty Exception to Attorney-Client Privilege. 47 A.L.R.6th 255.

Applicability of Attorney-Client Privilege to Communications Made in Presence of or Solely to or by Nonattorney Consultants, Professionals, and Similar Contractors. 66 A.L.R.6th 83.

Applicability of Attorney-Client Privilege to Communications Made in Presence of or Solely to or by Family Members or Companion, Confidant, or Friend of Attorneys or Client or Attesting Witnesses for Client's Will. 67 A.L.R.6th 341.

Construction and Application of Self-Protection or Self-Defense Exception to Attorney-Client Privilege. 71 A.L.R.6th 249.

Waiver of evidentiary privilege by inadvertent disclosure-federal law. 159 A.L.R. Fed. 153.

Views of United States Supreme Court as to attorney-client privilege. 159 A.L.R. Fed. 243.

## Rule 503. Privilege between patient and physician or psychotherapist.

(a) *Definitions.* — In this rule:

(1) "Patient" means a person who consults, is examined by, or is interviewed by a physician or psychotherapist;

(2) "Physician" means a person who is – or the patient reasonably believes to be – authorized to practice medicine in any state or nation;

(3) "Psychotherapist" means:

(A) a physician, or a person licensed or certified as a psychologist by any state or nation,

(B) while engaged in diagnosing or treating a mental or emotional condition, including alcohol or drug addiction.

(4) A communication is "confidential" if not intended to be disclosed to third persons, other than those:

(A) present to further the patient's interests in the consultation, examination, or interview;

(B) reasonably necessary to transmit the communication; or

(C) participating in the diagnosis or treatment under the physician's or psychotherapist's direction, including members of the patient's family.

(b) *General rule of privilege.* — A patient has a privilege to refuse to disclose, and to prevent others from disclosing:

(1) knowledge the physician or psychotherapist derived from the professional relationship with the patient; and

(2) confidential communications:

(A) made for the purpose of diagnosing or treating the patient's physical, mental, or emotional condition, including alcohol or drug addiction, and

(B) between or among the patient, the patient's physician or psychotherapist, and persons – including the patient's family – participating in the diagnosis or treatment under the direction of the physician or psychotherapist.

(c) *Who may claim the privilege.* —

(1) The privilege may be claimed by:

(A) the patient;

(B) the patient's guardian or conservator; or

(C) a deceased patient's personal representative.

(2) The physician or psychotherapist at the time of the communication is presumed to have authority to claim the privilege, but only on the patient's behalf.

(d) *Exceptions.* — The privilege does not apply:

(1) *Hospitalization proceedings.* In proceedings to hospitalize the patient for mental illness, if the physician or psychotherapist has determined in the course of diagnosis or treatment that the patient needs to be hospitalized;

(2) *Court-ordered examination.* To any communication related to the purpose of a court order directing an examination of the physical, mental, or emotional condition of a patient who is a party or witness, unless the order states that the privilege applies;.

(3) *Breach of duty.* To an issue of breach of duty by the physician or psychotherapist to the patient or by the patient to the physician or psychotherapist; or

(4) *Children and parents; seal or release records.* To communications – including records – regarding a party's physical, mental, or emotional health or drug or alcohol condition when relevant to child custody, visitation, adoption, or termination of parental rights.

As to this paragraph (4), the court may order the records sealed or – after a hearing in chambers – order the relevant records released.

(e) *Waiver by filing case or delivering notice.* — In a case or claim for professional services that were or should have been rendered, filing the case or delivering written notice of the claim waives the privilege.

(f) *Waiver by pleadings; ex parte contact.* — A party whose pleadings place in issue any aspect of that party's physical, mental, or emotional condition thereby – and to that extent only – waives the privilege.

The exception in this subdivision (f) does not authorize *ex parte* contact by an opposing party.

**HISTORY: Amended October 13, 1992; amended effective May 27, 2004 to remove the privilege in child custody and like proceedings; restyled effective July 1, 2016.**

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 2017, the Advisory Committee Note to Rule 503 was amended to substitute a citation to the new Rule of Criminal Procedure for a superseded Uniform Rule of Circuit Court Practice.

Effective July 1, 2016, the Rule was amended as part of the general restyling of the Evidence Rules.

Effective June 16, 2016, the "Comment" was retitled "Advisory Committee Note."

Effective May 24, 2004, Rule 503(d)(4) was adopted and corresponding changes were made to the Advisory Committee Note, making clear that no physician-patient privilege exists in child custody or similar proceedings. 870-873 So. 2d XIX (West Miss. Cas. 1994).

Effective October 13, 1992, Rule 503(f) was amended to state that the rule is inapplicable to contexts other than hearings or discovery proceedings and to delete reference to workers' compensation proceedings. 603-605 So. 2d XXI (West Miss. Cas. 1993).

## ADVISORY COMMITTEE NOTE

The language of Rule 503 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. In Rule 503(a)(4)(C), "diagnosis or treatment" replaces "diagnosis and treatment," to conform to Mississippi law, including the statement of privilege in subdivision (b). These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Subdivision (a) defines the terms "patient," "physician," "psychotherapist," and "confidential communication." Existing Mississippi law is codified at M.C.A. § 13-1-21. The existing statute is broader than Rule 503(a) in that it extends the privilege to physicians, osteopaths, dentists, hospitals, nurses, pharmacists, podiatrists, optometrists, and chiropractors. M.C.A. § 73-31-29 extends the privilege to psychologists. Additionally, under existing Mississippi law no allowance has been made for an erroneous belief that the treating individual was a physician. Rules 503(a)(2) and (3) make such an allowance.

Rule 503(a)(4) is essentially a codification of existing state practice. It is compatible with the definition of "confidential communication" under Rule 502 (the attorney-client privilege.)

Rule 503(b) is a statement of the privilege rule. It, too, is compatible with the statement of the attorney-client privilege in Rule 502. The public policy protecting communications made about alcohol and drug addiction arises out of the current contemporary concern about these problems. By protecting these communications it is hoped that rehabilitation efforts will be encouraged.

Subdivision (c) is reflective of M.C.A. § 13-1-21. The privilege belongs to the patient, and only the patient can waive it.

Subdivision (d) excepts four instances from the privilege. The first exception concerns commitment proceedings. Existing law in Mississippi is structured so that such communications currently are not privileged. *See* M.C.A. § 41-21-67 et seq.

The second exception under subdivision (d) pertains to court-ordered physical or mental examinations. The exception is necessary for the effective utilization of this procedure. It is important to note that the exception is effective only with respect to the particular purpose for which the examination is ordered. No statement made by an accused in the course of an examination into competency to stand trial is admissible on the issue of guilt. *See also* MRCrP 12.4.

Under the third exception there is no privilege when a controversy develops between physician and patient, such as in a dispute over medical fees or medical malpractice.

Under subdivision (d)(4), when determining whether records are relevant to a custody, termination, or adoption action, some of the factors courts should consider include whether: (1) the treatment was recent enough to be relevant; (2) substantive independent evidence of serious impairment exists; (3) sufficient evidence is unavailable elsewhere; (4) court ordered evaluations are an inadequate substitute; and (5) given the severity of the alleged disorder, communications made in the course of treatment are likely to be relevant.

Subdivision (e) is required by considerations of fairness and policy, and simply provides that the institution of a claim, either by delivery of written notice or by the filing of an action, operates to waive the privilege as to any medical information relevant to the claim.

The primary impact of subdivision (f) will be in personal injury actions, although the exception by its terms is not so limited. This subdivision, like the remainder of these rules, has no application outside the context of hearing or discovery processes in the Mississippi Rules of Civil Procedure and other rules of court. *See* Rules 101 and 1101. By virtue of this exception a party who seeks recovery of damages for a physical, mental or emotional injury waives the privilege for purposes of that action only and to the extent that he or she has put his or her physical, mental or emotional condition in issue by his or her pleadings. With respect to any aspect of the party's physical, mental or emotional condition not put in issue by his or her pleadings, the privilege remains in full force and effect. Rules of Evidence by their definition govern the admissibility of evidence at trial. Subdivision (f) is not a procedural rule and cannot be used as such.

[Amended effective May 27, 2004; "Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended July 1, 2016, to note restyling.]

## JUDICIAL DECISIONS

### ANALYSIS

Constitutionality.
Construction.
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Admissible evidence.
Ex parte rule.
Review.
Use by criminal defendant.
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**Constitutionality.**

Witness's assertion of physician and psychotherapist privilege to deny defendant access to the witness's medical records did not deny defendant the constitutional right to confront the witness. Windham v. State, 800 So. 2d 1257, 2001 Miss. App. LEXIS 488 (Miss. Ct. App. 2001).

Defendant waived the doctor-patient privilege where defendant took steps which made the information in defendant's medical records available to the public and the prosecutor, and put defendant's health at issue at trial. Hopkins v. State, 799 So. 2d 874, 2001 Miss. LEXIS 306 (Miss. 2001).

Subsection (f) does not deny the a defendant's equal protection, due process, or free speech rights since there are other avenues of discovery besides ex parte contacts; a defendant is still able to conduct discovery according the Mississippi Rules of Civil Procedure and the Mississippi Rules of Evidence, and any restrictions of a defendant's rights are due to a public policy favoring physician-patient privileges; a patient's right to privacy outweigh a defendant's rights. Tinnon v. Martin, 716 So. 2d 604, 1998 Miss. LEXIS 299 (Miss. 1998).

**Construction.**

This rule does not base psychologist–patient privilege on how a counselor represents himself to patient, but rather focuses on reasonable belief of patient, and thus privilege existed where defendant thought counselor was either a psychologist or psychiatrist, and trial court erroneously admitted counselor's testimony. Kolberg v. State, 704 So. 2d 1307, 1997 Miss. LEXIS 697 (Miss. 1997).

Subdivision (f) of this rule did not authorize court to order plaintiff to submit to an independent medical examination, even though she placed her physical condition at issue and thereby waived her physician/patient privilege. Swan v. I.P., Inc., 613 So. 2d 846, 1993 Miss. LEXIS 31 (Miss. 1993).

In termination of parental rights proceeding based on mental illness of both natural parents, court declined to create an exception to this rule to allow admission of otherwise privileged medical and psychiatric information concerning parents. Lauderdale County Dep't of Human Servs. by Barnett v. T.H.G., 614 So. 2d 377, 1992 Miss. LEXIS 843 (Miss. 1992).

**Applicability.**

Patient-physician privilege under Mississippi Rules of Evidence was not applicable in workers' compensation proceedings. Although Mississippi courts have found that a patient-physician privilege does exist in the workers' compensation context, under Mississippi workers' compensation law, the patient-physician privilege is removed for medical and surgical treatment. Jones v. Univ. of Miss. Med. Ctr., 309 So. 3d 1135, 2021 Miss. App. LEXIS 7 (Miss. Ct. App. 2021).

**Admissible evidence.**

In a collection agency's suit brought on an open account against a patient, the patient did not have a counterclaim for breach of a physician-patient privilege when the collection agency attached certain information to its complaint because Miss. Code Ann. § 13-1-21 was too narrow to apply, and there was no privilege for this type of information under the broader Miss. R. Evid. 503. Franklin Collection Serv. v. Kyle, 2007 Miss. LEXIS 11 (Miss. Jan. 11, 2007), sub. op., op. withdrawn, 955 So. 2d 284, 2007 Miss. LEXIS 234 (Miss. 2007).

Circuit court violated its protective responsibility by allowing a sexual assault victim premature inspection of allegedly privileged documents produced by the perpetrator's employer because counsel for the victim was in possession of the documents hours before the employer was even aware that they had been released and before it was given a chance to appeal the court's decision. Simply issuing a protective order in conjunction with the order compelling production was not enough to protect the employer's rights. Miss. United Methodist Conf. v. Brown, 911 So. 2d 478, 2005 Miss. LEXIS 584 (Miss. 2005).

Without the results of defendant's urine specimen and test, which specimen was taken and which test was performed by a hospital according to its policy, the State would have been unable to prove that defendant was under the influence of cocaine when defendant collided with the victim's automobile; thus, to ensure the proper administration of justice, the medical records regarding the analysis of defendant's urine specimen had to be removed from the protection of the physician-patient privilege under Miss. Code Ann. § 13-1-21(1) and Miss. R. Evid. 503(b) and the trial court did not err in admitting this evidence. Jones v. State, 881 So. 2d 209, 2002 Miss. App. LEXIS 869 (Miss. Ct. App. 2002), aff'd, 2003 Miss. LEXIS 588 (Miss. Oct. 30, 2003).

Medical evidence pertaining to a victim may be secured and admissible in limited situations where the medical evidence was relevant, material and exculpatory; although the medical records were improperly submitted, any error was harmless because the jury convicted defendant and did not give credence to the suicide defense. Cox v. State, 849 So. 2d 1257, 2003 Miss. LEXIS 337 (Miss. 2003).

Defendant's conviction for vehicular homicide was affirmed where the appellate court found that a hospital employee's analysis of his urine that showed defendant had cocaine in his system at the time of the fatal accident was properly admitted; to ensure the proper administration of justice, the analysis of defendant's urine specimen was removed from the protection of the physician-patient privilege. Jones v. State, 2002 Miss. App. LEXIS 185 (Miss. Ct. App. Apr. 9, 2002), op. withdrawn, sub. op., 881 So. 2d 209, 2002 Miss. App. LEXIS 869 (Miss. Ct. App. 2002).

**Ex parte rule.**

Nephew carried out his duty as personal representative by probating the decedent's 2005 will and thus held the general medical privilege as the decedent's personal representative under the rule; the statute also authorized the nephew to waive the entire medical privilege as a personal representative and contestant of the 2012 will, and thus the ex parte rule did not operate to bar his attorney from speaking alone with the physician witness. Estate of Lyons v. Lyons, 227 So. 3d 910, 2017 Miss. LEXIS 131 (Miss. 2017).

**Review.**

On appeal, defendant may raise issue of trial court's denial of a patient's doctor-patient privilege, provided patient properly raised privilege in court below and denial resulted in prejudice to defendant; otherwise, privilege has no effect on appeal, as patient cannot assert as error the denial of his privilege since he is not a party to the suit. Cotton v. State, 675 So. 2d 308, 1996 Miss. LEXIS 198 (Miss. 1996).

**Use by criminal defendant.**

Nothing in Cox v. State, 849 So. 2d 1257 (Miss. 2003), suggests that an in camera review is required in all situations that a criminal defendant requests the medical records of someone else. The supreme court merely suggested that the circuit court consider an in camera inspection when the court is considering admitting evidence normally excluded by the doctor-patient privilege. Jackson v. State, 924 So. 2d 531, 2005 Miss. App. LEXIS 451 (Miss. Ct. App. 2005), cert. denied, 927 So. 2d 750, 2006 Miss. LEXIS 175 (Miss. 2006).

Circuit courts must control a criminal defendant's access to information subject to the doctor-patient privilege, which should normally remain inviolate: the court should conduct an in camera review of the medical records to determine if the evidence is material, relevant, and exculpatory. If the court finds that the records are admissible, they should be redacted as much as possible to show only the evidence which is relevant and exculpatory. Cox v. State, 2003 Miss. LEXIS 103 (Miss. Mar. 13, 2003), op. withdrawn, sub. op., 849 So. 2d 1257, 2003 Miss. LEXIS 337 (Miss. 2003).

**Waiver.**

Jail psychologist did not violate the psychotherapist-patient privilege by communicating defendant's threats to harm two judges or by testifying at defendant's trial on two counts of intimidating a judge because Miss. R. Evid. 503 protected only confidential communications that were not intended to be disclosed to third parties and when the psychologist told defendant that he had a duty to warn of the threats made, defendant said that he did not care and affirmed his intentions to harm the judges. Weeks later, defendant asked the psychologist whether the two judges had been made aware of his threats, and when the psychologist indicated that he had informed the judges of the threats, defendant approved; by intending that his communications be disclosed to third parties, defendant waived any and all rights under the psychotherapist-patient privilege. Hearn v. State, 3 So. 3d 722, 2008 Miss. LEXIS 607 (Miss. 2008).

Where a church administration referred priests and victims to counseling following sexual abuse allegations against the priests, and the priests and victims signed waivers allowing the church administration access to reports from treating doctors and therapists, those waivers were limited and therefore the documents were not discoverable under Miss. R. Evid. 503(4) because the limited waiver of privilege did not serve to waive privilege generally. However, the Priest-penitent privilege of Miss. R. Evid. 505 did not apply to documents not directed to anyone in their professional character as spiritual adviser. Roman Catholic Diocese v. Morrison, 905 So. 2d 1213, 2005 Miss. LEXIS 295 (Miss. 2005).

In the former clients' malpractice action against the attorney that represented them in prior Phen-Fen litigation, the attorney's claim that physician-patient privilege prevented disclosure of medical information pertaining to the clients' settlement in the Phen-Fen litigation was properly rejected because the information was relevant in determining whether the proceeds of the aggregate settlement were improperly or fraudulently distributed among the various plaintiffs and under Miss. R. Evid. 503(f) the privilege was deemed waived by former litigants who had placed their physical, mental, or emotional condition in issue. Williamson v. Edmonds, 880 So. 2d 310, 2004 Miss. LEXIS 1031 (Miss. 2004).

In a capital murder case, the trial court did not err in requiring defendant to turn over all of her medical records to a psychiatrist as defendant specifically requested that her mental health be evaluated by the psychiatrist, necessitating that he review all of defendant's relevant medical records; thus, she waived her physician-patient privilege. Byrom v. State, 863 So. 2d 836, 2003 Miss. LEXIS 535 (Miss. 2003), cert. denied, 543 U.S. 826, 125 S. Ct. 71, 160 L. Ed. 2d 40, 2004 U.S. LEXIS 5754 (U.S. 2004).

In a child custody proceeding, the chancellor did not err in refusing to review a joint summary of court-ordered psychological evaluations of the parties and their son and in refusing to permit access by the husband to the summary where the wife refused to waive her medical privilege. Belding v. Belding, 736 So. 2d 425, 1999 Miss. App. LEXIS 138 (Miss. Ct. App. 1999).

State was entitled to cross-examine forensic psychologist on basis of his opinions, including any medical records he considered in forming those opinions, and no medical privilege existed since defendant placed his mental and emotional condition in issue. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

If suit is filed on either medical malpractice grounds or other grounds placing plaintiff's condition in issue, plaintiff's medical privilege regarding any relevant medical information from whatever source is automatically waived for purposes of and only to extent to which plaintiff's condition is put in issue; determination of relevancy of medical information which cannot be agreed upon by opposing counsel is to be resolved by a judicial relevancy hearing. Scott by & Through Scott v. Flynt, 704 So. 2d 998, 1996 Miss. LEXIS 147 (Miss. 1996).

Evidence obtained by opposing party from ex parte contacts with plaintiff's medical providers, without prior patient consent, is inadmissible when subsequently used during a legal proceeding. Scott by & Through Scott v. Flynt, 704 So. 2d 998, 1996 Miss. LEXIS 147 (Miss. 1996).

Circuit courts must control a criminal defendant's access to information subject to the doctor-patient privilege, which should normally remain inviolate: the court should conduct an in camera review of the medical records to determine if the evidence is material, relevant, and exculpatory. If the court finds that the records are admissible, they should be redacted as much as possible to show only the evidence which is relevant and exculpatory. Cox v. State, 2003 Miss. LEXIS 103 (Miss. Mar. 13, 2003), op. withdrawn, sub. op., 849 So. 2d 1257, 2003 Miss. LEXIS 337 (Miss. 2003).

**Illustrative cases.**

Husband was not entitled access to the wife's psychiatric records, as they were privileged under Miss. R. Evid. 503, and the counseling had more to do with the divorce than any issue affecting the wife's ability to care for the child. Bruenderman v. Bruenderman, 220 So. 3d 204, 2017 Miss. App. LEXIS 10 (Miss. Ct. App. 2017).

Where an employer noticed that a return to work date on a medical leave form appeared to have been altered and asked the employee's health care provider to provide another copy of the form, which revealed the employee's alteration, the health care provider did not violate the physician-patient privilege under Miss. R. Evid. 503, which provided that a communication was confidential if not intended to be disclosed to a third person, because the employee always intended that the return to work date would be communicated to her employer. Thornton v. Statcare, PLLC, 988 So. 2d 387, 2008 Miss. App. LEXIS 416 (Miss. Ct. App. 2008).

Grant of summary judgment in favor of the city and police officer in the jogger's action after he was struck by the police officer while jogging was appropriate because the jogger asserted that there was a possibility that the officer was impaired at the time of the accident at issue, but there was no evidence supporting such an assertion. The jogger never alleged in his complaint that the officer was impaired at the time of the accident and the officer stated that he did not recall being administered a blood alcohol or drug test; thus, in attempting to gain access to the officer's medical records, the jogger was engaging in nothing more than a fishing expedition. Morton v. City of Shelby, 984 So. 2d 323, 2007 Miss. App. LEXIS 761 (Miss. Ct. App. 2007), cert. denied, 984 So. 2d 277, 2008 Miss. LEXIS 274 (Miss. 2008).

Information attached to a collection agency's open account complaint describing a patient's medical treatment and the amounts charged therefor were not covered by the physician-patient privilege under Miss. R. Evid. 503. Franklin Collection Serv. v. Kyle, 955 So. 2d 284, 2007 Miss. LEXIS 234 (Miss. 2007).

While the trial court allowed the defendant doctor's business associate to act as an expert witness, there was no violation of Miss. R. Evid. 503 because the expert witness did not testify as to any confidential communications pertaining to diagnosis or treatment and knowledge which the physician had by virtue of his/her professional relationship with the patient. Poole v. Avara, 908 So. 2d 716, 2005 Miss. LEXIS 486 (Miss. 2005).

In a divorce case, a chancery court did not err by excluding documents regarding the couple's joint counseling sessions where a former husband objected to the introduction of such evidence. Brabham v. Brabham, 950 So. 2d 1098, 2007 Miss. App. LEXIS 128 (Miss. Ct. App. 2007).

In a murder prosecution, the victim's medical and pharmacological records were privileged and should not have been admitted, as the doctor-patient privilege applied in criminal proceedings, the records were confidential even though a third party was present during an examination (as the doctor relied on this party in developing the patient's medical history), and the privilege survived the patient's death. Cox v. State, 2003 Miss. LEXIS 103 (Miss. Mar. 13, 2003), op. withdrawn, sub. op., 849 So. 2d 1257, 2003 Miss. LEXIS 337 (Miss. 2003).

Where newborn was accidently taken by hospital staff to the wrong mother to be breast fed, the unidentified patient responsible for breast feeding newborn is a fact witness to the alleged negligence of the hospital; therefore, her identity must be revealed and her medical records may be inspected by the judge in camera to determine whether the health of the newborn may be at risk. Baptist Mem'l Hosp.-Union County v. Johnson, 754 So. 2d 1165, 2000 Miss. LEXIS 5 (Miss. 2000).

## RESEARCH REFERENCES

**Law Reviews.**

Garrison, Evidence – Physician-Patient Privilege – Rule 503 Limits Waiver in Medical Malpractice Cases to Injuries Placed in Issue and Excludes Evidence Obtained From Ex Parte Contacts. 66 Miss. L. J. 221, Fall, 1996.

## Rule 504. Spousal privilege.

(a) *Definition.* — A communication is "confidential" if a person makes it privately to the person's spouse and does not intend its disclosure to any other person.

(b) *General rule of privilege.* — A person has a privilege to prevent the person's current or former spouse from testifying in a civil or criminal case about any confidential communication between them.

(c) *Who may claim the privilege.* — Either spouse may claim the privilege. A spouse has authority to claim the privilege on the other spouse's behalf.

(d) *Exceptions.* — The privilege does not apply:

(1) in a civil case between the spouses; or

(2) in a criminal case when one spouse is charged with a crime against:
  (A) the person of a minor child; or
  (B) the person or property of:
    (i) the other spouse;
    (ii) a resident of either spouse's household; or
    (iii) a third person when committed during a crime against any person described in paragraphs (d)(l) and (2).

**HISTORY: Restyled effective July 1, 2016.**

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective April 3, 2003, Rule 504 was amended to effect technical changes. ____ So. 2d ____ (West Miss. Cas. 2003).

Effective May 2, 2002, Rule 504(d) and its Advisory Committee Note were amended to remove the privilege in civil actions between the spouses. 813-815 So. 2d XXI (West Miss. Cases 2002).

Rule 504(d) was amended in *Fisher v. State,*690 So. 2d 268, 272 (Miss. 1996) to substitute "any minor child" for "a child of either" and to effect technical changes. The amendment applied prospectively upon publication (May 1, 1997, advance sheet) in West's *Southern Reporter.*

## ADVISORY COMMITTEE NOTE

The language of Rule 504 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

There are two areas of law which govern if and when one spouse may testify against the other, spousal competency and marital privilege. M.C.A. § 13-1-5 governs matters of spousal competency. On the other hand, marital privilege protects certain communications made during the marriage. The privilege extends only to communications which were intended to be confidential. Thus, the presence of another person, even a family member, is deemed to mean that the communication was not intended to be confidential. Likewise, if the intent was that the communication would be confidential, a third party may not testify regarding the communication, even if that third party learned it from one of the spouses directly. Rule 504(a) is in accord with existing Mississippi practice. (Amended effective March 20, 1995; "Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

Construction.
Exception.
Handwriting analysis.
Waiver.
Illustrative cases.

**Construction.**

Mississippi Rule of Evidence 601(a)(2) abolishes spousal incompetence to testify in certain circumstances; non-offender spouse may be called to testify, but other spouse may still invoke privilege regarding confidential communications that do not fall into an exception set out in Rule 504(d). Fisher v. State, 690 So. 2d 268, 1997 Miss. LEXIS 150 (Miss. 1997).

This rule did not require suppression of physical evidence obtained by officers as a result of their conversations with defendant's wife; location of items did not fall within any protected class of communication, and there was knowledge by persons other than defendant and his wife of their whereabouts. Ladner v. State, 584 So. 2d 743, 1991 Miss. LEXIS 434 (Miss.), cert. denied, 502 U.S. 1015, 112 S. Ct. 663, 116 L. Ed. 2d 754, 1991 U.S. LEXIS 7261 (U.S. 1991).

**Exception.**

In defendant's trial for exploitation of children, defendant's wife was not incompetent to testify against defendant because the privilege under Miss. R. Evid. 601(a)(2) and Miss. R. Evid. 504(d) did not apply, as defendant was being prosecuted for a criminal act against a child. Hood v. State, 17 So. 3d 548, 2009 Miss. LEXIS 379 (Miss. 2009).

In defendant's trial on a charge of exploitation of children, defendant's wife was not incompetent to testify against her husband under Miss. R. Evid. 601(a)(2) because spousal incompetency did not apply where the offender spouse was charged with a crime against children. Likewise, the confidential communication privilege under Miss. R. Evid. 504(d) did not apply because defendant was charged with a crime committed against a child and because defendant made his statement in the presence of a third party, his sister-in-law. Hood v. State, 17 So. 3d 548, 2009 Miss. LEXIS 364 (Miss. 2009).

In a murder trial, the court did not err in allowing defendant's wife to testify that she saw defendant shoot her ex-boyfriend, set his house on fire, and throw his pistol into the river. The spousal privilege only protects communication, not conduct. Roland v. State, 882 So. 2d 262, 2004 Miss. App. LEXIS 911 (Miss. Ct. App. 2004).

In a murder trial, the court did not err in allowing the admission of a taped telephone conversation between defendant and his then wife. A warning was posted near the telephone in the county jail alerting callers that calls could be recorded. Roland v. State, 882 So. 2d 262, 2004 Miss. App. LEXIS 911 (Miss. Ct. App. 2004).

Inmate's claims that his wife was improperly allowed to testify against him in his murder prosecution was without merit since Miss. R. Evid. 504(d)(1) contained an exception to the privilege where one spouse was charged with a crime against a minor child. Stevens v. State, 867 So. 2d 219, 2003 Miss. LEXIS 822 (Miss. 2003), cert. denied, 543 U.S. 858, 125 S. Ct. 222, 160 L. Ed. 2d 96, 2004 U.S. LEXIS 6409 (U.S. 2004).

Miss. R. Evid. 504 does not limit the exception to the marital privilege to the instance of a crime committed against a minor child of the testifying spouse or that spouse's household; Miss. R. Evid. 504(d)(1) provides an exception when one spouse is charged with a crime against any minor child. Stevens v. State, 806 So. 2d 1031, 2001 Miss. LEXIS 234 (Miss. 2001), cert. denied, 537 U.S. 1232, 123 S. Ct. 1384, 155 L. Ed. 2d 195, 2003 U.S. LEXIS 1755 (U.S. 2003).

**Handwriting analysis.**

A handwriting expert's use of letters written by the defendant to his wife to determine whether another letter was written by the defendant did not violate the rule. Alexander v. State, 759 So. 2d 411, 2000 Miss. LEXIS 104 (Miss. 2000).

**Waiver.**

The husband-wife privilege is waivable where both spouses consent to waive it, and upon such waiver the privilege is no longer afforded. Martin v. State, 773 So. 2d 415, 2000 Miss. App. LEXIS 579 (Miss. Ct. App. 2000).

**Illustrative cases.**

Even if defendant and his alleged former common-law wife proved a valid Texas common-law marriage, defendant's statement to the alleged wife about the robbery and murder would not be protected by spousal privilege because the statement was made before the alleged marriage began; there was evidence that defendant's cousin was in the car while defendant drove the alleged wife around and told her about the murder; and the presence of a third party negated the intent for the statement to remain confidential between defendant and the alleged wife. Lyons v. State, 237 So. 3d 763, 2017 Miss. App. LEXIS 218 (Miss. Ct. App. 2017), cert. denied, 236 So. 3d 817, 2018 Miss. LEXIS 99 (Miss. 2018).

Trial court did not err in allowing defendant's alleged former common-law wife to testify because no common-law marriage existed under Texas law, and the alleged wife's testimony was outside the scope of Mississippi's spousal privilege as there was evidence that defendant and the alleged wife failed to consistently hold themselves out as husband and wife because the alleged wife testified that she introduced defendant to friends and family as her husband, her ex-boyfriend, and her ex-husband, independently and with great frequency; and she testified that the nature of their relationship and the way it was labeled shifted constantly with the changing circumstances in their lives. Lyons v. State, 237 So. 3d 763, 2017 Miss. App. LEXIS 218 (Miss. Ct. App. 2017), cert. denied, 236 So. 3d 817, 2018 Miss. LEXIS 99 (Miss. 2018).

In a divorce case, the chancellor did not err in allowing the husband's previous wife to testify about the reason for her divorce, as it was relevant to the husband's character and to child custody. She did not testify to any confidential communications under Miss. Code Ann. § 13-1-5 or Miss. R. Evid. 504. McNeese v. McNeese, 119 So. 3d 264, 2013 Miss. LEXIS 172 (Miss. 2013).

Trial court had not violated petitioner state death row inmate's Fifth Amendment rights by allowing the testimony of his wife against him because the marital privilege was merely a testimonial privilege based on Miss. Evid. R. 504 and did not rise to the level of the constitutionally guaranteed right against self-incrimination under the Fifth Amendment. Stevens v. Epps, 2008 U.S. Dist. LEXIS 69564 (S.D. Miss. Sept. 15, 2008), aff'd, 618 F.3d 489, 2010 U.S. App. LEXIS 18696 (5th Cir. Miss. 2010).

Defendant's ex-wife did not testify as to communication between defendant and herself, let alone a confidential communication, she testified to events surrounding her marriage and the eventual end of her marriage to defendant, and there was no testimony from her that could be considered a confidential communication that the trial judge should have excluded; accordingly, Miss. R. Evid. 504(b) did not operate to preclude the ex-wife from testifying against defendant. Butt v. State, 986 So. 2d 981, 2007 Miss. App. LEXIS 783 (Miss. Ct. App. 2007).

In a prosecution for driving under the influence, the defendant's wife did not testify to confidential communications where she testified that she had called the police to report a domestic disturbance, told the responding officer that she had been choked and kicked by the defendant when she refused to hand over the keys to the car when the defendant had been drinking all day, and that she had tried to prevent him from driving in the condition he was in; even though the wife's conversation with the officer may have included and alluded to communications exchanged between her and the defendant that had led to the domestic disturbance call, such communications were not privileged because they were part and parcel of the physical abuse charges leveled against the defendant by his wife. Martin v. State, 773 So. 2d 415, 2000 Miss. App. LEXIS 579 (Miss. Ct. App. 2000).

Statement made by rape defendant to wife was not protected by husband-wife privilege, since it was made in front of a third person and was thus not a confidential communication; wife's statement that husband later told her the truth, made privately to wife with no indication of a third party also hearing it, was a confidential statement from defendant to his wife that, when admitted, constituted prejudicial error. Fisher v. State, 690 So. 2d 268, 1997 Miss. LEXIS 150 (Miss. 1997).

Spousal-immunity privilege could not be expanded to prevent a spouse from helping law enforcement officers investigate or solve crimes in which their spouse might be involved, and neither defendant's wife nor police investigator testified during defendant's second trial and so the could not have informed jury of any confidential conversations between defendant and his wife. Dowbak v. State, 666 So. 2d 1377, 1996 Miss. LEXIS 6 (Miss. 1996).

Spousal privilege did not apply, where statements of defendant's wife were made in presence of sheriff and deputy sheriff and not under circumstances suggesting confidentiality. Shell v. State, 554 So. 2d 887, 1989 Miss. LEXIS 492 (Miss. 1989), rev'd in part, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1, 1990 U.S. LEXIS 5501 (U.S. 1990).

## RESEARCH REFERENCES

**ALR.**

Competency of one spouse to testify against other in prosecution for offense against child of both or either or neither. 119 A.L.R.5th 275.

"Communications" Within Testimonial Privilege of Confidential Communications Between Husband and Wife as Including Knowledge Derived from Observation by One Spouse of Acts of Other Spouse. 23 A.L.R.6th 1.

## Rule 505. Communications to clergy.

(a) *Definitions.* — In this rule:

(1) "Clergy member" means a minister, priest, rabbi, or other similar functionary of a church, religious organization, or religious denomination.

(2) A communication is "confidential" when:

(A) made privately, and

(B) not intended to be disclosed except to further the purpose of the communication.

(b) *General rule of privilege.* — A person has a privilege to refuse to disclose – and to prevent others from disclosing – a confidential communication made by the person to a clergy member as spiritual adviser.

(c) *Who may claim the privilege.* —

(1) The privilege may be claimed by:

(A) the person who made the communication;

(B) the person's guardian or conservator; or

(C) a deceased person's personal representative.

(2) Unless the privilege is waived, the clergy member must claim it on the person's behalf.

(d) *Clerical staff.* — A clergy member's secretary, stenographer, or clerk must not be examined about any fact learned in that capacity without the clergy member's consent.

**HISTORY: Restyled effective July 1, 2016.**

## ADVISORY COMMITTEE NOTE

The language of Rule 505 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 505 is a restatement of M.C.A. § 13-1-22. The definition of a "clergyman" is broad but workable. It is fair to say that the term refers to clergy who are regularly engaged in activities of established denominations. It is not broad enough to include all sorts of "self-denominated ministers."

Rule 505, like M.C.A. § 13-1-22, cloaks the clergyman's secretary, stenographer, or clerk with the privilege should they, in their professional capacities, learn of the communication. The clergyman must consent before his employee may testify about the communication, but it would seem that his consent is meaningless if the penitent has not already waived the privilege. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

In general.
Construction.
Harmless error.
Production of documents.

**In general.**

The priest-penitent privilege did not apply to a conversation between the defendant while he was in jail and a close friend of the victim and deacon from a local church who visited the inmates at the county jail, as was his usual custom, to "spread the gospel" to those incarcerated. Banks v. State, 782 So. 2d 1237, 2001 Miss. LEXIS 88 (Miss. 2001).

A church member who went to the jail in which the defendant was being held, as did other church members, was not a clergyman within the meaning of the rule and, therefore, could testify regarding a conversation he had with the defendant. Banks v. State, 725 So. 2d 711, 1997 Miss. LEXIS 702 (Miss. 1997).

Where a church administration referred priests and victims to counseling following sexual abuse allegations against the priests, and the priests and victims signed waivers allowing the church administration access to reports from treating doctors and therapists, those waivers were limited and therefore the documents were not discoverable under Miss. R. Evid. 503(4) because the limited waiver of privilege did not serve to waive privilege generally. However, the Priest-penitent privilege of Miss. R. Evid. 505 did not apply to documents not directed to anyone in their professional character as spiritual adviser. Roman Catholic Diocese v. Morrison, 905 So. 2d 1213, 2005 Miss. LEXIS 295 (Miss. 2005).

**Construction.**

Individual who served as deacon in his church and who visited jail regularly to discuss spiritual issues with inmates was not a clergyman within plain meaning of this rule. Banks v. State, 725 So. 2d 711, 1997 Miss. LEXIS 702 (Miss. 1997).

**Harmless error.**

Defendant's conviction for murder was appropriate because any error in allowing a priest to claim the privilege of priest-penitent under Miss. R. Evid. 505(b) was harmless. Nothing in the proffer of the priest's testimony indicated that the victim mentioned suicidal thoughts during her encounter with the priest and the evidence did not end to prove that it was more likely that the victim committed suicide more than six months later. Williams v. State, 53 So. 3d 761, 2009 Miss. App. LEXIS 947 (Miss. Ct. App. 2009), rev'd, 53 So. 3d 734, 2010 Miss. LEXIS 590 (Miss. 2010).

**Production of documents.**

Circuit court violated its protective responsibility by allowing a sexual assault victim premature inspection of allegedly privileged documents produced by the perpetrator's employer because counsel for the victim was in possession of the documents hours before the employer was even aware that they had been released and before it was given a chance to appeal the court's decision. Simply issuing a protective order in conjunction with the order compelling production was not enough to protect the employer's rights. Miss. United Methodist Conf. v. Brown, 911 So. 2d 478, 2005 Miss. LEXIS 584 (Miss. 2005).

## RESEARCH REFERENCES

**ALR.**

Subject matter and waiver of privilege covering communications to clergy member or spiritual adviser. 93 A.L.R.5th 327.

Who are "clergy" or like within privilege attaching to communications to clergy members or spiritual advisers. 101 A.L.R.5th 619.

# ARTICLE VI. WITNESSES

## Rule 601. Competency to testify.

(a) *In general.* — Every person is competent to be a witness, except as provided in subdivisions (b) and (c).

(b) *Competency of spouse.* — If one spouse is a party, the other spouse may not testify as a witness in the case unless both consent, except:

(1) when called as a witness by the spouse who is a party;
(2) in a controversy between them; or
(3) in a criminal case for:
  (A) a criminal act against a child;
  (B) contributing to the neglect or delinquency of a child;
  (C) (C) desertion or nonsupport of a child under 16; and
  (D) (D) abandonment of a child.

(c) *Competency of appraiser.* — When the court – as required by law – appoints a person to make an appraisal for the immediate possession of property in an eminent domain case:

(1) the appraiser may not testify as a witness in the trial of the case; and
(2) the appraiser's report is not admissible in evidence during the trial.

**HISTORY: Amended November 16, 1988, effective retroactive to January 1, 1986; amended January 31, 1990; amended effective July 1, 1998; restyled effective July 1, 2016.**

### ADVISORY COMMITTEE HISTORICAL NOTE

Effective October 23, 1997, former Rule 601(b), which precluded testimony from convicted perjurers, was abandoned in *Fuselier v. State,* 702 So. 2d 388. Effective July 1, 1998, the Advisory Committee Note was amended to reflect this decision. 706-708 So. 2d XLI (West Miss. Cas. 1998).

Effective March 20, 1995, the Advisory Committee Note to Rule 601 was amended to delete the reference to a repealed statute. 648-651 So. 2d 651 So. 2d XXVI (West Miss. Cas. 1995).

Effective January 31, 1990, Rule 601 and its Advisory Committee Note were amended to reflect the decision in *Hudspeth v. State Highway Com'n of Mississippi,* 534 So. 2d 210 (Miss. 1990).

### ADVISORY COMMITTEE NOTE

The language of Rule 601 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. The Rule has been restructured, using an additional subdivision and more paragraphs and subparagraphs. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

This rule sets out the special provisions which render certain persons incompetent to testify. As originally written Rule 601 excepted two classes from competency, spouses pursuant to M.C.A. § 13-1-5 and persons convicted of perjury or subornation of perjury pursuant to M.C.A. § 13-1-11. Rule 601 was subsequently amended in 1990 to delete statutory references. Subdivision (b) retains the substance of superseded M.C.A. § 13-1-5. Former subdivision (b) retained the substance of superceded M.C.A. § 13-1-11 as it pertained to persons convicted of perjury or subornation of perjury. In *Fuselier v. State,* 702 So. 2d 388, decided Oct. 23, 1997 the Mississippi Supreme Court amended the rule by abandoning the perjurer's incompetency rule, striking that subdivision from the rule. A witness previously convicted of perjury or subornation of perjury is now competent as a witness and the fact of such a prior conviction will be available for impeachment of the witness under Rule 609(a)(2). Subdivision (c) reflects the substance of a prior amendment to Rule 601 made by the Mississippi Supreme Court in *Hudspeth v. State Highway Commission of Mississippi,* 534 So. 2d 210 (Miss. 1988). The *Hudspeth* amendment excepted from competency court appointed experts in eminent domain proceedings. The Hudspeth amendment, which was made retroactive to January 1, 1986, specifically referred to the provisions of then existing M.C.A. § 11-27-89. Subdivision (c) reflects the substance of the *Hudspeth* amendment but deletes any statutory reference. (Amended effective July 1, 1998; "Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

Construction.
Child witnesses.
Disinterested witness.
Husband and wife.
Perjury.
Personal knowledge.
Personal observation of witness.

**Construction.**

Trial court conducted a hearing outside the presence of the jury to determine whether the eight-year-old fondling victim was competent to testify as a witness and the victim testified that she knew the difference between a lie and the truth and that telling a lie was wrong. She also stated that she knew why she was in court, knew that she would be questioned by attorneys, remembered most of what had occurred, and would be able to say she did not remember if asked a question about a matter in which she had no recollection; as a result, the trial judge properly found that the victim was a competent witness. Barnes v. State, 906 So. 2d 16, 2004 Miss. App. LEXIS 971 (Miss. Ct. App. 2004), cert. denied, 904 So. 2d 184, 2005 Miss. LEXIS 430 (Miss. 2005).

Although it was arguable that the statute making treating family therapists' testimony inadmissible in family proceedings was repealed by Miss. R. Evid. 1103 because it conflicted with Miss. R. Evid. 601, any error was harmless because the excluded evidence in question was cumulative of other evidence provided by expert witnesses. Mabus v. Mabus, 890 So. 2d 806, 2003 Miss. LEXIS 62 (Miss. 2003).

The 1997 amendment to the rule, which, inter alia, expunged the subsection that precluded convicted perjurers from testifying in future actions, did not have retroactive effect and, instead, became effective on October 23, 1997. Beacham-Taylor v. Lewis (In re Estate of Taylor), 755 So. 2d 1284, 2000 Miss. App. LEXIS 69 (Miss. Ct. App. 2000).

Mississippi Rule of Evidence 601(a)(2) abolishes spousal incompetence to testify in certain circumstances; non-offender spouse may be called to testify, but other spouse may still invoke privilege regarding confidential communications that do not fall into an exception set out in Rule 504(d). Fisher v. State, 690 So. 2d 268, 1997 Miss. LEXIS 150 (Miss. 1997).

**Child witnesses.**

In a case of sexual battery of a victim under the age of 14, the trial court was not required conduct a preliminary interrogation of the four-year-old child to determine competency, and defendant did not show that the trial court erred in allowing her to testify. Graham v. State, 120 So. 3d 1038, 2013 Miss. App. LEXIS 552 (Miss. Ct. App. 2013).

After studying the child's testimony and the record, it was determined he was a competent witness; he exhibited the ability to understand and answer questions, he remembered events, and his testimony was consistent with the statements he had made previously to a state worker and a pediatrician. Dubose v. State, 22 So. 3d 340, 2009 Miss. App. LEXIS 784 (Miss. Ct. App. 2009).

Because a minor victim showed her understanding of the importance of telling the truth and her understanding of the seriousness of the charges pending against defendant, notwithstanding the victim's diminished I.Q., there was no indication that she was not competent to testify pursuant to Miss. R. Evid. 601. Edmond v. State, 35 So. 3d 536, 2009 Miss. App. LEXIS 626 (Miss. Ct. App. 2009), cert. dismissed, 34 So. 3d 1176, 2010 Miss. LEXIS 265 (Miss. 2010).

During defendant's trial for sexual battery of a child, the court did not abuse its discretion in allowing the five-year-old victim and her seven-year-old brother to testify; both children proved that they were intelligent, had the ability to understand and answer questions, and understood the importance of truthfulness. Valmain v. State, 5 So. 3d 1079, 2009 Miss. LEXIS 142 (Miss. 2009).

Defendant's conviction for capital rape in violation of Miss. Code Ann. § 97-3-65(1)(b) was proper because defendant argued that the trial court should have conducted a competency hearing to determine the child victim's ability to testify; however, no such claim was ever presented to the trial court for consideration. Accordingly, defendant waived any issue that there might have been concerning the competency of the victim in that regard and the appellate court proceeded with its review of the sufficiency of the evidence under the assumption that the victim's testimony was credible. Gordon v. State, 977 So. 2d 420, 2008 Miss. App. LEXIS 169 (Miss. Ct. App. 2008).

Defendant's convictions for sexual battery and fondling of a child were appropriate because a review of the record revealed nothing indicating that the teenaged victim was not a competent witness; she exhibited normal intelligence, had the ability to understand and answer questions asked of her, and she was able to remember explicit details about the sexual abuse that she had suffered. Tillman v. State, 947 So. 2d 993, 2006 Miss. App. LEXIS 525 (Miss. Ct. App. 2006), cert. denied, 947 So. 2d 960, 2007 Miss. LEXIS 81 (Miss. 2007).

Defendant's conviction for statutory rape in violation of Miss. Code Ann. § 97-3-65(1)(b) was proper where the circuit court did not err in admitting hearsay testimony of the victim into evidence because it appeared from the competency hearing that the victim knew the difference in truth and imagination. Further, the record showed that the State established all of the elements of the statutory rape charge. Withers v. State, 907 So. 2d 342, 2005 Miss. LEXIS 439 (Miss. 2005).

In defendant's appeal of sexual battery conviction, there was no merit to defendant's contention that defendant was denied a fair trial because the child victim was allowed to take the stand without first having been qualified as a competent witness; prior to trial, the defense chose not to challenge the child's competency to testify. In any event, the trial judge ruled that the child was not competent to testify and instructed the jury to disregard the testimony. Renfrow v. State, 882 So. 2d 800, 2004 Miss. App. LEXIS 919 (Miss. Ct. App. 2004).

In order to prevail in its effort to exclude the testimony of a child witness, the party opposing the testimony must show that at the time the court made its initial decision, it was apparent that the witness did not meet the criteria for testifying, not that the subsequent testimony was flawed or that the initial determination was possibly erroneous. Williams v. State, 859 So. 2d 1046, 2003 Miss. App. LEXIS 1075 (Miss. Ct. App. 2003).

Trial court did not abuse its discretion in finding competent to testify an eight-year-old child who was in special education classes at the time of an alleged sexual battery; although there were inconsistencies in the child's testimony, it was not apparent at the time the trial court made its initial decision that the witness did not meet the criteria for testifying. Williams v. State, 859 So. 2d 1046, 2003 Miss. App. LEXIS 1075 (Miss. Ct. App. 2003).

Where a father did not show that a trial court abused its discretion in allowing a three-year-old child to testify of sexual abuse by the father and any error in permitting the child to testify was cured by the doctor's and social worker's testimonies, the adjudication of abuse was affirmed. In the Interest of E. A. J., 858 So.

2d 205, 2003 Miss. App. LEXIS 987 (Miss. Ct. App. 2003).

In a prosecution for child fondling, the victim was properly permitted to testify, notwithstanding that she was mentally retarded, where her testimony was substantially consistent, especially regarding the circumstances surrounding the alleged incident, and she had the ability to understand and answer questions and could remember events. Riley v. State, 797 So. 2d 285, 2001 Miss. App. LEXIS 92 (Miss. Ct. App. 2001).

A court is not explicitly required to conduct a separate voir dire to make a competency determination with regard to a child witness. Davis v. State, 760 So. 2d 55, 2000 Miss. App. LEXIS 229 (Miss. Ct. App. 2000).

A 14 year old child was competent to testify about events that occurred when he was nine years old or younger because he was able to answer preliminary questions, testified that he understood what it means to tell the truth, and was a very credible witness. Davis v. State, 760 So. 2d 55, 2000 Miss. App. LEXIS 229 (Miss. Ct. App. 2000).

In a prosecution for sexual battery upon a four year old child, the child/victim was properly determined to be a competent witness where both counsel and the trial judge questioned the child and the child testified that she knew the difference between the truth and a lie and that she had not been told what to say. Mullins v. State, 757 So. 2d 1027, 2000 Miss. App. LEXIS 128 (Miss. Ct. App. 2000).

In a prosecution for murder and aggravated assault arising from the stabbing death of one victim and stabbing of her four year old child, the child was properly found competent to testify where the trial court examined the child outside the presence of the jury and listened to his proposed testimony as well as his responses to questions about his recall abilities and his understanding of the importance of telling the truth and determined that the child's testimony was at least trustworthy enough to permit the jury to hear it, thereby permitting the jury to make its own determination as to what weight and worth to afford the child's evidence. Barnett v. State, 757 So. 2d 323, 2000 Miss. App. LEXIS 136 (Miss. Ct. App. 2000).

In a prosecution for kidnapping, the victim, who was seven years old at the time of the crime, was properly found competent as a witness following questioning by the court during which he said that he would testify as to what happened and would not tell a lie. Lacking v. State, 775 So. 2d 731, 2000 Miss. App. LEXIS 131 (Miss. Ct. App. 2000).

The seven year old victim was properly found to be competent to testify in a prosecution for kidnapping and of touching a child for lustful purposes where the court interrogated the victim and the victim stated that he would be truthful. Lacking v. State, 1999 Miss. App. LEXIS 610 (Miss. Ct. App. Nov. 9, 1999), op. withdrawn, sub. op., 775 So. 2d 731, 2000 Miss. App. LEXIS 131 (Miss. Ct. App. 2000).

Children were not rendered incompetent to testify because of inconsistencies between their early accusations against a third party and their subsequent retractions of these allegations. Eakes v. State, 665 So. 2d 852, 1995 Miss. LEXIS 555 (Miss. 1995).

Fact that six-year-old witness did not know her birthday and did not know significance of the date of her injury did not render her incompetent to testify, and trial court did not abuse its discretion in finding that she was a competent witness. Bowen v. State, 607 So. 2d 1159, 1992 Miss. LEXIS 561 (Miss. 1992).

Although parents in divorce proceeding should if at all possible refrain from calling any children of marriage, of tender years at least, as witnesses, there can be no per se prohibition against a child witness testifying in a divorce case between his parents. Jethrow v. Jethrow, 571 So. 2d 270, 1990 Miss. LEXIS 700 (Miss. 1990).

**Disinterested witness.**

Defendant's convictions for armed robbery and arson were proper where the testimony of a witness did not require corroboration because the only requirements for the admissibility of a disinterested witness's testimony was that the witness be competent and speak from personal knowledge, and that the testimony be relevant. Payton v. State, 897 So. 2d 921, 2003 Miss. LEXIS 602 (Miss. 2003).

**Husband and wife.**

Because defense counsel failed to lodge an objection to the husband's testimony against defendant at trial, defendant's claim was barred from review. Sandlin v. State, 156 So. 3d 813, 2013 Miss. LEXIS 538 (Miss. 2013).

Because defendant's wife's out-of-court statements during a 911 call were made to law enforcement during the course of an ongoing emergency, her statements could not have been characterized as resembling in-court testimony, and thus were not inadmissible under Miss. R. Evid. 601(a). Shorter v. State, 33 So. 3d 512, 2009 Miss. App. LEXIS 830 (Miss. Ct. App. 2009).

In defendant's trial for exploitation of children, defendant's wife was not incompetent to testify against defendant because the privilege under Miss. R. Evid. 601(a)(2) and Miss. R. Evid. 504(d) did not apply, as defendant was being prosecuted for a criminal act against a child. Hood v. State, 17 So. 3d 548, 2009 Miss. LEXIS 379 (Miss. 2009).

In defendant's trial on a charge of exploitation of children, defendant's wife was not incompetent to testify against her husband under Miss. R. Evid. 601(a)(2) because spousal incompetency did not apply where the offender spouse was charged with a crime against children. Likewise, the confidential communication privilege under Miss. R. Evid. 504(d) did not apply because defendant was charged with a crime committed against a child and because defendant made his statement in the presence of a third party, his sister-in-law. Hood v. State, 17 So. 3d 548, 2009 Miss. LEXIS 364 (Miss. 2009).

In a prosecution for driving under the influence, the defendant's wife was competent to testify for the state where the defendant's attorney was specifically asked if he was waiving the claims of both the spousal privilege and competency and his answer was "right, we are not going to object." Martin v. State, 773 So. 2d 415, 2000 Miss. App. LEXIS 579 (Miss. Ct. App. 2000).

**Perjury.**

A person convicted of perjury is competent to testify, and is subject to cross-examination regarding his or her perjury conviction, at which point jury should be allowed to make final determination of credibility and weight of witness's testimony. Fuselier v. State, 702 So. 2d 388, 1997 Miss. LEXIS 529 (Miss. 1997).

**Personal knowledge.**

Gang investigator testified as a fact witness because portions of his testimony were grounded in facts learned during his investigation of the shooting and based on his personal knowledge; however, the investigator's testimony also included expert opinions because an average, randomly selected adult likely would not be able to identify a gang or testify about the difference between a gang member and a "hang-around," and he provided expert opinions about what he believed precipitated a shooting. Croft v. State, 283 So. 3d 1, 2019 Miss. LEXIS 201 (Miss. 2019).

Grant of summary judgment in favor of two lawyers in the clients' action claiming the lawyers had breached their fiduciary duty was improper because the trial court erred in applying a negligence standard to the clients' claims of breach of fiduciary duty. An attorney was not qualified as an expert witness, but his testimony was based on personal knowledge; thus, his proffered testimony was a matter of fact rather than opinion, and the trial court erred in excluding it. Crist v. Loyacono, 65 So. 3d 837, 2011 Miss. LEXIS 217 (Miss. 2011).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the trial court did not err excluding two of the widow's experts from testifying on the issue of the taillight visibility and in allowing two of the trucking company's lay witnesses to render opinions on taillight visibility; dirt on the taillights was not of a nature that required an expert opinion because the jury had enough knowledge to discern whether the photographs depicted dirt on the taillights. Further, neither of the widow's experts were at the scene of the accident; the trucking company's lay witnesses were at the scene moments after the collision; and the lay witnesses testified about their personal knowledge and observations. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450, 2010 Miss. LEXIS 200 (Miss. 2010).

**Personal observation of witness.**

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the trial court did not err in not excluding the testimony of the decedent's friend concerning the decedent's alleged making, using, or selling methamphetamine before the accident since the testimony was relevant and concerned the type of activity that the decedent was involved in prior to the accident and what impact that activity might have had on the decedent's alertness at the time of the accident. The testimony was not hearsay because it was the personal observation and knowledge of the witness. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450, 2010 Miss. LEXIS 200 (Miss. 2010).

## Rule 602. Need for personal knowledge.

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

**HISTORY: Restyled effective July 1, 2016.**

### ADVISORY COMMITTEE NOTE

The language of Rule 602 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 602 states existing practice. A person must have personal knowledge of the matter as opposed to a mere opinion, in order to testify. *See Dennis v. Prisock,* 221 So. 2d 706 (Miss. 1969); *Perkins v. State,* 290 So. 2d 697 (Miss. 1974). Normally the witness himself will supply the necessary foundation showing that he has personal knowledge. Rule 602 does not prevent, however, the witness from testifying about hearsay statements. He need only show that he has personal knowledge regarding the making of the statements. He cannot testify about the subject matter contained in the hearsay statement. When he is testifying with regard to hearsay statements, Rules 801 and 805 are applicable. *See* FRE 602, Advisory Committee Notes. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

### JUDICIAL DECISIONS

#### ANALYSIS

Disinterested witness.
Illustrative cases.

**Disinterested witness.**

Defendant's convictions for armed robbery and arson were proper where the testimony of a witness did not require corroboration because the only requirements for the admissibility of a disinterested witness's testimony was that the witness be competent and speak from personal knowledge, and that the testimony be relevant. Payton v. State, 897 So. 2d 921, 2003 Miss. LEXIS 602 (Miss. 2003).

**Illustrative cases.**

Gang investigator testified as a fact witness because portions of his testimony were grounded in facts learned during his investigation of the shooting and based on his personal knowledge; however, the investigator's testimony also included expert opinions because an average, randomly selected adult likely would not be able to identify a gang or testify about the difference between a gang member and a "hang-around," and he provided expert opinions about what he believed precipitated a shooting. Croft v. State, 283 So. 3d 1, 2019 Miss. LEXIS 201 (Miss. 2019).

Claimant was not entitled to receive unemployment benefits when the claimant was terminated by the claimant's employer, a regional library system, after the claimant posted a compromising photo of a library patron in violation of the employer's confidentiality policy because the claimant's testimony that the employer did not uniformly enforce its confidentiality policy was uncorroborated hearsay not based upon any personal knowledge. Therefore, the claimant's testimony did not rise to the level of substantial evidence. Jackson-George Reg'l Library Sys. v. Miss. Dep't of Empl. Sec., 226 So. 3d 133, 2017 Miss. App. LEXIS 539 (Miss. Ct. App. 2017).

Trial court did not abuse its discretion in permitting witnesses to testify that they viewed a surveillance video of the armed robbery of a store and, based on their familiarity with how defendant walked, were of the opinion that one of the robbers in the video was defendant. The witnesses testified they were personally acquainted with defendant and could recognize defendant by the way defendant walked. Lenoir v. State, 222 So. 3d 273, 2017 Miss. LEXIS 193 (Miss. 2017).

In a burglary case, the investigator's testimony complied with this rule as he only testified to subject matters about which he possessed personal knowledge because he personally collected DNA from defendant and her boyfriend, along with the blood found inside the victim's home; he sent the samples to the Mississippi Crime Laboratory for analysis; and he testified that he received the results of the analysis back from the Mississippi Crime Laboratory, but he neither revealed nor testified to the actual results of the DNA analysis; instead, he merely stated that, due to evidence he had after receiving the report, he no longer believed defendant's pretrial statement that she did not bleed inside the victim's home. Woods v. State, 217 So. 3d 719, 2017 Miss. App. LEXIS 43 (Miss. Ct. App. 2017).

In a wrongful death case, testimony of a decedent's coworker was not sufficient to show the liability of a railroad company under the Federal Employers' Liability Act because the coworker had no personal knowledge as to whether putty used contained asbestos. Ill. Cent. R.R. Co. v. Jackson, 179 So. 3d 1037, 2015 Miss. LEXIS 588 (Miss. 2015).

Trial judge acted within the judge's discretion when the judge allowed defendant's jail nurse to testify, as a lay witness during the prosecution's rebuttal, about defendant's lack of medical care for a shooting-related injury. Bates v. State, 172 So. 3d 805, 2014 Miss. App. LEXIS 425 (Miss. Ct. App. 2014), aff'd, 172 So. 3d 695, 2015 Miss. LEXIS 434 (Miss. 2015).

Trial court did not abuse its discretion when it allowed the victim to testify that she was certain that defendant had touched her inappropriately approximately one year before the event that led to defendant's conviction for touching a child for lustful purposes, because the victim had personal knowledge about the prior act and testified that she was certain that defendant's penis had been touching her finger in the prior incident. Gerhold v. State, 127 So. 3d 1116, 2013 Miss. App. LEXIS 241 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 17 (Miss. 2014).

Trial court did not abuse its discretion by finding that the potential interference, occurring when the State violated this rule by failing to lay a proper foundation before a witness made a statement from which the jury could have inferred that defendant was involved with a gang, did not warrant a mistrial. Morgan v. State, 117 So. 3d 619, 2013 Miss. LEXIS 371 (Miss. 2013).

Testimony of the five victims of automobile burglary was sufficient to support a finding that each possessed personal knowledge of the matter because each of the victims testified that they viewed parking lot surveillance videos prior to trial, testified as to the items taken from their vehicles and provided descriptions as to each of their own vehicles, and testified as to how the surveillance videos related to the actual damages to their vehicles. Bunch v. State, 123 So. 3d 484, 2013 Miss. App. LEXIS 602 (Miss. Ct. App. 2013).

Grant of summary judgment in favor of two lawyers in the clients' action claiming the lawyers had breached their fiduciary duty was improper because the trial court erred in applying a negligence standard to the clients' claims of breach of fiduciary duty. An attorney was not qualified as an expert witness, but his testimony was based on personal knowledge; thus, his proffered testimony was a matter of fact rather than opinion, and the trial court erred in excluding it. Crist v. Loyacono, 65 So. 3d 837, 2011 Miss. LEXIS 217 (Miss. 2011).

Defendant's conviction for DUI maiming was proper because he consented to a blood sample, he never objected to the introduction of the blood-analysis evidence during the course of the testimony by a witness with the Mississippi Crime Laboratory, defendant did not object to the admission of testimony by a doctor regarding the amount of other substances found in the blood sample and the impairing effects of the other substances, defendant's objection made at trial did not state with requisite specificity the basis for the objection to the admission of the testimony, and a deputy was permitted to testify as to what he personally observed concerning defendant's written consent to the blood test. Irby v. State, 2010 Miss. LEXIS 423 (Miss. Aug. 12, 2010), op. withdrawn, 2010 Miss. LEXIS 650 (Miss. Dec. 9, 2010), sub. op., 49 So. 3d 94, 2010 Miss. LEXIS 638 (Miss. 2010).

Circuit court did not abuse its discretion in prohibiting cross-examination regarding a victim's statement to the police about defendant's other possible sexual encounters with other teenage girls because it was within the circuit court's discretion to find that the victim had insufficient personal knowledge about the other encounters and that her statement was too speculative to be deemed relevant for impeachment as a prior inconsistent statement under Miss. R. Evid. 613(b); furthermore, what the victim could have been told by another teenage girl was inadmissible hearsay under Miss. R. Evid. 801 and 802. Timmons v. State, 44 So. 3d 1021, 2010 Miss. App. LEXIS 32 (Miss. Ct. App.), cert. denied, 49 So. 3d 106, 2010 Miss. LEXIS 517 (Miss. 2010).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the trial court did not err in not excluding the testimony of the decedent's friend concerning the decedent's alleged making, using, or selling methamphetamine before the accident since the testimony regarding methamphetamine was relevant and concerned the type of activity that the decedent was involved in prior to the accident and what impact that activity might have had on the decedent's alertness at the time of the accident. The testimony was not hearsay because it was the personal observation and knowledge of the witness. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450, 2010 Miss. LEXIS 200 (Miss. 2010).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the trial court did not err excluding two of the widow's experts from testifying on the issue of the taillight visibility and in allowing two of the trucking company's lay witnesses to render opinions on taillight visibility; dirt on the taillights was not of a nature that required an expert opinion because the jury had enough knowledge to discern whether the photographs depicted dirt on the taillights. Further, neither of the widow's experts were at the scene of the accident; the trucking company's lay witnesses were at the scene moments after the collision; and the lay witnesses testified about their personal knowledge and observations. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450, 2010 Miss. LEXIS 200 (Miss. 2010).

Circuit court did not abuse its discretion in prohibiting cross-examination regarding a victim's statement to the police about defendant's other possible sexual encounters with other teenage girls because it was within the circuit court's discretion to find that the victim had insufficient personal knowledge about the other encounters and that her statement was too speculative to be deemed relevant for impeachment as a prior inconsistent statement under Miss. R. Evid. 613(b); furthermore, what the victim could have been told by another teenage girl was inadmissible hearsay under Miss. R. Evid. 801 and 802. Timmons v. State, 44 So. 3d 1021, 2010 Miss. App. LEXIS 32 (Miss. Ct. App.), cert. denied, 49 So. 3d 106, 2010 Miss. LEXIS 517 (Miss. 2010).

In an armed robbery case, a witness who was present outside of a house where the crime took place was allowed to testify based on his personal knowledge under Miss. R. Evid. 602, even though he was unable to identify defendant; the description given by the witness of a gunman's age, height, and hat matched the description given by the victim. Therefore, a trial judge did not abuse his discretion by denying a motion in limine and allowing the witness to testify about what he saw and did before, during, and after the robbery. Eley v. State, 19 So. 3d 124, 2009 Miss. App. LEXIS 161 (Miss. Ct. App.), cert. denied, 19 So. 3d 82, 2009 Miss. LEXIS 491 (Miss. 2009).

In a DUI homicide case under Miss. Code Ann. § 63-11-30(1)(c) and (5), the trial court did not abuse its discretion in admitting an officer's testimony that defendant was driving the car that hit the victim because the officer concluded that defendant was driving that car based on defendant's presence as the sole non-emergency personnel present at the scene, the presence of emergency responders, and common sense. Travis v. State, 972 So. 2d 674, 2007 Miss. App. LEXIS 342 (Miss. Ct. App. 2007), cert. denied, 973 So. 2d 244, 2008 Miss. LEXIS 1 (Miss. 2008).

Directed verdict was properly denied in a case involving the sale of crack cocaine under Miss. Code Ann. § 41-29-139 because it was within the province of the jury to assess the credibility of a coded confidential informant and an undercover agent making the drug buy; both identified defendant from a photo lineup after the buy and testified as to their personal knowledge. Johnson v. State, 950 So. 2d 178, 2007 Miss. LEXIS 125 (Miss. 2007).

Defendant's convictions for aggravated assault and conspiracy to murder the victim were proper under Miss. R. Evid. 602 because a sergeant's testimony met the "personal knowledge" requirement of Rule 602; the sergeant testified to knowledge that he received through personal interviews with the parties involved in the shooting incident and others in community, along with knowledge gained through his personal observations during his years in law enforcement. Robinson v. State, 940 So. 2d 235, 2006 Miss. LEXIS 576 (Miss. 2006).

It was not error for a trial court to allow a detective to testify that defendant signed his advice of rights form "freely and voluntarily." The detective was the person who gave defendant his rights and took his statement and he was testifying from his own observation and first-hand knowledge; he would have known if anyone, including himself, had threatened or tried to coerce defendant or had made any promises of leniency or other reward in exchange for defendant's statement. Magee v. State, 912 So. 2d 1044, 2005 Miss. App. LEXIS 252 (Miss. Ct. App. 2005).

Investigative officer testified to what she had been told happened and this not only was hearsay, but it also showed that her testimony was not based on personal knowledge; under Miss. R. Evid. 602, the only witness who can testify to facts not within personal knowledge is an expert witness, and since the investigative officer was not qualified as an expert witness, it was error to allow her to testify to events of which she had no personal knowledge. Estate of Carter v. Phillips & Phillips Constr. Co., 860 So. 2d 332, 2003 Miss. App. LEXIS 1117 (Miss. Ct. App. 2003).

In a negligence suit against the Mississippi Department of Transportation (MDOT), the trial court properly allowed a witness who lived near the scene of the plaintiff's accident to testify as to other accidents on the highway, since he had personal knowledge of them, having either witnessed them or heard about them, and the testimony was admissible to show the existence of a defective or dangerous condition and MDOT's knowledge thereof. Miss. DOT v. Cargile, 847 So. 2d 258, 2003 Miss. LEXIS 255 (Miss. 2003), overruled in part, Miss. Transp. Comm'n v. Montgomery, 2011 Miss. LEXIS 609 (Miss. Oct.

20, 2011), overruled in part, Miss. Transp. Comm'n v. Montgomery, 80 So. 3d 789, 2012 Miss. LEXIS 96 (Miss. 2012), overruled, Little v. Miss. DOT, 129 So. 3d 132, 2013 Miss. LEXIS 551 (Miss. 2013).

Police officer's testimony regarding the type of shotgun shells he observed at the scene of a shooting did not constitute expert testimony; the officer was permitted to testify because the matter was within his personal knowledge, and the testimony was helpful to the trier of fact. Lane v. State, 841 So. 2d 1163, 2003 Miss. App. LEXIS 52 (Miss. Ct. App. 2003).

Accident victim was clearly incompetent to testify regarding the victim's own medical prognosis and treatment. Haggerty v. Foster, 838 So. 2d 948, 2002 Miss. LEXIS 398 (Miss. 2002).

In a prosecution for obtaining a controlled substance by fraud, it was error to allow a pharmacist to testify that a prescription from a hospital in Arkansas was a forgery since he lacked personal knowledge on which to base this conclusion and relied upon a telephone conversation that he had with a doctor at the Arkansas hospital. Clay v. State, 821 So. 2d 136, 2000 Miss. App. LEXIS 486 (Miss. Ct. App. 2000).

In a divorce proceeding in which the wife's use of the Internet to meet men was at issue, it was error for the court to allow a counselor to testify with regard to Internet addiction and Internet pornography where the counselor was not qualified as an expert witness and had no personal knowledge of the wife's computer usage. Bower v. Bower, 758 So. 2d 405, 2000 Miss. LEXIS 80 (Miss. 2000).

## Rule 603. Oath or affirmation to testify truthfully.

Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

**HISTORY: Restyled effective July 1, 2016.**

### ADVISORY COMMITTEE HISTORICAL NOTE

Effective March 20, 1995, the Advisory Committee Note to Rule 603 was amended to delete the reference to a repealed statute. 648-651 So. 2d 651 So. 2d XXVI (West Miss. Cases 1995).

### ADVISORY COMMITTEE NOTE

The language of Rule 603 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 603 is consistent with M.R.C.P. 43(d) which provides that an affirmation may be made in lieu of an oath. The policy behind allowing an affirmation in lieu of an oath is to refrain from offending religious persons who oppose oath-taking, atheists, and children who are too young to comprehend the meaning of an oath, among others. The affirmer as well as the oath-taker are equally subject to perjury charges under M.C.A. § 97-9-59. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

### JUDICIAL DECISIONS

**Illustrative cases.**

Not only did a chancery court not err when it failed to grant an ex-husband's motion for a new trial after it allowed unsworn testimony to be taken in violation of Miss. R. Evid. 603 because a later swearing of the witnesses was effective, but the husband waived the issue because he failed to timely object to the chancery court's failure. Harbit v. Harbit, 3 So. 3d 156, 2009 Miss. App. LEXIS 80 (Miss. Ct. App. 2009).

Although a child victim's video statement was not given under oath, there was no Miss. R. Evid. 603 violation where the video statement, with two exceptions, was duplicative of the victim's in-court testimony, which was given under oath, and the victim had testified under oath in court that she had told the truth in the video. Penny v. State, 960 So. 2d 533, 2006 Miss. App. LEXIS 909 (Miss. Ct. App. 2006), cert. denied, 959 So. 2d 1051, 2007 Miss. LEXIS 384 (Miss. 2007), cert. denied, 959 So. 2d 1051, 2007 Miss. LEXIS 386 (Miss. 2007).

## Rule 604. Interpreter.

An interpreter must be qualified and must give an oath or affirmation to make a true translation.

**HISTORY: Restyled effective July 1, 2016.**

### ADVISORY COMMITTEE HISTORICAL NOTE

Effective March 20, 1995, the Advisory Committee Note to Rule 604 was amended to delete the reference to repealed statutes. 648-651 So. 2d 651 So. 2d XXVI (West Miss. Cas. 1995).

### ADVISORY COMMITTEE NOTE

The language of Rule 604 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

This rule should be read in conjunction with M.R.C.P. 43(f), M.C.A. § 99-17-7, and M.C.A. §§ 13-1-301 through 315. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## Rule 605. Judge's competency as a witness.

The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.

**HISTORY: Restyled effective July 1, 2016.**

### ADVISORY COMMITTEE NOTE

The language of Rule 605 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

Applicability.
Illustrative cases.

**Applicability.**

Miss. R. Evid. 605 precludes the testimony of a judge in a trial in which the judge is presiding but does not preclude a judge's testimony in subsequent proceedings concerning what occurred in a previous proceeding. Stone v. State, 867 So. 2d 1032, 2003 Miss. App. LEXIS 1026 (Miss. Ct. App. 2003).

Given absence of provision forbidding judge from testifying in a subsequent inquiry into the verdict, it can be inferred that drafters of this rule understood there were certain extraordinary situations in which a judge may be called upon to explain his verdict or ruling in a subsequent proceeding. Stewart v. Southeast Foods, 688 So. 2d 733, 1996 Miss. LEXIS 643 (Miss. 1996).

**Illustrative cases.**

Where welfare worker had no firsthand knowledge of how baby ingested cocaine, her testimony was merely speculative and apparently based on what she heard others say, and it was therefore beyond her knowledge or expertise and created undue prejudice, constituting reversible error. Jones v. State, 678 So. 2d 707, 1996 Miss. LEXIS 411 (Miss. 1996).

Circuit court did not err in overruling defendant's motion to exclude the testimony of the municipal judge who presided at his initial appearance where the State called the judge to buttress testimony of police officers to statements against interest that defendant had made. Stone v. State, 867 So. 2d 1032, 2003 Miss. App. LEXIS 1026 (Miss. Ct. App. 2003).

## Rule 606. Juror's competency as a witness.

(a) *At the trial.* — A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence.

(b) *During an inquiry into the validity of a verdict or indictment.* —

(1) *Prohibited testimony or other evidence.* During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) *Exceptions.* A juror may testify about whether:

(A) extraneous prejudicial information was improperly brought to the jury's attention; or

(B) an outside influence was improperly brought to bear on any juror.

**HISTORY: Amended effective July 1, 2009; restyled effective July 1, 2016.**

## ADVISORY COMMITTEE NOTE

The language of Rule 606 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 606(a) disqualifies a juror from taking the witness stand during the trial of the case in which the juror is sitting. Of course, calling a juror as a witness will be rare; voir dire will generally expose a juror's knowledge of facts relevant to a case and result in disqualification of the juror for cause.

Rule 606(b) is designed to protect all "components of [a jury's] deliberations, including arguments, statements, discussions, mental and emotional reactions, votes and any other feature of the process." *See* FRE 606, Advisory Committee Notes. Thus testimony or affidavits of jurors is incompetent to show a compromise verdict, a quotient verdict, misinterpretation of instructions, and the like. *See, e.g., Hayes v. Entergy Mississippi, Inc.,* 871 So. 2d 743 (Miss. 2004) (pressure to reach a verdict); *Busick v. St. John*, 856 So. 2d 304 (Miss. 2003) (misinterpretation of instructions); *APAC-Mississippi, Inc. v. Goodman*, 803 So. 2d 1177 (Miss. 2002) (quotient verdict); *Curtis v. Bellwood Farms, Inc.*, 805 So. 2d 541 (Miss. Ct. App. 2000) (improper consideration of attorney's statements despite court's cautionary instruction); *Gavin v. State,* 767 So. 2d 1072 (Miss. Ct. App. 2000) (confusion regarding instructions); *Galloway v. State,* 735 So. 2d 1117 (Miss. Ct. App. 1999) (improper consideration of defendant's prior conviction). This broad rule of exclusion ensures jurors "freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment." *See* FRE 606, Advisory Committee Notes.

Rule 606(b) does not purport to set forth the substantive grounds for setting aside verdicts because of an irregularity. Even when grounds are alleged to exist, there is a "general reluctance after verdict to haul in and probe jurors for potential instances of bias, misconduct or extraneous influences." *Gladney v. Clarksdale Beverage Co., Inc.*, 625 So. 2d 407, 418 (Miss. 1993) (discussing substantive grounds for setting aside a verdict). At the least, a party needs to show "a specific, non-speculative impropriety has occurred," and the trial court must supervise any post-trial investigation to "ensure that jurors are protected from harassment and to guard against inquiry into subjects beyond which a juror is competent to testify." *Id.*at 419. When jurors are permitted to testify about objective facts not of record and about outside influences, they may not be questioned about the effect upon them of what was improperly brought to their attention. *Id.*

The United States Supreme Court has recognized a limited Sixth Amendment exception to Rule 606(b) when "a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant." *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855, 869 (2017). Not every offhand comment will suffice to overcome Rule 606(b)'s prohibitions. Rather, there must be a threshold showing "that racial animus was a significant motivating factor in the juror's vote to convict." *Id.*at 869.

In narrowly prescribed circumstances, Mississippi permits the correction of clerical errors in the verdict, notwithstanding Rule 606(b). *See Martin v. State*, 732 So. 2d 847, 851-55 (Miss. 1998) (Verdict incorrectly stated the defendant was guilty of possession of morphine when in fact the jury unanimously found the defendant not guilty. Such an allegation of clerical error did "not challenge the "validity" of the verdict or the deliberation or mental process of the jurors.") Of course, the possibility of clerical errors in the verdict form will be reduced substantially by polling the jury. Errors that come to light after polling the jury "may be corrected on the spot, or the jury may be sent out to continue deliberations, or, if necessary, a new trial may be ordered." C. Mueller & L. Kirkpatrick, *Evidence Under the Rules*at 671 (2d ed. 1999) (citing *Sincox v. United States*, 571 F.2d 876, 878-79 (5th Cir. 1978)). (Adopted effective July 1, 2009; "Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling; Advisory Committee Note amended July 16, 2019, in light of *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855 (2017).)

## JUDICIAL DECISIONS

### ANALYSIS

Applicability.
Extraneous prejudicial information.
Fair inquiry by trial court.
Validity of verdict.

**Applicability.**

Post-conviction relief court erred by allowing a juror to be questioned about how alleged extraneous information affected his deliberations. Roach v. State, 116 So. 3d 126, 2013 Miss. LEXIS 348 (Miss. 2013).

In a personal injury products liability lawsuit, a juror's affidavit set out the thought processes of the jurors and what was on their minds when they assessed the damages; the tire maker made no allegation of external influences that could have tainted the jury's verdicts. Instead it was an attempt through the juror's affidavit to make an entry into the thought processes and deliberations of the jury, which was not permissible, Miss. R. Evid. 606(b). Goodyear Tire & Rubber Co. v. Kirby, 156 So. 3d 281, 2009 Miss. App. LEXIS 221 (Miss. Ct. App. 2009), cert. dismissed, 36 So. 3d 455, 2010 Miss. LEXIS 327 (Miss. 2010).

Inmate was not entitled to post-conviction relief on his claim that at least four jurors considered his silence at trial as indicative of guilt because the affidavit of the inmate's private investigator amounted to nothing more than hearsay. Even if one of the jurors had provided his or her own affidavit, it would not have been admissible under Miss. R. Evid. 606(b). Spicer v. State, 973 So. 2d 184, 2007 Miss. LEXIS 619 (Miss. 2007).

Circuit court did not err by failing to conduct a post-trial hearing based on an affidavit and sworn testimony of a juror that the jury was pressured to deliver a guilty verdict and that a juror did not disclose that she had been molested as a child because there was no evidence of jury tampering, and the question of whether some jurors coerced others was prohibited under Miss. R. Evid. 606(b); there was no indication or allegation that anyone tampered with the jury or interfered in the deliberation process. The allegation that some unnamed juror was the victim of sexual abuse or molestation was insufficient upon which to base a motion for a new trial because defendant did not ask the jurors during voir dire whether anyone had been the victim of a crime. Foxworth v. State, 982 So. 2d 453, 2007 Miss. App. LEXIS 751 (Miss. Ct. App. 2007), cert. denied, 981 So. 2d 298, 2008 Miss. LEXIS 241 (Miss. 2008).

Circuit court correctly denied the patient's request to reconvene the jury as improper and without merit under Miss. R. Evid. 606(b); the email a juror sent to the circuit court judge after the trial concluded that the jury may have misinterpreted an instruction, and such a concern did not represent that the jury verdict was not rendered as intended. Johnson v. St. Dominics - Jackson Mem'l Hosp., 967 So. 2d 20, 2007 Miss. LEXIS 592 (Miss. 2007).

Trial court's failure to investigate juror misconduct jeopardized the parties' right to a fair and impartial trial in a wrongful death action; if accurate, the juror's statement on the first day of trial that she had already decided for plaintiff estate clearly belied her implied impartiality. Mariner Health Care, Inc. v. Estate of Edwards, 964 So. 2d 1138, 2007 Miss. LEXIS 520 (Miss. 2007).

It does not matter that information outside the record is provided by a fellow juror as opposed to some other person if the extraneous information is outside the record of proceedings in open court, it is an outside influence under the rule. Perkins v. Dauterive, 882 So. 2d 773, 2004 Miss. App. LEXIS 927 (Miss. Ct. App. 2004).

Where the accident occurred at an intersection in a busy grocery store parking lot, the injured person was expected to maintain control over the injured person's speed, and be aware of, and expect to meet other vehicles in front of or approaching the sides of the injured person's vehicle, and the instruction on whether the injured person was guilty of negligence (fault), which was the proximate contributing cause of the accident, was not error, and reformation of the jury verdict was not required, as the jury was provided with an opportunity to assess fault based on principles of comparative negligence, even though neither party pled or argued such a defense. Busick v. St. John, 856 So. 2d 304, 2003 Miss. LEXIS 491 (Miss. 2003).

In the absence of a threshold showing of external influences, an inquiry into a juror verdict is not required. Alpha Gulf Coast, Inc. v. Jackson, 801 So. 2d 709, 2001 Miss. LEXIS 319 (Miss. 2001).

Subdivision (b) of this rule did not extend to preclude use of judge's affidavit in a subsequent civil trial; had drafters of rule wanted to use broader language such as "trier of fact," they could have easily done so. Stewart v. Southeast Foods, 688 So. 2d 733, 1996 Miss. LEXIS 643 (Miss. 1996).

**Extraneous prejudicial information.**

Any alleged mental impairment of a juror was not an extraneous influence for the purpose of impeaching the verdict. Hutto v. State, 286 So. 3d 653, 2019 Miss. LEXIS 358 (Miss. 2019).

Defendant was not entitled to a new trial because he presented no evidence of an external influence on the jury. Husband v. State, 23 So. 3d 550, 2009 Miss. App. LEXIS 332 (Miss. Ct. App. 2009), cert. dismissed, 31 So. 3d 1217, 2010 Miss. LEXIS 218 (Miss. 2010).

Trial court did not abuse its discretion in denying the administrator's motion for a new trial where there was no evidence that the accident report and the photographs seen by the jurors would have presented evidence that was qualitatively different from the evidence presented at trial; the trial court was not convinced that a mistake was made in the submission and review of the exhibits. In re Estate of Guillory v. McGee, 922 So. 2d 823, 2006 Miss. App. LEXIS 123 (Miss. Ct. App. 2006).

In an appeal of a capital murder conviction and life sentence, the judgment was reversed and the case remanded for a new trial because the jury considered extraneous prejudicial information and the defendant did not receive a fair trial. The failure to fully reconvene the jury pursuant to Miss. R. Evid. 606(b) constituted reversible error. James v. State, 912 So. 2d 940, 2005 Miss. LEXIS 539 (Miss. 2005).

Rule against a juror revealing influences on his own verdict precludes a juror from testifying as to extraneous information or outside influence which he himself introduced to the jury. Perkins v. Dauterive, 882 So. 2d 773, 2004 Miss. App. LEXIS 927 (Miss. Ct. App. 2004).

Based on the testimony of three jurors, it was clear that there was no external influence upon the jury; each juror was given the opportunity, when polled, to express any dissatisfaction with the verdict and the opportunity to vote without any jury deliberation room pressure, such that the trial court was correct in refusing to allow further investigation of alleged jury misconduct. Hayes v. Entergy Miss., Inc., 871 So. 2d 743, 2004 Miss. LEXIS 457 (Miss. 2004).

In a prosecution for the murder of an infant, testimony by a prospective juror regarding remarks made by a trial juror about the fact that the defendant was also charged with the murder of another infant provided a sufficient basis for the trial court to hold a hearing for the purpose of determining whether extraneous prejudicial information was introduced into the jury's deliberations concerning the death of the other child. James v. State, 777 So. 2d 682, 2000 Miss. App. LEXIS 457 (Miss. Ct. App. 2000).

In a prosecution for capital murder while in the commission of felonious child abuse, it was reversible error for the court not to hold a hearing for the purpose of determining whether extraneous prejudicial information was introduced into the jury's deliberations concerning the death of the victim's sibling where there was evidence presented by a member of the prospective jury panel regarding knowledge of the death of the other child by several members of the jury. James v. State, 2000 Miss. App. LEXIS 164 (Miss. Ct. App. Apr. 11, 2000), op. withdrawn, sub. op., 777 So. 2d 682, 2000 Miss. App. LEXIS 457 (Miss. Ct. App. 2000).

The defendant's contention that the jury failed to follow the court's instructions not to consider the fact that the defendant did not testify as evidence against him and not to draw any unfavorable inferences from his decision not to testify and, also, to carefully weigh the evidence in reaching a verdict and on the presumption of innocence did not fall under the exceptions for investigating extraneous prejudicial information or outside influence. Gleeton v. State, 716 So. 2d 1083, 1998 Miss. LEXIS 312 (Miss. 1998).

**Fair inquiry by trial court.**

Circuit court did not abuse its discretion by instructing the circuit clerk not to issue witness subpoenas because trial counsel failed to adhere to any of the procedures and instead sought to subpoena members of the jury without the circuit court's permission or oversight; the circuit court refuted the allegation that it had instructed the clerk to deny all of defendant's future subpoena request and made it clear that defendant had a right to subpoena nonjurors. Hall v. State, 295 So. 3d 544, 2019 Miss. App. LEXIS 610 (Miss. Ct. App. 2019).

Circuit court did not err in its application of subsection (b) because it correctly advised the clerk regarding defendant's requests and correctly determined that there was no sufficient basis to allow defendant to subpoena the jury members; defendant did not allege that either of the exceptions listed in subsection (b) were applicable to his case. Hall v. State, 295 So. 3d 544, 2019 Miss. App. LEXIS 610 (Miss. Ct. App. 2019).

Trial court conducted a fair and adequate inquiry into defendant's allegations of juror misconduct, as the trial court questioned both bailiffs, as they were stationed outside the jury room and could have seen who went in the room, and they did not see anyone interfere with the deliberations, and there was no information as to the person who informed the jury of defendant's supposed plea or the juror to whom it was said. Bryant v. State, 151 So. 3d 1025, 2014 Miss. App. LEXIS 445 (Miss. Ct. App. 2014).

**Validity of verdict.**

Defendant, following a conviction for aggravated assault, was entitled to a new trial based on juror misconduct that may have altered the verdict because defendant's fiancée and one of the jurors testified at a hearing after the trial that during the course of the trial and after the jury's verdict the juror and defendant's fiancée engaged in improper communications. The court determined that the juror initiated the improper contact with defendant's fiancée and tried to begin a romantic relationship with defendant's fiancée. Murry v. State, 218 So. 3d 303, 2017 Miss. App. LEXIS 216 (Miss. Ct. App. 2017).

Once it was determined that a communication was made to a juror during a trial and what the contents were, the court then found that it was not reasonably possible that the communication altered the verdict. The trial court could not delve into the internal deliberations of the jury. Wallace v. State, 166 So. 3d 520, 2014 Miss. App. LEXIS 385 (Miss. Ct. App. 2014), cert. dismissed, 2015 Miss. LEXIS 341 (Miss. June 25, 2015).

Where the trial judge polled the jury, the record reflected that three jurors did not audibly respond to the judge's question, but the trial judge made a finding of unanimity, defendant was not entitled to an evidentiary hearing on her motion for a new trial based upon a claim that the jury's verdict was not unanimous but was based upon a majority vote because the judge made a finding of unanimity after polling the jury and neither defense counsel nor any juror objected to this finding and because defendant's production of a statement from one juror that the verdict was based upon a majority vote was insufficient to overcome the trial judge's finding of unanimity. Edwards v. State, 997 So. 2d 241, 2008 Miss. App. LEXIS 777 (Miss. Ct. App. 2008).

In a medical malpractice trial, where a juror submitted an affidavit indicating that a nurse on the jury had told members of the jury that the doctor could lose his medical license if they did not vote for him, the court found that the information in the affidavit did not go to the material issue in the case concerning breach of the applicable standard of care. A new trial was not warranted, because there was no reasonable possibility that the nurse's information swayed the other eight majority jurors to ignore the copious evidence legitimately presented in the case and to vote for the doctor. Perkins v. Dauterive,

882 So. 2d 773, 2004 Miss. App. LEXIS 927 (Miss. Ct. App. 2004).

Once it is determined that the communication was made and what the contents were, the court is then to decide whether it is reasonably possible that this communication altered the verdict. In assessing the significance of the extraneous information, the court may order a new trial if the extra-record facts are material, that is, if they affect an issue of importance in the case, and if they are qualitatively different from the evidence properly presented to the jury in the case. Perkins v. Dauterive, 882 So. 2d 773, 2004 Miss. App. LEXIS 927 (Miss. Ct. App. 2004).

Denial of the inmate's petition for post-conviction relief under Miss. Code Ann. § 13-5-1 was proper where the issue was procedurally barred from being raised for the first time in that petition; further, submission of the juror's affidavit in an apparent attempt to impeach the verdict was improper under Miss. R. Evid. 606(b) because a juror could not testify on any matter or statement occurring during the course of the jury's deliberations. Puckett v. State, 879 So. 2d 920, 2004 Miss. LEXIS 592 (Miss. 2004), cert. denied, 544 U.S. 924, 125 S. Ct. 1638, 161 L. Ed. 2d 483, 2005 U.S. LEXIS 2506 (U.S. 2005).

A verdict can not be overturned on the basis that the jury did not follow the court's instructions; the jury is presumed to follow the court's instructions, and a verdict will only be overturned if the jury received "extra record" facts that concerned a material issue in dispute and that were qualitatively different from the evidence admitted at trial. Curtis v. Bellwood Farms, 805 So. 2d 541, 2000 Miss. App. LEXIS 113 (Miss. Ct. App. 2000).

Trial court correctly refused to allow sworn affidavits of two jurors, concerning alleged juror misconduct, to be admitted in support of plaintiffs' motion for new trial, where neither affidavit revealed extra-record information, or anything qualitatively different from that which was properly brought to jury's attention during course of trial. Gladney v. Clarksdale Beverage Co., 625 So. 2d 407, 1993 Miss. LEXIS 428 (Miss. 1993).

Party alleging juror misconduct must make an adequate showing to overcome presumption of jury impartiality, and juror polling outside supervision of court shall only be permitted upon written request; when threshold showing is made, court should conduct a post-trial hearing, with questions of jurors limited to whether communication was made and what it contained, and court may then decide whether it is reasonably possible the communication altered the verdict. Gladney v. Clarksdale Beverage Co., 625 So. 2d 407, 1993 Miss. LEXIS 428 (Miss. 1993).

"Extraneous prejudicial information" as to which a juror may testify includes information brought into jury room by another juror, so that a juror may testify about another juror's words or actions in bringing such information before jury. T. K. Stanley, Inc. v. Cason, 614 So. 2d 942, 1992 Miss. LEXIS 844 (Miss. 1992).

Under subdivision (b) of this rule, it was permissible to question jurors as to additional information relayed to jury by several jurors' unauthorized and unsupervised inspection of accident scene. Schmiz v. Illinois C. G. R. Co., 546 So. 2d 693, 1989 Miss. LEXIS 320 (Miss. 1989).

## Rule 607. Who may impeach a witness.

Any party, including the party that called the witness, may attack the witness's credibility.

**HISTORY: Restyled effective July 1, 2016.**

### ADVISORY COMMITTEE NOTE

The language of Rule 607 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 607 is a repudiation of the old voucher rule. With regard to civil cases the voucher rule was previously eliminated by former M.R.C.P. 43(b)(4) which became effective January 1, 1982. Former M.R.C.P. 43(b)(4) has been abrogated by Rule 607. Rule 607 now repudiates the voucher rule in both civil and criminal cases. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

Purpose.
Statements.
Illustrative cases.

**Purpose.**

To the extent that Mississippi courts have held that evidence of collateral-source payments may not be introduced for the purpose of impeaching false or misleading testimony, those decisions are expressly overruled. Permitting evidence of collateral-source payments for the narrow purpose of impeaching false or misleading testimony is consistent with the Mississippi Rules of Evidence. Robinson Prop. Group, L.P. v. Mitchell, 7 So. 3d 240, 2009 Miss. LEXIS 195 (Miss. 2009).

Trial court erred in admitting testimony offered under guise of impeachment, where its primary purpose was to avoid the hearsay rule. Cooper v. State Farm Fire & Casualty Co., 568 So. 2d 687, 1990 Miss. LEXIS 273 (Miss. 1990).

**Statements.**

While the elements of surprise and/or unexpected hostility are an acceptable basis for allowing a party to impeach its own witness, neither is required for purposes of this rule. To the extent Wilkins v. State, 603 So. 2d 309, 322 (Miss. 1992), holds otherwise, it was overruled and the Supreme Court of Mississippi held that, in order to prevent abuse of Rule 607, impeachment of one's own witness should be only allowed when circumstances indicating good faith and the absence of subterfuge are present. Carothers v. State, 152 So. 3d 277, 2014 Miss. LEXIS 592 (Miss. 2014).

Before a party may introduce for impeachment purposes an unsworn pretrial inconsistent statement of his own witness, he must show surprise or unexpected hostility, and such statement can never be used as substantive evidence; under provisions of M.R.E. Rule 403, trial judge should consider whether a cautionary instruction to jury will be sufficient to keep jury from treating the unsworn pretrial inconsistent statement as substantive evidence, and if not, the statement should not be introduced. Wilkins v. State, 603 So. 2d 309, 1992 Miss. LEXIS 282 (Miss. 1992), overruled in part, Carothers v. State, 152 So. 3d 277, 2014 Miss. LEXIS 592 (Miss. 2014).

**Illustrative cases.**

Circuit court did not err in excluding at defendant's retrial the former testimony of a witness because defendant did not seek to impeach the credibility of the witness with the former testimony of the witness, but sought to introduce the former testimony of the witness as substantive evidence in support of the central issue of defendant's guilt. Friston v. State, 243 So. 3d 198, 2017 Miss. App. LEXIS 444 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 71, 2018 Miss. LEXIS 230 (Miss. 2018).

In order to prevent abuse of this rule, impeachment of one's own witness should be only allowed when circumstances indicating good faith and the absence of subterfuge are present. Carothers v. State, 152 So. 3d 277, 2014 Miss. LEXIS 592 (Miss. 2014).

Trial court abused its discretion in excluding a pre-negotiation appraisal report under Miss. R. Evid. 403 where it did not find that the probative value of the report was substantially outweighed by the danger of unfair prejudice, and since the landowners were allowed to impeach an expert witness appraiser with his prior appraisal under Miss. R. Evid. 607, it was relevant evidence in the eminent domain action. Redding v. Miss. Transp. Comm'n, 169 So. 3d 958, 2014 Miss. App. LEXIS 676 (Miss. Ct. App. 2014), cert. denied, 168 So. 3d 962, 2015 Miss. LEXIS 374 (Miss. 2015).

State's impeachment of its own witnesses with unsworn prior statements was improper, because the State failed to made the required predicate showing of surprise or unexpected hostility. While the trial court provided a cautionary instruction, the error was not harmless, because the risk that the instruction was not followed was too great and the evidence was not overwhelming. James v. State, 124 So. 3d 693, 2013 Miss. App. LEXIS 217 (Miss. Ct. App.), cert. denied, 123 So. 3d 450, 2013 Miss. LEXIS 566 (Miss. 2013).

It was error under Miss. R. Evid. 607 to exclude portions of a murder witness's videotaped statement in which she told police that the victim was armed, even though the defense was attempting to impeach the in-court testimony of its own witness. However, the error was harmless because the jury was fully informed that the in-court testimony was inconsistent with prior out-of-court statements to the police and to defendant's counsel. Young v. State, 99 So. 3d 159, 2012 Miss. LEXIS 485 (Miss. 2012).

A trial court did not err in excluding collateral-source evidence and in refusing to allow a partnership to use evidence to impeach an injured party when the injured party's testimony about medical bills and nonmedical evidence was not unduly prejudicial. Robinson Prop. Group, L.P. v. Mitchell, 7 So. 3d 240, 2009 Miss. LEXIS 195 (Miss. 2009).

Witness' testimony was properly excluded because defendant intended to introduce the witness' prior statements to show that the victim had been coached to lie, and, therefore, the statement constituted hearsay under Miss.R. Evid. 801 (c) because defendant intended to use his witness' prior statement in the guise of impeachment under Miss. R. Evid. 607 for the primary purpose of placing before the jury substantive evidence which was not otherwise admissible in order to avoid the hearsay rule. Elkins v. State, 918 So. 2d 828, 2005 Miss. App. LEXIS 483 (Miss. Ct. App. 2005), cert. denied, 921 So. 2d 1279, 2006 Miss. LEXIS 26 (Miss. 2006), cert. denied, 547 U.S. 1194, 126 S. Ct. 2865, 165 L. Ed. 2d 898, 2006 U.S. LEXIS 4564 (U.S. 2006).

In a prosecution for embezzlement arising from an incident in which the defendant took a lawnmower with permission from the victim for the purpose of repairing it, but then pawned it, the defendant was properly precluded from cross-examining the victim with regard to her prior offense for driving while intoxicated and her history of mental problems since there was no argument that the victim was confused on the stand, appeared to be hallucinating, or otherwise lacked coherence and, therefore, such evidence was irrelevant. Bishop v. State, 755 So. 2d 1269, 2000 Miss. App. LEXIS 65 (Miss. Ct. App. 2000).

Trial court's exclusion of statement as hearsay was error, because it was a prior inconsistent statement that was not being offered in evidence to prove the truth of the matter asserted; rather, statement was being offered as circumstantial evidence from which jury could infer that trial testimony of declarant was unreliable. Hall v. State, 691 So. 2d 415, 1997 Miss. LEXIS 73 (Miss. 1997).

Videotape taken at booking of defendant charged with assaulting police officers was properly admitted for impeachment purposes; tape was not collateral or too remote in time, probative value of tape substantially outweighed its prejudicial value, and tape was relevant to credibility of defendant's brother, whose recollection of events wavered significantly. Johnson v. State, 655 So. 2d 37, 1995 Miss. LEXIS 232 (Miss. 1995).

Trial court did not err in allowing prosecutor to impeach his own witness on the basis of witness's prior inconsistent statements, where proper predicate for impeachment was laid and prosecutor was not using prior statements merely as a subterfuge to place incriminating hearsay before jury. Harrison v. State, 534 So. 2d 175, 1988 Miss. LEXIS 534 (Miss. 1988).

## Rule 608. A witness's character for truthfulness or untruthfulness.

(a) *Reputation or opinion evidence.* — A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) *Specific instances of conduct.* — Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

**HISTORY: Amended effective July 1, 2009; restyled effective July 1, 2016.**

### ADVISORY COMMITTEE NOTE

The language of Rule 608 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 608's limitation of bad-act impeachment to "cross-examination" is trumped by Rule 607, which allows a party to impeach witnesses on direct examination. Courts have not relied on the term "on cross-examination" to limit impeachment that would otherwise be permissible under Rules 607 and 608. Therefore, no change to the language of the Rule was necessary in the context of a restyling project.

Rule 608 is concerned with character evidence of witnesses. Rule 404(a) prohibits the use of character evidence to prove conformity of conduct, but with some exceptions. Rule 608 addresses those exceptions. Thus, it is necessary to read both rules together.

Subdivision (a) permits the introduction of character evidence of a witness only after the witness's character for veracity has been attacked. A party may not bolster the character of the party's own witness; the party can only react in response to a charge of untruthfulness. Moreover, only the witness's character for truthfulness or its opposite can be attacked. Other character traits are irrelevant for impeachment purposes. Evidence shall be produced in the form of an opinion or reputation.

Subdivision (b) flatly prohibits impeaching a witness's character for truthfulness via *extrinsic proof* of specific acts of the witness's conduct, except criminal convictions pursuant to Rule 609. In contrast, specific instances of conduct of the witness may, in the discretion of the court, be inquired into on *cross-examination* of that witness (or on cross-examination of another who testifies concerning that witness's character for truthfulness) *if* probative of truthfulness or untruthfulness. *See Brent v. State,* 632 So. 2d 936, 944 (Miss. 1994) ("If the past conduct did not involve lying, deceit, or dishonesty in some manner, it cannot be inquired into on cross-examination.")

This absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness's character for truthfulness. The admissibility of extrinsic evidence offered for other grounds of impeachment, such as contradiction, prior inconsistent statement, bias, and mental or sensory capacity, is governed by Rules 402, 403, and 616.

The extrinsic evidence prohibition of Rule 608(b) bars the use of any kind of evidence, including documents or the testimony of other witnesses, except a direct admission by the witness being cross-examined. *See Brent* at 945 ("a party cross-examining a witness about past instances of conduct is bound by the witness's answer [and] is not permitted to offer evidence in rebuttal to contradict it.")

Of course, counsel must have a good faith basis before beginning to inquire on cross-examination about specific instances of past conduct, and may not merely seek a "fishing license." *Brent,* 632 So. 2d at 645.

The last sentence of Rule 608 seeks to guarantee that a witness does not waive the privilege against self-incrimination when questioned about matters relating to credibility. (Amended effective July 1, 2009; "Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

In general.
Bolstering.
Credibility of witness.
Knowledge and opinions.
Scope of rebuttal evidence.
Sexual history.
Truthfulness of victim.
Waiver.
Illustrative cases.

**In general.**

Where a defendant appealed his conviction and sentence for sexual battery and gratification of lust, he unsuccessfully argued that Miss. R. Evid. 608 and 609 limited all prior-bad-acts evidence to prior convictions. Rule 608 addressed the admissibility of impeachment evidence regarding the character and conduct of a witness, and Rule 609 pertained to the use of a witness's prior convictions for impeachment purposes. Cole v. State, 126 So. 3d 880, 2013 Miss. LEXIS 544 (Miss. 2013), cert. denied, 572 U.S. 1062, 134 S. Ct. 1901, 188 L. Ed. 2d 914, 2014 U.S. LEXIS 2878 (U.S. 2014).

A witness's credibility may be impeached under subsection (a) with evidence that he has a character for untruthfulness; indeed, it is reversible error to refuse to allow a defendant to call a character witness to impeach the character for truth and veracity of an important prosecution witness. White v. State, 755 So. 2d 1148, 1999 Miss. App. LEXIS 310 (Miss. Ct. App. 1999).

**Bolstering.**

Drug conviction was reversed and remanded for a new trial; the officer's testimony pursuant to Miss. R. Evid. 608(a) was in error because simply pointing out the impossibility of one's account, or discrepancies between accounts, was not the sort of attack on a witness's character or reputation that warranted opening the door to bolstering testimony. Brent v. State, 929 So. 2d 952, 2005 Miss. App. LEXIS 702 (Miss. Ct. App. 2005), cert. denied, 929 So. 2d 923, 2006 Miss. LEXIS 292 (Miss. 2006).

In a wrongful death case, a court did not err in sustaining plaintiff's objection to testimony concerning the relationship between the doctor and the decedent's family where substantially the same testimony provided during the proffer came before the jury; the evidence was self-serving, and it was not relevant. Eckman v. Moore, 2003 Miss. LEXIS 552 (Miss. Oct. 23, 2003), op. withdrawn, 2004 Miss. LEXIS 310 (Miss. Mar. 25, 2004), sub. op., 876 So. 2d 975, 2004 Miss. LEXIS 287 (Miss. 2004).

Audiotapes of drug transactions did not bolster the testimony of any of the state's witnesses as their veracity was never at issue; instead, the tapes were corroborating evidence of the crime committed and were properly introduced into evidence. Lawrence v. State, 780 So. 2d 652, 2001 Miss. App. LEXIS 4 (Miss. Ct. App. 2001).

**Credibility of witness.**

Defense witness's testimony attacking another witness's credibility was properly limited because inquiry into the other witness's character for truthfulness was irrelevant to defendant's guilt or any material issue. Shead v. State, 294 So. 3d 655, 2020 Miss. App. LEXIS 61 (Miss. Ct. App. 2020).

Trial court did not abuse its discretion in refusing to allow a defendant on trial for capital murder to attempt to impeach a former police detective who had been arrested for, but not convicted of bribery, with evidence of the arrest because the arrest was irrelevant to the credibility of the detective and the acts were too far removed to be of probative value; trial court's action did not deprive defendant of his right to confront the witness. Ellis v. State, 856 So. 2d 561, 2003 Miss. App. LEXIS 456 (Miss. Ct. App.), cert. denied, 860 So. 2d 1223, 2003 Miss. LEXIS 892 (Miss. 2003).

That a witness had some unmentioned and unrelated charges pending was not, in and of itself, probative of untruthfulness; therefore, the circuit court did not abuse its discretion when it sustained the state's objection. Moore v. State, 958 So. 2d 824, 2007 Miss. App. LEXIS 144 (Miss. Ct. App.), cert. dismissed, 966 So. 2d 172, 2007 Miss. LEXIS 552 (Miss. 2007).

The credibility of a witness may be attacked by cross-examination and by opinion and reputation evidence, but not by an attempt to prove with extrinsic evidence that an answer given by the witness to an extraneous matter was incorrect. Feazell v. State, 750 So. 2d 1286, 2000 Miss. App. LEXIS 8 (Miss. Ct. App. 2000).

Questioning of a murder victim's stepfather in regard to the truthfulness of the defendant could not be justified under subsection (a) of this rule because the defendant did not testify at her trial. Mosby v. State, 749 So. 2d 1090, 1999 Miss. App. LEXIS 438 (Miss. Ct. App. 1999).

**Knowledge and opinions.**

Trial court erred in excluding proffered evidence which may have established that witness had knowledge and an opinion as to drug informant's truth and veracity, since under the rules, defendant had the right to make his offer of proof. Cooper v. State, 628 So. 2d 1371, 1993 Miss. LEXIS 546 (Miss. 1993).

**Scope of rebuttal evidence.**

Although the state was properly permitted to impeach a statement in defense counsel's opening statement that the defendant in a murder prosecution had never pointed his pistol at anyone with evidence that he had done so about one year before the crime at issue, it was reversible error for the court to allow the other person involved in that incident to testify to the details of that incident. Slaughter v. State, 752 So. 2d 1092, 1999 Miss. App. LEXIS 573 (Miss. Ct. App. 1999).

**Sexual history.**

In a proceeding in which the plaintiff sought to establish the identity of her child's father so as to participate in the wrongful death settlement arising from the death of the putative father, the Chancellor did not sufficiently narrow the scope of questioning regarding the plaintiff's sexual habits where he permitted the introduction of evidence as to her sexual relationships from a few months before the conception through the entire term of her pregnancy. Brown v. Jackson (In re Estate of Chambers), 711 So. 2d 878, 1998 Miss. LEXIS 251 (Miss. 1998).

**Truthfulness of victim.**

Defendant's appellate claim objecting to the admission of testimony on the victim's truthfulness failed because defendant did not object to the testimony. Griffin v. State, 269 So. 3d 337, 2018 Miss. App. LEXIS 187 (Miss. Ct. App. 2018), cert. denied, 260 So. 3d 796, 2019 Miss. LEXIS 6 (Miss. 2019).

In a prosecution for sexual battery characterized as a "he said, she said" case, the defendant was improperly precluded from introducing evidence of the reputation for truthfulness of the complaining witness where her character for truthfulness had already been attacked at the time the testimony was proffered. Vaughan v. State, 759 So. 2d 1092, 1999 Miss. LEXIS 178 (Miss. 1999).

**Waiver.**

Defendant waived his claim that the State's rebuttal evidence violated this rule since defendant only objected to the evidence based on Miss. Unif. Cir. & Cty. R. 9.04 and hearsay grounds. Pearson v. State, 115 So. 3d 148, 2013 Miss. App. LEXIS 348 (Miss. Ct. App. 2013).

**Illustrative cases.**

Trial judge erred by not admitting testimony by defendant's estranged wife because it contradicted testimony by the victim's mother that that the mother did not express concerns to the wife regarding defendant's property, while the wife sought to testify to the exact opposite, that the mother had expressed such concerns. As such, it was admissible for impeachment purposes. Second, the testimony of the defendant's estranged wife should have been admitted on the basis that it presented potential bias against the defendant. Martin v. State, 266 So. 3d 652, 2018 Miss. App. LEXIS 558 (Miss. Ct. App. 2018), cert. denied, 265 So. 3d 181, 2019 Miss. LEXIS 128 (Miss. 2019).

In a case in which a jury found defendant guilty of aggravated domestic violence, the trial court did not err in not allowing defendant to make an adequate offer of proof regarding the victim's background. Although the defense sought to elicit testimony that the victim had worked as an exotic dancer in the past, the testimony would not have had an arguable impact on the victim's credibility. Johnson v. State, 204 So. 3d 763, 2016 Miss. LEXIS 487 (Miss. 2016).

In a capital murder case, the trial judge did not abuse his discretion by precluding defendant from questioning a former detective concerning possible allegations of bribery that had nothing to do with the former detective's testimony. There was no logical reason that the jury would have given less weight to defendant's own recorded and handwritten confessions had they been made aware that someone apparently accused the former detective of bribery in some unrelated case. Johnson v. State, 198 So. 3d 427, 2016 Miss. App. LEXIS 169 (Miss. Ct. App.), cert. denied, 202 So. 3d 615, 2016 Miss. LEXIS 359 (Miss. 2016).

When defendant objected to granting the prosecution's motion in limine to limit defendant's cross-examination of a prosecution witness, and the subject of the proposed cross-examination might have been admissible under Miss. R. Evid. 608(b), the objection was not preserved for appeal because defense counsel (1) did not pursue the objection before the trial court, (2) proffer the proposed testimony, or (3) cite the Rule. Catledge v. State, 174 So. 3d 293, 2015 Miss. App. LEXIS 153 (Miss. Ct. App. 2015).

Witness's testimony about defendant's statement that his father had "turned State on him" did not constitute inadmissible character evidence. Thomas v. State, 134 So. 3d 357, 2013 Miss. App. LEXIS 717 (Miss. Ct. App. 2013).

Investigator's testimony was properly admitted and a recording of a defense witness's conversation with the investigator was properly played for the jury as they evidenced a prior inconsistent statement since the purpose of the evidence was to contradict the witness's prior testimony that she and an investigator did not talk about her trying to get a client to change his story in exchange for the witness getting out of jail, not to attack the witness's character for truthfulness. Pearson v. State, 115 So. 3d 148, 2013 Miss. App. LEXIS 348 (Miss. Ct. App. 2013).

Trial court did not abuse its discretion in refusing to allow testimony of a narcotics investigator relating to illegal gaming and drug activity at a bar, which was the establishment that a defendant was charged with robbing at gunpoint, because the proffered testimony revealed nothing other than a collateral matter and was irrelevant under Miss. R. Evid. 608 and 609. Croft v. State, 992 So. 2d 1151, 2008 Miss. LEXIS 502 (Miss. 2008).

Witness's juvenile court record was offered for general impeachment purposes, which was not permitted, and the record was not offered to show bias or interest in testifying and thus the trial court properly refused to allow the witness to be cross-examined thereby; the witness's prior instances of violence were inadmissible under Miss. R. Evid. 608(b) and the evidence was also inadmissible under Miss. R. Evid. 404(a), as it was offered to show that he was a violent person to create an inference that he acted in conformity with his propensity for violence. Williams v. State, 994 So. 2d 808, 2008 Miss. App. LEXIS 183 (Miss. Ct. App.), cert. denied, 998 So. 2d 1010, 2008 Miss. LEXIS 665 (Miss. 2008).

Where a son sought to set aside a warranty deed that transferred property from the son's mother to a daughter, the case was properly dismissed for failure to prosecute because, inter alia, although the daughter was not prejudiced by the unavailability of a long-time family attorney since the attorney could not have testified about the property deed because such testimony would be an effort to prove specific instances of conduct through extrinsic evidence in order to impeach the son, the daughter was prejudiced because of their mother's intervening death. Cox v. Cox, 976 So. 2d 869, 2008 Miss. LEXIS 125 (Miss. 2008).

In a drug case, a trial court properly rejected the proposed testimony of a defense witness regarding an informant allegedly using drugs previously with defendant; the informant had already denied on cross-examination that this had occurred. Moreover, an issue under Miss. R. Evid. 616 was not preserved for review since it was not raised at trial. Spann v. State, 970 So. 2d 135, 2007 Miss. LEXIS 695 (Miss. 2007).

Trial court's ruling, allowing the jury to hear a tape recording of a message to a confidential informant, fell under Miss. R. Evid. 608, and although the introduction of the recording might have been improper, any error was harmless and no reversal was required, as the court was unable to find where a substantial right of defendant's was affected by the ruling. Pittman v. State, 987 So. 2d 1010, 2007 Miss. App. LEXIS 747 (Miss. Ct. App. 2007), cert. dismissed, 2008 Miss. LEXIS 368 (Miss. July 31, 2008).

Defendant's conviction for the sale of marijuana within a correctional facility was appropriate under Miss. R. Evid. 608(a) because the circuit court did not err when it prohibited defendant's presentation of two witnesses since the jury heard exactly the evidence that defendant claimed that the circuit court improperly excluded; defendant could not have been prejudiced by prohibiting the same testimony from a judge that both defendant and a parole officer testified about. Jackson v. State, 962 So. 2d 649, 2007 Miss. App. LEXIS 104 (Miss. Ct. App.), cert. denied, 962 So. 2d 38, 2007 Miss. LEXIS 434 (Miss. 2007).

During cross-examination, the defense attempted to impeach an informant by showing that he had recently been convicted of grand larceny, but pursuant to Miss. R. Evid. 608(b), grand larceny was not a crime generally considered to show an individuals tendency for truth and veracity; therefore, the informant's pending charge for grand larceny alone was not probative of his general truthfulness or untruthfulness, and the trial court did not abuse its discretion in sustaining the state's objection that the informant could not be impeached with his grand larceny conviction. Singleton v. State, 948 So. 2d 465, 2007 Miss. App. LEXIS 52 (Miss. Ct. App. 2007).

It was not an error for the trial court to rule that under Miss. R. Evid. 608 a witness could be questioned about an alleged theft of the victim but that his answer could not be attacked with extrinsic evidence because Rule 608 did not allow further questioning; defendant's argument that he sought to introduce the evidence to show that the witness was too concerned with stealing money to accurately perceive what happened was not persuasive. Shumpert v. State, 935 So. 2d 962, 2006 Miss. LEXIS 352 (Miss. 2006).

In a prosecution for possession of a firearm by a felon, it was reversible error for the state to cross examine defense witnesses with regard to whether they would maintain their opinions regarding the defendant's reputation for truthfulness if told that he had also been charged with receiving stolen property, stealing a bicycle, not having a tag, leaving the scene of an accident, reckless driving, robbery, trespassing, driving without a license, and simple assault since (1) the state did not inform the court that it intended to cross examine as to specific acts of past conduct not resulting in a conviction, and (2) several of the defendant's misdeeds did not involve lying, deceit, or dishonesty and had absolutely no probative value whatsoever in regard to his character for truthfulness. Porter v. State, 735 So. 2d 987, 1999 Miss. LEXIS 110 (Miss. 1999).

In a prosecution for conspiracy to sell cocaine, the court properly excluded evidence of prior prostitution by a state witness on the ground that such conduct did not involve truthfulness or untruthfulness. Harris v. State, 731 So. 2d 1125, 1999 Miss. LEXIS 37 (Miss. 1999).

In a prosecution for armed robbery, the court properly excluded evidence pertaining to the victim's past history of drug violations since the defendant attempted to introduce this evidence for purposes strictly prohibited by subsection (b). McGowan v. State, 726 So. 2d 217, 1998 Miss. App. LEXIS 1070 (Miss. Ct. App. 1998).

The defendant was properly precluded from introducing evidence that two assault victims broke into his car the night before the alleged assault since such break-in was an irrelevant collateral matter. Bingham v. State, 723 So. 2d 1189, 1998 Miss. App. LEXIS 977 (Miss. Ct. App. 1998).

Trial court's admission over defendant's objection, of testimony of alleged sexual acts with third party not contained in indictment, constituted reversible error. Nicholson v. State, 704 So. 2d 81, 1997 Miss. LEXIS 506 (Miss. 1997).

State's attempt to impeach defense witness with extrinsic evidence of specific instances of that witness' conduct was improper; rule provided for limited exploration of a witness' conduct, but on cross-examination, not on direct examination or by rebuttal testimony of a third party. Jackson v. State, 645 So. 2d 921, 1994 Miss. LEXIS 535 (Miss. 1994).

When a party seeks to cross-examine a witness about specific instances of past conduct probative of veracity under M.R.E. Rule 608 (b), trial judge should make specific findings of record under Rule 403. Brent v. State, 632 So. 2d 936, 1994 Miss. LEXIS 99 (Miss. 1994).

If a witness's past conduct did not involve lying, deceit, or dishonesty in some manner, it cannot be inquired into on cross-examination. Brent v. State, 632 So. 2d 936, 1994 Miss. LEXIS 99 (Miss. 1994).

Neither robbery nor marijuana use were probative of witness's character for truthfulness or untruthfulness, and therefore testimony concerning these activities was irrelevant and properly excluded. Johnston v. State, 618 So. 2d 90, 1993 Miss. LEXIS 181 (Miss. 1993).

Witness's testimony that defendant had a gun three days before assault was properly admitted, where defendant had denied having had possession of a gun on night of incident or several days prior to incident; testimony was not reputation or character evidence or impeachment on a collateral issue, since possession of a gun and the identity of the aggressor were central factual issues relevant to the merits. Lewis v. State, 580 So. 2d 1279, 1991 Miss. LEXIS 314 (Miss. 1991).

## RESEARCH REFERENCES

**ALR.**

Admissibility and Effect of Evidence or Comment on Party's Military Service or Lack Thereof. 24 A.L.R. 6th 747.

## Rule 609. Impeachment by evidence of a criminal conviction.

(a) *In general.* — The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, when the witness is not a party; and

(B) must be admitted when the witness is a party, if the probative value of the evidence outweighs its prejudicial effect to that party; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving – or the witness's admitting – a dishonest act or false statement.

(b) *Limit on using the evidence after 10 years.* — This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

(c) *Effect of a pardon, annulment, or certificate of rehabilitation.* — Evidence of a conviction is not admissible if:

(1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or

(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) *Juvenile adjudications.* — Evidence of a juvenile adjudication is admissible under this rule only if:

(1) it is offered in a criminal case;

(2) the adjudication was of a witness other than the defendant;

(3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and

(4) admitting the evidence is necessary to fairly determine guilt or innocence.

(e) *Pendency of an appeal.* — A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

**HISTORY: Amended May 2, 2002; amended effective July 1, 2009; restyled effective July 1, 2016.**

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective May 2, 2002, Rule 609(a) and its Advisory Committee Note were amended to provide that scrutiny for admitting convictions to impeach non-party witnesses differs from that of party witnesses. 813-815 So. 2d XXIII-XXVII (West Miss. Cas. 2002).

Effective March 1, 1989, the Advisory Committee Note to Rule 609(a) was amended to include reference to Peterson v. State, 518 So. 2d 632 (Miss.1987). 536-538 So. 2d XXXII (West Miss. Cas. 1989).

## ADVISORY COMMITTEE NOTE

The language of Rule 609 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. By incorporating provisions from the Advisory Committee Note, Rule 609(a)(2) now tracks the language of the federal rule. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Under Rule 609(a) crimes are divided into two categories for purposes of impeachment. 609(a)(l) deals with felony convictions and under the original version treated convictions of all witnesses the same. The second category, 609(a)(2), originally addressed crimes involving dishonesty or false statement, whether felonies or misdemeanors.

Rule 609(a)(l) was amended in 2002 to incorporate the rationale of decisions by the Mississippi Supreme Court which recognized the difference in the highly prejudicial effect of showing the convictions when the witness is the accused and the little prejudicial effect from such impeachment of other witnesses. It was reasoned that when the impeachment by convictions is of a witness other than the accused in a criminal case there is little or no unfair prejudice which can be caused to a party. Thus, the probative value on the credibility of the witness will almost always outweigh any prejudice. In *White v. State,* 785 So. 2d 1059 (Miss. 2001) it was held that the accused had the right, bolstered by his right of confrontation, to impeach a state's witness with his felony drug conviction. In *Moore v. State,* 787 So. 2d 1282 (Miss. 2001) the court held that the state was properly permitted to impeach a defense witness with his five prior convictions, noting that there was no prejudice against the accused.

The amendments here refer to parties instead of the accused to clearly apply to civil cases, as did the original rule. Under this amended rule, convictions offered under 609(a)(l) to impeach a party must be analyzed under the guidelines set forth in *Peterson v. State,* 518 So. 2d 632 (Miss. 1987) to determine if the probative value is great enough to overcome the presumed prejudicial effect to that party, and findings should be made on the record by the judge. Convictions offered to impeach any other witness are admissible unless the court is persuaded by the opponent that the probative value is substantially outweighed by negative factors included in Rule 403. A record of the findings on the issue is not required in that case. *See Moore,* above.

Convictions from any state or federal jurisdiction may be considered for admission under the rule.

The phrase "dishonest act or false statement" in 609(a)(2) means crimes such as perjury or subornation of perjury, false statement, fraud, forgery, embezzlement, false pretense or other offense in the nature of *crimen falsi,* the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the witness' propensity to testify truthfully. Such convictions are peculiarly probative of credibility and are always to be admitted, not subject to the discretionary balancing by the judge.

Rule 609(a)(2) requires that the proponent have ready proof that the crime was in the nature of *crimen falsi.* Ordinarily, the statutory elements of the crime will indicate whether it is one of dishonesty or false statement. Where the deceitful nature of the crime is not apparent from the statute and the face of the judgment – as, for example, where the conviction simply records a finding of guilt for a statutory offense that does not reference deceit expressly – a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions to show that the fact finder had to find, or the defendant had to admit, an act of dishonesty or false statement in order for the witness to have been convicted. *Cf. Taylor v. United States,* 110 S. Ct. 2143 (1990) (providing that a trial court may look to a charging instrument or jury instructions to ascertain the nature of a prior offense where the statute is insufficiently clear on its face); *Shepard v. United States,* 125 S. Ct. 1254 (2005) (the inquiry to determine whether a guilty plea to a crime defined by a nongeneric statute necessarily admitted elements of the generic offense was limited to the charging document's terms, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or a comparable judicial record). But the rule does not contemplate a "mini-trial" in which the court plumbs the record of the previous proceeding to determine whether the crime was in the nature of *crimen falsi.*

The reference in former 609(a) to proving a conviction during crossexamination is eliminated because the conviction may have to be proved in rebuttal if the witness refuses to admit the prior conviction on cross-examination.

The first sentence of 609(a) uses the term "character for truthfulness" instead of the prior term "credibility," because the limitations of Rule 609 are not applicable if a conviction is admitted for a purpose other than to prove the witness's character for untruthfulness. *See, e.g., United States v. Lopez,* 979 F.2d 1024 (5th Cir. 1992) (Rule 609 was not applicable where the conviction was offered for purposes of contradiction). The use of the term "credibility" in subdivision (d) is retained, however, as that subdivision is intended to govern the use of a juvenile adjudication for any type of impeachment.

Subdivision (b) imposes a time limitation on prior convictions. If the conviction occurred more than ten years earlier, it may not be used as impeachment evidence. The rationale underlying subdivision (b) is based on fairness. A person's past should not be able to haunt the person for life. The judge may grant an exception in instances where the probativeness of the conviction substantially outweighs the prejudice. But, before the judge makes such a decision, the proponent must give the adversary sufficient notice so that the adversary may challenge the decision.

Prior to the rules Mississippi had no time limitation regarding prior convictions. The courts held only that the prior conviction should not be too remote in time from the case at bar. That principle obviously left a great deal of discretion with the trial judge in determining remoteness. Thus, the appellate court often upheld the use of prior convictions for impeachment which were far in excess of the ten-year limitation of Rule 609(b).

Subdivision (c) expresses the public policy that a person who has been rehabilitated or whose conviction has been nullified based on a later finding of his innocence should not be tainted by this conviction. Subdivision (c) does not apply to pardons which simply restore a person's civil rights. Rather, it is implicitly limited to cases in which rehabilitation has occurred or in which it can be shown that the person was innocent.

Subdivision (d) prohibits impeachment based on juvenile adjudications. Reasons for this rule include the wish to free an adult from bearing the burden of a youthful mistake, the informality of youth court proceedings, and the confidential nature of those proceedings. *See* FRE 609, Advisory Committee Notes.

In pre-rule Mississippi practice, the use of juvenile adjudications for impeachment purposes has been governed by M.C.A. § 43-21-561 which provides that no adjudication against a child shall be deemed a criminal conviction. Indeed, the juvenile offender is permitted by statute to deny the fact of the prior adjudication. However, the statute permits cross-examination by either the state or the defendant in a criminal action or the respondent in a juvenile adjudication proceeding regarding prior juvenile offenses for the limited purpose of showing bias and interest. In short, the evidence could be used in these limited circumstances but not to attack the general credibility of the witness.

Under Rule 609(d) the court has the discretion to allow impeachment of a witness, other than a criminal defendant, by a prior juvenile adjudication if the judge determines that it is necessary. The court's discretion extends only to witnesses other than the accused in a criminal case.

Subdivision (e) reflects the presumption that exists in favor of a trial court's decision. Until overturned, that decision is deemed to be the correct decision. Once the prior conviction has been introduced, the adversary can present evidence that an appeal of that conviction is pending. In theory, this gives a sense of balance to the use of the prior conviction. However, in practice, evidence of a pending appeal has insufficient weight to balance the use of the prior conviction. (Amended effective July 1, 2009; "Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

In general.
Applicability.
Determinating probative value.
Drug offenses.
Harmless error.
Intent to appeal.
Juvenile adjudications.
Limiting instructions.
Nonparty witnesses.
Notice.
Pending indictments.
Previous convictions.
Sentencing.
Sexual offenses.
Illustrative cases.

**In general.**

Where a defendant appealed his conviction and sentence for sexual battery and gratification of lust, he unsuccessfully argued that Miss. R. Evid. 608 and 609 limited all prior-bad-acts evidence to prior convictions. Rule 608 addressed the admissibility of impeachment evidence regarding the character and conduct of a witness, and Rule 609 pertained to the use of a witness's prior convictions for impeachment purposes. Cole v. State, 126 So. 3d 880, 2013 Miss. LEXIS 544 (Miss. 2013), cert. denied, 572 U.S. 1062, 134 S. Ct. 1901, 188 L. Ed. 2d 914, 2014 U.S. LEXIS 2878 (U.S. 2014).

Evidence was sufficient to support defendant's conviction for aggravated assault–he inflicted the injuries to the victim with a deadly weapon. Defendant "opened the door" regarding his credibility in his direct examination, hence, the line of questioning presented by the State was proper. Harris v. State, 892 So. 2d 830, 2004 Miss. App. LEXIS 978 (Miss. Ct. App. 2004).

Given the constitutional right of a criminal defendant to confront those testifying against him, subsection (a)(1) allows full impeachment of prosecution witnesses without the requirement of a balancing test, except in extreme situations such as where the prosecution witness has a prior conviction that is both highly inflammatory and completely unrelated to the charges pending against the accused; such a prior conviction should be analyzed under the subsection (a)(1) probative/prejudicial balancing test. White v. State, 785 So. 2d 1059, 2001 Miss. LEXIS 44 (Miss. 2001).

So long as the prejudice/probative test of subsection (a)(1) is complied with, convictions resulting in death or imprisonment in excess of one year are admissible for impeachment purposes whether or not the conviction relates to the witness's veracity. White v. State, 785 So. 2d 1059, 2001 Miss. LEXIS 44 (Miss. 2001).

Where the victim did not testify or imply that he had never been in any prior difficulties with the authorities, the court properly refused to allow the defendant to introduce evidence that the victim had been convicted for house burglary, burglary of an automobile and grand larceny. Johnson v. State, 723 So. 2d 1205, 1998 Miss. App. LEXIS 956 (Miss. Ct. App. 1998), overruled in part, White v. State, 785 So. 2d 1059, 2001 Miss. LEXIS 44 (Miss. 2001).

Final hurdle to be cleared before declaring a prior conviction admissible for impeachment purposes is an on-the-record balancing of five factors: (1) impeachment value of the prior offense; (2) date of the prior conviction; (3) similarity between the past and presently charged offenses; (4) importance of defendant's testimony; and (5) whether credibility is central. Hopkins v. State, 639 So. 2d 1247, 1993 Miss. LEXIS 486 (Miss. 1993).

When weighing probative value of convictions not involving dishonesty or false statement against prejudicial effect of their admission, trial judge must consider: (1) impeachment value of prior crime, (2) point in time of conviction and witness' subsequent history, (3) similarity between past crime and charged crime, (4) importance of defendant's testimony, and (5) centrality of credibility issue. Jordan v. State, 592 So. 2d 522, 1991 Miss. LEXIS 960 (Miss. 1991).

In admitting convictions not involving dishonesty or false statement, trial judge must make an on-the-record determination that probative value of the evidence outweighs its prejudicial effect, and he should articulate his reasons for this finding; where this evidence is manifestly prejudicial to defendant and trial judge fails to make an on-the-record determination, the case must be reversed and remanded for new trial. Jordan v. State, 592 So. 2d 522, 1991 Miss. LEXIS 960 (Miss. 1991).

Trial judge must make his determination, that probative value of prior conviction outweighs its prejudicial effect, on the record. Johnson v. State, 525 So. 2d 809, 1988 Miss. LEXIS 238 (Miss. 1988).

**Applicability.**

Although a trial court erred in refusing to let defendant cross-examine a witness about the other criminal convictions that the witness failed to disclose during the direct examination of the witness, as advanced written notice by defendant of the intended use of the convictions to impeach the witness was not required when the witness lied about the criminal record of the witness, the error was harmless as the testimony of the witness had already been tarnished and the evidence of defendant's guilt was substantial. Collier v. State, 183 So. 3d 885, 2016 Miss. LEXIS 56 (Miss. 2016).

Motion for post-conviction relief was denied because Miss. R. Evid. 609 had no bearing upon the use of prior convictions to enhance a sentence; moreover, the prior convictions in this case met the requirements under Miss. Code Ann. § 99-19-81, and there was no provision limiting the use of prior convictions that were over 10 years old. Shies v. State, 19 So. 3d 770, 2009 Miss. App. LEXIS 143 (Miss. Ct. App.), cert. denied, 19 So. 3d 82, 2009 Miss. LEXIS 504 (Miss. 2009).

In appellant's capital murder case, the State was not required to obtain the criminal history on its witness because the witness's felony conviction occurred in 1983, almost seventeen years before the crime at issue, and whether impeachment of the witness concerning his seventeen-year-old conviction for burglary would have been admissible was doubtful. Additionally, there was no such request by the defense for the records. Howell v. State, 989 So. 2d 372, 2008 Miss. LEXIS 419 (Miss. 2008).

Trial court did not err in allowing the State to introduce evidence of defendant's prior conviction, and Miss. R. Evid. 609(a)(1)(B) did not apply because the conviction was not used to impeach, but admitted during a redirect examination of a witness; once defendant's attorney opened the door by asking the witness if defendant had been arrested previously, the State was free to rebut the response with proof of defendant's prior conviction, and since defendant later admitted to the prior conviction while on the stand, the State was properly allowed to question defendant on the subject. Porter v. State, 869 So. 2d 414, 2004 Miss. App. LEXIS 9 (Miss. Ct. App. 2004).

Defendant's conviction of armed robbery was affirmed where the speedy trial, improper testimony and impeachment, jury instruction, and weight of the evidence issues that she raised on appeal had no merit; the trial court properly attacked defendant's truthfulness under Miss. R. Evid. 609(a)(2) by producing evidence of a prior misdemeanor conviction for prescription forgery. Jones v. State, 846 So. 2d 1041, 2002 Miss. App. LEXIS 688 (Miss. Ct. App. 2002), cert. denied, 846 So. 2d 229, 2003 Miss. App. LEXIS 583 (Miss. Ct. App. 2003).

This rule does not apply to the use of a 14 year old conviction to classify a defendant as a habitual offender. Sanders v. State, 760 So. 2d 839, 2000 Miss. App. LEXIS 231 (Miss. Ct. App. 2000).

**Determinating probative value.**

Defendant's conviction for burglary was inappropriate because the prosecutor impermissibly used defendant's prior conviction for attempted grand larceny as evidence of defendant's predisposition to steal to prove the element of intent of the indicted offense. Although the circuit court cited Miss. R. Evid. 609 as the basis for admitting evidence of the prior conviction, the record reflected no findings reflecting any consideration of the Peterson factors and without those findings, the appellate court was unable to discern that the circuit court found that the probative value of the prior conviction outweighed the R. 609 presumed prejudicial effect to defendant. Robinson v. State, 42 So. 3d 598, 2010 Miss. App. LEXIS 86 (Miss. Ct. App. 2010).

Court did not abuse its discretion in excluding a prosecution witness's prior armed robbery conviction where the conviction was more than ten years old and not probative of the truth of the witness's testimony; hence, defendant's capital murder conviction was upheld. Martin v. State, 872 So. 2d 713, 2004 Miss. App. LEXIS 397 (Miss. Ct. App. 2004).

When the defendant objects to the admission of character evidence, the trial court must balance its probative value against the danger of unfair prejudice, pursuant to Miss. R. Evid. 105, 403, 609(a), and the court finds that the rule envisions an objection contemporaneous with the admission of the testimony; as the prior bad acts evidence was introduced by one defendant, any objection thereto by that defendant was waived, and because none of defendants objected to the closing argument that referred to the prior bad acts evidence, which was not unduly prejudicial in the first place, the court found that error was not preserved on appeal and the issue had no merit. Harris v. State, 2003 Miss. LEXIS 80 (Miss. Feb. 20, 2003), op. withdrawn, sub. op., 861 So. 2d 1003, 2003 Miss. LEXIS 872 (Miss. 2003).

Although it was error for the court to permit the introduction into evidence of the defendant's previous conviction without a determination on the record that the probative value of the evidence outweighed its prejudicial effect, the error was harmless in light of the overwhelming evidence of guilt. DeLoach v. State, 722 So. 2d 512, 1998 Miss. LEXIS 510 (Miss. 1998).

Trial judge committed reversible error in failing to make on-the-record determination that probative value of defendant's prior conviction outweighed its prejudicial effect; judge's admission of prior conviction had a chilling effect, as defendant subsequently opted not to testify. Hickson v. State, 697 So. 2d 391, 1997 Miss. LEXIS 251 (Miss. 1997).

Trial court failed to conduct balancing test, under subdivision (a)(1) of this rule, to assess prejudicial impact of defendant's prior drug conviction in Tennessee along with its probative value in case at bar. Spraggins v. State, 606 So. 2d 592, 1992 Miss. LEXIS 480 (Miss. 1992).

**Drug offenses.**

In a possession of five or more kilograms of marijuana case, the trial court did not err in admitting evidence of defendant's prior conviction because his testimony and credibility were unquestionably central to the case where the only seriously contested issue was the ownership of the drugs. Gonzalez v. State, 134 So. 3d 350, 2013 Miss. App. LEXIS 556 (Miss. Ct. App. 2013), cert. denied, 133 So. 3d 818, 2014 Miss. LEXIS 167 (Miss. 2014).

In a prosecution for murder, the state was properly permitted to impeach a defense witness with his conviction for the sale of cocaine. Baldwin v. State, 784 So. 2d 148, 2001 Miss. LEXIS 90 (Miss. 2001).

In a prosecution for selling crystal methamphetamine, the defendant failed to make a threshold showing that the prior out-of-state conviction of a confidential informant for possession of narcotics related to his veracity and, therefore, such evidence was properly excluded. White v. State, 2000 Miss. App. LEXIS 41 (Miss. Ct. App. Feb. 1, 2000), rev'd, 785 So. 2d 1059, 2001 Miss. LEXIS 44 (Miss. 2001).

In a prosecution for aggravated assault, it was not error for the court to permit the impeachment of a defense witness with evidence of a prior conviction for possession of cocaine. McCullough v. State, 750 So. 2d 1212, 1999 Miss. LEXIS 326 (Miss. 1999).

**Harmless error.**

Defendant testified about a prior conviction during defendant's direct examination in defendant's case-in-chief, opening the door for a follow-up question during cross-examination. While the circuit court did not conduct an on-the-record balancing test regarding defendant's prior conviction (and was not requested to do so), the court did not abuse its broad discretion by admitting the testimony, and, in light of the overwhelming evidence presented by the State of Mississippi regarding defendant's guilt, the error was harmless. Jones v. State, — So. 3d —, 2019 Miss. App. LEXIS 235 (Miss. Ct. App. May 28, 2019), cert. denied, 284 So. 3d 752, 2019 Miss. LEXIS 445 (Miss. 2019), cert. denied, — So. 3d —, 2019 Miss. LEXIS 455 (Miss. 2019).

Trial court's limitation of defendant's cross-examination of a prosecution witness, about a prior felony conviction of the witness, was harmless error because the witness admitted on cross-examination to being a convicted felon, defendant failed to make a proffer regarding the prior felony conviction(s) of the witness, the prior conviction of the witness was for residential burglary, and defendant's trial counsel thoroughly cross-examined the witness, highlighting a plea agreement. Page v. State, 269 So. 3d 440, 2018 Miss. App. LEXIS 305 (Miss. Ct. App. 2018), cert. dismissed, 2018 Miss. LEXIS 524 (Miss. Dec. 13, 2018).

Although defendant should have been allowed to impeach the confidential informant with her prior convictions when she did not provide accurate testimony about her criminal history, the trial judge's decision to prevent defendant's attorney from cross-examining the informant on three convictions she did not mention was harmless because the informant's credibility already had been tarnished, and there was substantial evidence that defendant sold the informant cocaine. Collier v. State, 2015 Miss. LEXIS 172 (Miss. Apr. 16, 2015), op. withdrawn, 2016 Miss. LEXIS 64 (Miss. Feb. 4, 2016), sub. op., 183 So. 3d 885, 2016 Miss. LEXIS 56 (Miss. 2016).

Improper admission of defendant's prior conviction for simple battery was not harmless because: (1) the issue of innocence or guilt was close; (2) the quantity and character of the evidence favored neither defendant nor the State substantially; (3) the aggravated-assault charge was a grave offense for which defendant was sentenced to 20 years; and (4) the impeachment was reversible error since the State first sought to put defendant's character at issue by asking whether he was a violent person in order to impeach him with his prior conviction. Gilmore v. State, 119 So. 3d 278, 2013 Miss. LEXIS 361 (Miss. 2013).

Although the trial court should have determined on the record whether the probative value of admitting evidence of defendant's prior crimes outweighed its prejudicial effect, pursuant to Miss. R. Evid. 609(a)(1)(B), due to the overwhelming weight of the evidence presented to the jury for the felony fleeing charge, the error was harmless. Kirkwood v. State, 53 So. 3d 7, 2010 Miss. App. LEXIS 48 (Miss. Ct. App. 2010), aff'd in part, rev'd, 52 So. 3d 1184, 2011 Miss. LEXIS 36 (Miss. 2011).

Defendant's conviction for capital murder was proper because, although a witness's convictions of burglary and fleeing from police were arguably unrelated to defendant's charge of capital murder, the trial court had the discretion to conduct a probative/prejudicial balancing test despite the fact that the witness was a non-party, Miss. R. Evid. 609(a)(1). Additionally, in the event the trial court did err in excluding the witness's prior convictions, the error was harmless due to the overwhelming weight of evidence against defendant. Catchings v. State, 39 So. 3d 943, 2009 Miss. App. LEXIS 762 (Miss. Ct. App. 2009), writ denied, 39 So. 3d 5, 2010 Miss. LEXIS 382 (Miss. 2010), cert. denied, 565 U.S. 1205, 132 S. Ct. 1546, 182 L. Ed. 2d 178, 2012 U.S. LEXIS 1556 (U.S. 2012).

Where a co-indictee testified against defendant at his capital murder trial, the trial court violated Miss. R. Evid. 609(b) by excluding the co-indictee's prior felony convictions that were more than ten years old without conducting the balancing test under Miss. R. Evid. 403; however, this was harmless error. The trial judge allowed the co-indictee's most recent conviction for burglary and larceny to be introduced into evidence, which had more probative value than the older convictions. Spurlock v. State, 13 So. 3d 301, 2008 Miss. App. LEXIS 674 (Miss. Ct. App. 2008), cert. denied, 14 So. 3d 731, 2009 Miss. LEXIS 343 (Miss. 2009).

Trial court erred in ruling that defendant's prior aggravated assault conviction could be admitted in his trial for aggravated assault if he testified; the evidence was more prejudicial than probative, but defendant never proffered what he would testify to if he testified, and as a result, the error was harmless in light of the overwhelming weight of the evidence against defendant. Walker v. State, 936 So. 2d 424, 2006 Miss. App. LEXIS 550 (Miss. Ct. App. 2006).

In defendant's trial for capital murder, it was error for the trial court to have prevented defendant from using a State witness' recent grand larceny conviction for impeachment on the basis that said offense was not a "crimen falsi crime." Said conviction could have been used to impeach the witness under Miss. R. Evid. 609, since said crime was punishable by imprisonment in excess of one year, and because the probative value of that evidence was not substantially outweighed by the danger of unfair prejudice. On the other hand, because the evidence against defendant was overwhelming, and because said witness' testimony was cumulative to that of another witness, the trial court's error was harmless. Hammons v. State, 918 So. 2d 62, 2005 Miss. LEXIS 515 (Miss. 2005).

Although the trial court erred in refusing to allow the plaintiff to impeach a defense witness with her prior conviction for embezzlement, such error was harmless in light of ample evidence introduced on behalf of the defendant. Baine v. River Oaks Convalescent Ctr., 791 So. 2d 844, 2001 Miss. App. LEXIS 123 (Miss. Ct. App. 2001).

**Intent to appeal.**

Because there was no pending appeal at the time of the trial as required, the trial court did not err by refusing to allow testimony regarding defendant's intent to appeal his prior convictions. Burgess v. State, 210 So. 3d 569, 2016 Miss. App. LEXIS 314 (Miss. Ct. App. 2016), cert. denied, 209 So. 3d 431, 2017 Miss. LEXIS 59 (Miss. 2017).

**Juvenile adjudications.**

It was no error to exclude a witness's juvenile adjudications because defendant (1) sought to use the adjudications for general impeachment purposes and (2) did not explain what defendant expected the adjudications to show or how the adjudications would show bias or interest. Johnson v. State, 268 So. 3d 534, 2019 Miss. LEXIS 78 (Miss. 2019).

Defendant sought to attack the victim's credibility and show that she had a motive to lie for ill will by introducing evidence at trial regarding a juvenile adjudication of a shoplifting charge, and notwithstanding the prohibition on the use of a juvenile adjudication for the purpose of impeachment, the crime of shoplifting could not be used for impeachment purposes because it was not a crime categorized as crimen falsi; thus, the trial court did not err in excluding defendant's questioning regarding the victim's juvenile shoplifting adjudication. Evans v. State, 984 So. 2d 308, 2007 Miss. App. LEXIS 641 (Miss. Ct. App. 2007), cert. denied, 984 So. 2d 277, 2008 Miss. LEXIS 289 (Miss. 2008).

In a criminal prosecution for burglary, the trial court did not err by refusing to allow defendant to use a witness's juvenile record for impeachment purposes; the charges against the witness were reduced to crimes that would not be admissible for impeachment purposes if committed by an adult. Sandefer v. State, 952 So. 2d 281, 2007 Miss. App. LEXIS 105 (Miss. Ct. App. 2007).

In a prosecution for the sale of cocaine, evidence of a witness's juvenile adjudications was admissible under subsection (d) because it would have been admissible under subsection (a) to attack the credibility of an adult and because it was necessary for a fair determination of guilt or innocence; the witness admitted that he told the prosecutor that he was arrested for the crime for which the defendant was being tried and, therefore, it was necessary for the prosecution to show that he was arrested and sentenced to training school for other crimes for a fair determination of guilt or innocence and, furthermore, the witness opened the door for the prosecution to question him about his juvenile adjudications by stating that he had just gotten out of training school, which statement was not elicited by the prosecution. Simmons v. State, 1999 Miss.

LEXIS 179 (Miss. May 13, 1999), op. withdrawn, sub. op., 746 So. 2d 302, 1999 Miss. LEXIS 246 (Miss. 1999).

Trial court did not err in prohibiting cross-examination of witness as to his juvenile record, where defense counsel had ample opportunity to interview witness before trial, explore his background and test the credibility of what he proposed to testify, and yet defense failed to indicate a specific reason or basis for asking witness about his juvenile record. Bass v. State, 597 So. 2d 182, 1992 Miss. LEXIS 134 (Miss. 1992).

**Limiting instructions.**

Denial of defendant's motion for a new trial after he had been convicted of aggravated assault and rape was appropriate because defendant did not request a limiting instruction and was barred from bringing the issue on appeal; the trial judge was not obligated to provide a limiting instruction sua sponte regarding the admission of defendant's prior convictions. Moss v. State, 977 So. 2d 1201, 2007 Miss. App. LEXIS 632 (Miss. Ct. App. 2007), cert. denied, 977 So. 2d 1144, 2008 Miss. LEXIS 151 (Miss. 2008).

Because the burden to request a limiting instruction falls upon defense counsel in the admittance of Miss. R. Evid. 404(b) evidence, the burden falls upon defense counsel to request a limiting instruction in the context of the admittance of prior convictions through impeachment under Miss. R. Evid. 609. Moss v. State, 977 So. 2d 1201, 2007 Miss. App. LEXIS 632 (Miss. Ct. App. 2007), cert. denied, 977 So. 2d 1144, 2008 Miss. LEXIS 151 (Miss. 2008).

Although the trial judge has a responsibility to give sua sponte a limiting instruction when prior convictions are sought to be admitted under subsection (a)(2), there is no per se reversible error rule when the trial court fails to give such an instruction, and such error is not excluded from a harmless error analysis. Bishop v. State, 771 So. 2d 397, 2000 Miss. App. LEXIS 506 (Miss. Ct. App. 2000).

In a prosecution for forgery in the state presented evidence of four prior forgery convictions of the defendants, the trial judge committed reversible error in failing to give a limiting instruction sua sponte to ensure that the defendant's forgery conviction was based upon the evidence related to the crime at hand rather than his prior convictions for forgery. Robinson v. State, 735 So. 2d 208, 1999 Miss. LEXIS 126 (Miss. 1999).

**Nonparty witnesses.**

In an aggravated assault case, a trial court did not err by admitting evidence of a witness' prior conviction for false information; even where a non-party witness being impeached was defendant's primary or sole witness, evidence of the witness' prior conviction had to be admitted if the requirements of this rule were met. Any prejudice to a non-party witness was irrelevant. Clay v. State, 151 So. 3d 1018, 2014 Miss. App. LEXIS 422 (Miss. Ct. App. 2014).

Prosecution only asked whether a defense witness was a convicted felony, which she agreed she was, and the prosecution did not mention that her conviction was for conspiring with defendant to bring drugs into a county jail; thus, the trial court did not improperly allow the witness to be impeached by her prior felony conviction under Miss. R. Evid. 609(a)(1). Sessom v. State, 942 So. 2d 234, 2006 Miss. App. LEXIS 392 (Miss. Ct. App.), cert. denied, 942 So. 2d 164, 2006 Miss. LEXIS 716 (Miss. 2006).

In defendant's trial on charges of violating Miss. Code Ann. § 97-11-53, inducement to influence a public official to approve a property owner's construction project, the trial court did not violate defendant's Sixth Amendment right to confront witnesses by limiting his cross-examination of the property owner because defendant sought to inquire about other lawsuits in which the property owner was involved and the trial court had determined that the property owner had not been convicted of any of the wrongdoings for which defense counsel wished to impeach his testimony, thus the trial court ruled that the testimony sought to be elicited from the property owner would not have been allowed by Miss. R. Evid. 609 and that it would have been unduly prejudicial, in violation of Miss. R. Evid. 403. Because the trial court's ruling was in accordance with the Mississippi Rules of Evidence, no abuse of discretion was present. Edmonson v. State, 906 So. 2d 73, 2004 Miss. App. LEXIS 1124 (Miss. Ct. App. 2004).

In a capital murder case, the inmate's counsel were not ineffective for failing to challenge the testimony of the county sheriff who was in charge of the investigation of the inmate because (1) the trial court's refusal to admit evidence of the sheriff's conviction seven years after his testimony in the inmate's case was not an abuse of discretion under Miss. R. Evid. 609(a)(1); (2) the sheriff's prior testimony was admissible under Miss. R. Evid. 804; (3) the inmate's confrontation clause rights were not violated because he had been present when the testimony was given and was able to confront the sheriff; and (4) evidence from a civil lawsuit involving one of the sheriff's deputies could have done little harm to the sheriff's credibility. Wilcher v. State, 863 So. 2d 776, 2003 Miss. LEXIS 492 (Miss. 2003), cert. denied, 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678 (U.S. 2004).

State's impeachment of defendant's witness by his prior convictions was proper under Miss. R. Evid. 609; since the witness was not a party, the trial court was obliged to consider the issue of prejudice. Al-Fatah v. State, 856 So. 2d 494, 2003 Miss. App. LEXIS 333 (Miss. Ct. App.), cert. denied, 860 So. 2d 315, 2003 Miss. LEXIS 714 (Miss. 2003).

The trial court did not commit reversible error when it failed to conduct an on-the-record balancing test before allowing in evidence of the prior convictions of a nonparty defense witness as any prejudice suffered by the witness was irrelevant. Moore v. State, 2000 Miss. LEXIS 264 (Miss. Dec. 21, 2000), op. withdrawn, sub. op., 787 So. 2d 1282, 2001 Miss. LEXIS 164 (Miss. 2001).

The defendant was entitled to reversal of his conviction and a remand for a new trial with instructions to allow the introduction of evidence of the prior burglary conviction of a witness for the state for impeachment purposes; the state's argument that the witness was its primary one any prejudice to him would unduly prejudice the state's case was flawed since the rule exists to protect testifying parties from being unduly prejudiced through admission of prior convictions but, since the defendant was not a party, any prejudice to him was irrelevant. Young v. State, 731 So. 2d 1145, 1999 Miss. LEXIS 41 (Miss. 1999).

**Notice.**

The admission into evidence of a previous conviction of the defendant that was more than 10 years old was error, notwithstanding the court's determination that the defendant was aware of the existence of the conviction and had been orally advised by the prosecution of the prosecution's intention to use it, as the state did not comply with the technical requirements of the rule with respect to notice; however, the error was harmless. Bishop v. State, 771 So. 2d 397, 2000 Miss. App. LEXIS 506 (Miss. Ct. App. 2000).

**Pending indictments.**

Circuit court did not err in excluding evidence of a victim's pending solicitation charges under Miss. R. Evid. 609 and 403 because defendant did not claim that the victim was an aggressor and that he killed the victim in self-defense or in defense or another; therefore, there was no basis for allowing the victim's pending criminal charges admitted into evidence, especially where the crimes did not reflect on the victim's character for truthfulness, dishonesty, violence, or peacefulness. Reith v. State, 135 So. 3d 892, 2013 Miss. App. LEXIS 126 (Miss. Ct. App. 2013), rev'd, 135 So. 3d 862, 2014 Miss. LEXIS 194 (Miss. 2014).

In a prosecution for distribution of cocaine, the trial court did not err in refusing to allow the defendant to question a confidential informant regarding whether she had any pending indictments as the record contained no evidence of any such pending indictments and the informant's character and past were adequately put before the jury. Scott v. State, 796 So. 2d 959, 2001 Miss. LEXIS 116 (Miss. 2001).

**Previous convictions.**

In a case in which plaintiff sought compensation for the time that he served in prison because of his criminal convictions for issuing and delivering bad checks, the trial court did not abuse its discretion in allowing the State to introduce evidence regarding a prior theft-by-deception conviction in the State's efforts to attack plaintiff's credibility. Higgins v. State, 202 So. 3d 1274, 2016 Miss. App. LEXIS 365 (Miss. Ct. App. 2016).

Defendant was denied his constitutionally guaranteed right to effective assistance of counsel because defense counsel's failure to object to the expansive inquiry into defendant's prior convictions constituted ineffective assistance of counsel, the prejudicial effect of the admissions clearly outweighed any probative value in allowing them, defendant's right to a fair trial was compromised by defense counsel's withdrawal of a motion in limine regarding defendant's criminal history and failure to object to the State's extensive cross-examination regarding defendant's prior convictions, and the State's extensive cross-examination regarding defendant's numerous past felony convictions was clearly more prejudicial than probative in a case that largely turned on the respective credibility of defendant and the State's main witness. Taylor v. State, 167 So. 3d 1143, 2015 Miss. LEXIS 351 (Miss. 2015).

Defendant was procedurally barred from arguing that the trial court's ruling, which would have allowed the State to impeach him on cross-examination with his prior burglary conviction, prevented his putting on a defense because he failed to proffer his testimony. Wallace v. State, 160 So. 3d 1184, 2014 Miss. App. LEXIS 573 (Miss. Ct. App. 2014), cert. denied, 160 So. 3d 704, 2015 Miss. LEXIS 177 (Miss. 2015), vacated in part, — So. 3d —, 2019 Miss. LEXIS 471 (Miss. 2019).

Trial court did not abuse its discretion by permitting the State to question defendant about his prior felony conviction because defendant opened the door to the State to impeach his testimony by asking about his prior conviction; as a result of defendant's testimony, the nature and date of his prior conviction were probative of his credibility. Myers v. State, 153 So. 3d 581, 2014 Miss. LEXIS 446 (Miss. 2014).

Trial court did not abuse its discretion by permitting the State to question defendant about his prior felony conviction because it conducted a full, on the record analysis and found that the probative value of the State being allowed to elicit from defendant the nature and the date of his conviction outweighed the prejudicial effect; the prior conviction was relatively recent and wholly dissimilar from the charged crime. Myers v. State, 153 So. 3d 581, 2014 Miss. LEXIS 446 (Miss. 2014).

Trial court did not abuse its discretion in prohibiting cross-examination regarding a witness's 17-year-old conviction because the conviction was over 10 years old, defendant failed to present any evidence that the conviction or the circumstances surrounding it would have offered any probative or impeachment value in the case against him, and there was no evidence that the witness's testimony was motivated by any animus against defendant. Mack v. State, 129 So. 3d 230, 2013 Miss. App. LEXIS 725 (Miss. Ct. App. 2013).

Trial court did not err in refusing to permit defense counsel to cross-examine the State's key witness about her felony arrests because the charges had not resulted in a conviction; the arrests could not be used to show bias or favorable treatment because there was no correlation between the arrests and the witness's purchases of cocaine from defendant. Cassidy v. State, 110 So. 3d 335, 2013 Miss. App. LEXIS 123 (Miss. Ct. App. 2013).

Although a trial court erred in admitting evidence of a witness's prior petty larceny conviction as impeachment evidence under Miss. R. Evid. 609, the issue was procedurally barred because, even though defense counsel objected to the initial question regarding the prior conviction, defense counsel only objected to the phrasing of the question and not to the admissibility of the conviction. Baskin v. State, 155 So. 3d 818, 2013 Miss. App. LEXIS 56 (Miss. Ct. App. 2013), aff'd in part and rev'd in part, 145 So. 3d 601, 2014 Miss. LEXIS 68 (Miss. 2014).

During defendant's trial for statutory rape and sexual battery, defendant received ineffective assistance of counsel because defendant's attorney introduced evidence of defendant's two prior convictions for sexual battery, both of which occurred approximately 25 years prior to trial and exceeded the 10-year threshold of Miss. R. Evid. 609(b), and failed to exclude the convictions; the evidence of the prior convictions was incendiary and prejudicial. Sea v. State, 49 So. 3d 614, 2010 Miss. LEXIS 641 (Miss. 2010).

Evidence of defendant's prior felony conviction was inadmissible under Miss. R. Evid. 609 as defendant was convicted well past the ten-year limit of Miss. R. Evid. 609(b). Furthermore, it was clear that the probative value of the prior conviction was completely overshadowed by the prejudicial effect that it had. Williams v. State, 37 So. 3d 717, 2010 Miss. App. LEXIS 301 (Miss. Ct. App. 2010).

Where defendant failed to proffer his testimony, defendant was procedurally barred from arguing that the trial court's ruling, which would have allowed the State to impeach defendant with a prior burglary conviction pursuant to Miss. R. Evid. 609(a)(1)(B), resulted in defendant's inability to put on a defense. McClellan v. State, 34 So. 3d 548, 2010 Miss. LEXIS 163 (Miss. 2010).

Defendant's murder conviction was appropriate because his arguments regarding the impeachment of witnesses were without merit; although the exact date of his conviction was not given, a sheriff's conviction was over 30 years old at the time of trial and was thus subject to the time limits of Miss. R. Evid. 609(b). Further, another witness's kidnapping conviction was over 40 years old and was thus subject to the time limitations contained in R. 609(b). Ross v. State, 22 So. 3d 400, 2009 Miss. App. LEXIS 861 (Miss. Ct. App. 2009).

Although defendant asked the court to apply the plain error doctrine, the court did not find that the State's line of questioning as to what prior convictions defendant had substantially affected his right to a fair trial when he openly admitted that he had a record of multiple convictions. Butler v. State, 16 So. 3d 751, 2009 Miss. App. LEXIS 485 (Miss. Ct. App. 2009).

When defendant introduced his record of prior convictions on his own initiative during direct examination, he effectively denied the trial court the opportunity to perform the appropriate balancing test under Miss. R. Evid. 609(a)(1)(B) and 403 so that it could determine whether the prior convictions constituted admissible evidence, plus when the State cross-examined defendant about his prior convictions, defense counsel failed to object; the trial judge did not abuse his discretion by allowing the State to question defendant about his prior convictions. Butler v. State, 16 So. 3d 751, 2009 Miss. App. LEXIS 485 (Miss. Ct. App. 2009).

Where defendant was charged with aggravated assault for firing a gun at the brother of his ex-girlfriend, the trial court did not err in precluding defendant from impeaching the brother with a prior conviction that was more than 10 years old. While defendant argued that the brother's conviction for possessing a firearm was probative because the brother denied threatening defendant or possessing a firearm on the day of the shooting, defendant confused the issue because the use of prior convictions was permissible to impeach the credibility of a witness but was not permissible to show a victim's propensity to violence when defendant alleged self-defense; because the conviction was not particularly probative of honesty and the event occurred in the presence of numerous witnesses, the brother's testimony was not so central to proof of defendant's guilt that the trial court's decision amounted to an abuse of discretion. McKinney v. State, 26 So. 3d 1065, 2009 Miss. App. LEXIS 309 (Miss. Ct. App. 2009), cert. denied, 27 So. 3d 404, 2010 Miss. LEXIS 48 (Miss. 2010).

In defendant's trial on a charge of aggravated assault regarding his stabbing of the woman with whom he lived, the trial court erred in permitting the State to elicit details of defendant's prior conviction for shooting a woman years earlier because, although prior convictions could be used to impeach a criminal defendant, the details of defendant's prior conviction were not used to impeach his testimony. Defendant clearly stated to the jury that he no longer carried a pistol because he was a convicted felon, and the State had already introduced evidence of defendant's prior conviction; as such, there was no need to impeach defendant's testimony on this issue, and the prosecutor's line of questioning into the details of defendant's prior conviction was inadmissible evidence. Thomas v. State, 19 So. 3d 130, 2009 Miss. App. LEXIS 192 (Miss. Ct. App.), cert. denied, 19 So. 3d 82, 2009 Miss. LEXIS 485 (Miss. 2009).

In a prosecution for selling cocaine to an undercover informant, defendant's prior conviction for possessing cocaine within 1,500 feet of a school was admissible in accordance with Miss. R. Evid. 404(b) with respect to intent as well as Miss. R. Evid. 609 to impeach defendant's claim of a set-up and law enforcement conspiracy. The trial judge conducted a Peterson analysis and a Miss. R. Evid. 403 balancing test on the record. Young v. State, 13 So. 3d 339, 2009 Miss. App. LEXIS 129 (Miss. Ct. App. 2009).

Although a trial court abused its discretion when it denied defendant the opportunity to re-cross-examine a victim about the victim's probation revocation, the error was harmless because defendant was allowed an extensive opportunity to impeach the victim regarding the victim's drug use and criminal history; the jury also heard evidence that the victim was smoking marijuana on the day of the shooting. Moore v. State, 1 So. 3d 871, 2008 Miss. App. LEXIS 381 (Miss. Ct. App. 2008), cert. denied, 999 So. 2d 1280, 2009 Miss. LEXIS 59 (Miss. 2009).

In defendant's criminal case, the trial court did not err in not allowing impeachment evidence under Miss. R. Evid. 609(b) because the witness's burglary conviction was 26 years old at the time defendant sought to use it for impeachment. Additionally, evidence of the 26-year-old conviction was not probative of that witness's credibility or an unfounded assertion that he was working as an informant for law enforcement. Vickers v. State, 994 So. 2d 200, 2008 Miss. App. LEXIS 208 (Miss. Ct. App.), cert. denied, 998 So. 2d 1010, 2008 Miss. LEXIS 675 (Miss. 2008).

Denial of defendant's motion for a new trial after he had been convicted of aggravated assault and rape was appropriate pursuant to Miss. R. Evid. 609(a)(1)(B) because evidence of a prior conviction was admitted when he took the stand in his own defense; thus, the trial judge did not abuse his discretion by allowing the state to question defendant about the prior conviction after defendant had volunteered such information. Moss v. State, 977 So. 2d 1201, 2007 Miss. App. LEXIS 632 (Miss. Ct. App. 2007), cert. denied, 977 So. 2d 1144, 2008 Miss. LEXIS 151 (Miss. 2008).

Trial court did not abuse its discretion in ruling that defendant's prior convictions for armed robbery and possession of cocaine, which would be referred to only as an unnamed felony because of the similarity with the current offense, would be admissible for impeachment purposes under Miss. R. Evid. 609 because: (1) defendant's credibility would be central to the case; and (2) the probative value of the prior convictions outweighed their prejudicial effect. McCoy v. State, 954 So. 2d 479, 2007 Miss. App. LEXIS 248 (Miss. Ct. App. 2007).

In a personal injury suit brought against a paper company, the trial court erred in failing to allow the company to cross-examine the logging truck driver's safety expert as to his misdemeanor convictions for lack of safety; the witness was proffered as an expert on the basis that he had been "driving trucks for a number of years," and therefore, the jury should have been allowed to hear testimony elicited on cross-examination regarding his record of driving trucks during that period of time. Int'l Paper Co. v. Townsend, 961 So. 2d 741, 2007 Miss. App. LEXIS 192 (Miss. Ct. App.), cert. denied, 962 So. 2d 38, 2007 Miss. LEXIS 424 (Miss. 2007).

Trial court did not abuse its discretion by admitting defendant's prior conviction of shooting into an occupied dwelling into evidence under Miss. R. Evid. 609 because he opened the door to the state's questions concerning the conviction, as he testified that he did not get angry with his loved ones and that he, at best, simply walked away if he started getting angry; the prior conviction involved defendant's shooting into his ex-girlfriend's house. White v. State, 962 So. 2d 728, 2007 Miss. App. LEXIS 525 (Miss. Ct. App. 2007).

Where defendant was charged with drug offenses stemming from a transaction with a confidential informant, impeachment evidence of the informant's prior conviction for possession of a controlled substance was excluded by Miss. R. Evid. 609(b). The informant's testimony was not contradicted by any prior statements. Gray v. State, 921 So. 2d 393, 2006 Miss. App. LEXIS 81 (Miss. Ct. App. 2006).

Finding against the company in the driver's action for damages was improper pursuant to Miss. R. Evid. 609 where the trial court erred in excluding an expert's misdemeanor convictions. The expert was thus allowed to testify as an expert on safety, opining that the company was unsafe in its practice while simultaneously precluding the company from cross-examining the expert on his own personal record of safety directly related to his alleged area of expertise. Int'l Paper Co. v. Townsend, 2006 Miss. App. LEXIS 108 (Miss. Ct. App. Feb. 7, 2006), op. withdrawn, sub. op., 961 So. 2d 741, 2007 Miss. App. LEXIS 192 (Miss. Ct. App. 2007).

In an aggravated assault case, a court erred by admitting evidence of defendant's prior aggravated assault conviction because the State's argument was that defendant did not act in self-defense in the current instance because his prior conviction for assault evidenced a lack of intent to act in self-defense. That line of logic represented precisely the sort of unfair prejudice prohibited by Miss. R. Evid. 404 and Miss. R. Evid. 609. Walker v. State, 2005 Miss. App. LEXIS 728 (Miss. Ct. App. Oct. 11, 2005), op. withdrawn, sub. op., 936 So. 2d 424, 2006 Miss. App. LEXIS 550 (Miss. Ct. App. 2006).

Trial court did not err in allowing evidence of defendant's prior convictions to come into evidence as defendant had already testified to the fact that he had prior convictions. Hall v. State, 925 So. 2d 856, 2005 Miss. App. LEXIS 574 (Miss. Ct. App. 2005), cert. denied, 927 So. 2d 750, 2006 Miss. LEXIS 182 (Miss. 2006).

Trial court did not err by not allowing evidence of a witness's prior conviction under Miss. R. Evid. 609(a)(1), as the evidence came in that the witness was a drug user and the state supreme court had stated that any prejudicial effect of a witness's prior conviction was irrelevant if the witness was not a party. Keys v. State, 909 So. 2d 757, 2005 Miss. App. LEXIS 573 (Miss. Ct. App. 2005).

Defendant voluntarily waived his right to testify after being informed that his prior embezzlement conviction could be used against him for impeachment purposes; while defendant's enthusiasm for testifying might have suffered a chilling effect upon being advised by the trial judge that his embezzlement conviction could be used against him for impeachment purposes, that was the reality of the adversarial system. Additionally, as the impeaching crime of embezzlement was a Miss. R. Evid. 609(a)(2) crime involving dishonesty or false statements, no balancing analysis was required for the admission of that prior conviction; thus, the trial court did not err in finding that the prior conviction would be admissible if defendant decided to testify. Jackson v. State, 910 So. 2d 658, 2005 Miss. App. LEXIS 170 (Miss. Ct. App.), cert. denied, 904 So. 2d 184, 2005 Miss. LEXIS 402 (Miss. 2005).

While trial court erred in admitting evidence of defendant's prior convictions due to the similarity to the crime for which he was being tried, the error was harmless given other evidence including defendant's confession to the crime. Triplett v. State, 881 So. 2d 303, 2004 Miss. App. LEXIS 478 (Miss. Ct. App. 2004).

In a depraved-heart murder case, as the prior bad acts evidence was introduced by defendant himself through his direct examination, any objection he may have had concerning its entry into evidence was waived. Further, defendant did not object to the admissibility of this conviction until the State cross-examined him and there was nothing unduly prejudicial in the way the prosecutor cross-examined defendant . Harris v. State, 861 So. 2d 1003, 2003 Miss. LEXIS 872 (Miss. 2003).

Where the prosecuting attorney initially framed the prosecutor's motion to admit evidence of a prior conviction as being brought under Miss. R. Evid. 609, but the thrust of the prosecutor's argument was that the prior conviction was admissible under Miss. R. Evid. 404(b), specifically to negate a claim of accident or mistake, and the trial court admitted the evidence under Miss. R. Evid. 404(b), defendant's claim that defendant elected not to testify based on the chilling effect of the trial court's erroneous ruling was rejected, as nothing in the issues raised or argued on appeal significantly challenged the trial court's ruling as to the evidence's admissibility under Miss. R. Evid. 404(b); in all events, the ruling based on Miss. R. Evid. 404, even if erroneous, did nothing to improperly interfere with defendant's right to testify in defendant's own defense. Vince v. State, 844 So. 2d 510, 2003 Miss. App. LEXIS 383 (Miss. Ct. App. 2003).

Trial court properly permitted the State to impeach a defense witness in a simple assault case by showing that he was serving a sentence of 30 years without parole; the fact that the witness was serving the equivalent of a life sentence and would have had nothing to lose if convicted of perjury was both relevant and probative, and there was little likelihood of unfair prejudice to defendant because there was no evidence that defendant was associated in any criminal activity or otherwise with the witness. Williams v. State, 797 So. 2d 372, 2001 Miss. App. LEXIS 243 (Miss. Ct. App. 2001).

State's cross-examination of one of defendant's witnesses concerning the witness's prior aggravated assault conviction was, at best, harmless error because the testimony of the impeached witness was consistent with the stories of two other witnesses and the witness's testimony could not be of much help to defendant. Armstead v. State, 805 So. 2d 592, 2001 Miss. App. LEXIS 485 (Miss. Ct. App. 2001).

In the prosecution of an inmate for assault on law enforcement officers, the state was properly permitted to introduce evidence that a defense witness was serving a term of 30 years imprisonment without parole since the fact that the witness was serving the equivalent of a life term without parole and would have nothing to lose if he should be convicted of perjury was both relevant and probative as to his credibility and bias. Williams v. State, 2001 Miss. App. LEXIS 56 (Miss. Ct. App. Feb. 13, 2001), op. withdrawn, sub. op., 797 So. 2d 372, 2001 Miss. App. LEXIS 243 (Miss. Ct. App. 2001).

In a prosecution for unlawful touching of a minor for lustful purposes, the defendant's prior conviction for grand larceny was properly introduced into evidence as relevant to his credibility as a witness. Lawler v. State, 770 So. 2d 586, 2000 Miss. App. LEXIS 505 (Miss. Ct. App. 2000).

Shoplifting is not a crimen falsi (i.e., a crime involving dishonesty or false statement) and, therefore, is not automatically admissible under subsection (a)(2). Laird v. State, 755 So. 2d 489, 1999 Miss. App. LEXIS 266 (Miss. Ct. App. 1999).

The court did not abuse its discretion in granting the state's motion in limine to prevent the defense from cross-examining a witness regarding two offenses to which he had plead guilty, namely burglary and grand larceny, since such crimes are not crimes of falsehood. Bennett v. State, 738 So. 2d 300, 1999 Miss. App. LEXIS 134 (Miss. Ct. App. 1999), overruled in part, White v. State, 785 So. 2d 1059, 2001 Miss. LEXIS 44 (Miss. 2001).

In a prosecution for the sale of cocaine, the court did not err in ruling that the defendant would be subject to cross examination about his prior felony convictions for robbery and burglary if he testified since such convictions could be used for impeachment purposes. Seals v. State, 740 So. 2d 340, 1999 Miss. App. LEXIS 114 (Miss. Ct. App. 1999).

The court properly allowed the introduction of evidence about the defendant's prior conviction for credit card fraud where the defendant, by his own admission, found a credit card and used it to purchase a television, a VCR, a radio, a ring, and a watch. Booker v. State, 716 So. 2d 1064, 1998 Miss. LEXIS 140 (Miss. 1998).

Defendant's prior convictions for petty larceny, shoplifting and gambling could not be used for impeachment purposes, as they were not properly considered crimes involving dishonesty or false statement. Blackman v. State, 659 So. 2d 583, 1995 Miss. LEXIS 381 (Miss. 1995).

A burglary conviction is not ordinarily admissible under subdivision (a)(2) of this rule; convictions under this rule should be limited to crimes in the nature of crimen falsi. Townsend v. State, 605 So. 2d 767, 1992 Miss. LEXIS 468 (Miss. 1992).

**Sentencing.**

This rule does not apply to convictions used for the purpose of enhancing charges or sentences. Fielder v. State, 749 So. 2d 1248, 1999 Miss. App. LEXIS 582 (Miss. Ct. App. 1999).

**Sexual offenses.**

In a proceeding in which the plaintiff sought to establish the identity of her child's father so as to participate in the wrongful death settlement arising from the death of the putative father, the question of the plaintiff's committing a crime by having sex with a minor was inadmissible as she was not convicted for any such crime. Brown v. Jackson (In re Estate of Chambers), 711 So. 2d 878, 1998 Miss. LEXIS 251 (Miss. 1998).

**Illustrative cases.**

Trial judge did not improperly limited defendant's ability to cross-examine the victim's mother about a pending fraud charge in another county and a non-adjudicated embezzlement charge under this rule. Bishop v. State, 282 So. 3d 633, 2019 Miss. App. LEXIS 345 (Miss. Ct. App. 2019).

It was reversible error for the trial court to allow defendant to be impeached with the details of his prior convictions without making on-the-record findings regarding the factors outlined in prior case law; furthermore, the trial court found the prior convictions admissible for impeachment only, yet the prosecution clearly went beyond that purpose to suggest the prior convictions were evidence of defendant's intent in taking the various objects belonging to his girlfriend. Thus, if the details of defendant's prior convictions were found to be admissible on remand their use should be limited to credibility and not to show a propensity to have acted on the present occasion in conformity with the criminal character suggested by the previous conviction. Taylor v. State, 246 So. 3d 936, 2018 Miss. App. LEXIS 229 (Miss. Ct. App. 2018).

In a case in which plaintiff was sexually assaulted by an undocumented worker in the hotel-lobby bathroom of defendant's resort, and a jury returned a verdict in favor of defendant, the circuit court did not err in excluding evidence of a security guard's prior criminal convictions. The circuit court properly weighed the evidence of the security guard's past criminal convictions against the prejudicial effect such an admission would have on the proceedings. Magers v. Diamondhead Resort, LLC, 224 So. 3d 106, 2016 Miss. App. LEXIS 793 (Miss. Ct. App. 2016), cert. denied, 2017 Miss. LEXIS 337 (Miss. July 17, 2017), cert. denied, 222 So. 3d 311, 2017 Miss. LEXIS 284 (Miss. 2017).

Trial court did not abuse its discretion in admitting defendant's three prior felony convictions; the trial court addressed the relevant factors, determined that the probative value of the evidence outweighed any prejudicial effect, but the jury was not to hear what the prior convictions were for or the details thereof, and the trial court instructed the jury accordingly. Burgess v. State, 210 So. 3d 569, 2016 Miss. App. LEXIS 314 (Miss. Ct. App. 2016), cert. denied, 209 So. 3d 431, 2017 Miss. LEXIS 59 (Miss. 2017).

Trial judge committed reversible error by prohibiting defendant from impeaching the victim with evidence of his prior felony convictions since the case turned primarily on the credibility of the victim and defendant and the evidence was not overwhelming, making it possible that the jury might have found in defendant's favor had it known that the victim, who was on probation, had a significant motivation to lie. Reed v. State, 191 So. 3d 134, 2016 Miss. App. LEXIS 291 (Miss. Ct. App. 2016).

Where a driver's payment of a traffic ticket for failure to yield was not used to attack her general character for truthfulness during the negligence action but rather was used to contradict and impeach her trial testimony that she acted prudently and carefully in proceeding into the intersection, admission of the payment of the ticket was not prohibited under this rule. Owens v. Kelly, 191 So. 3d 738, 2015 Miss. App. LEXIS 480 (Miss. Ct. App. 2015), cert. denied, 202 So. 3d 208, 2016 Miss. LEXIS 226 (Miss. 2016).

In defendant's cocaine possession case, the trial judge clearly erred by allowing the State to impeach a vital defense witness with a misdemeanor petty-larceny conviction, although an embezzlement conviction was properly admitted; because the issue of whether defendant possessed cocaine turned entirely on whether the jury believed the witness, the damage required reversal. Baskin v. State, 145 So. 3d 601, 2014 Miss. LEXIS 68 (Miss. 2014).

Defendant's prior conviction for simple battery was not admissible under this rule since simple battery in Louisiana carried a maximum potential punishment of six months' and there was no showing that the conviction involved dishonesty or a false statement. Gilmore v. State, 119 So. 3d 278, 2013 Miss. LEXIS 361 (Miss. 2013).

Trial court did not abuse its discretion in refusing to allow testimony of a narcotics investigator relating to illegal gaming and drug activity at a bar, which was the establishment that a defendant was charged with robbing at gunpoint, because the proffered testimony revealed nothing other than a collateral matter and was irrelevant under Miss. R. Evid. 608 and 609. Croft v. State, 992 So. 2d 1151, 2008 Miss. LEXIS 502 (Miss. 2008).

Trial court did not abuse its discretion by allowing the state to question defendant regarding a prior incident during which his ex-girlfriend's face was cut during an altercation because defendant was arrested as a result of the incident, as the arrest indicated that the incident was a "bad act." White v. State, 962 So. 2d 728, 2007 Miss. App. LEXIS 525 (Miss. Ct. App. 2007).

Trial court did not abuse its discretion by allowing the state to introduce evidence of a conviction that was over 10 years old because defense counsel elicited testimony from defendant's sister indicating that defendant was a peaceable, law-abiding citizen; the prosecution was entitled to rebut the sister's testimony with evidence of defendant's 1980 conviction for possession of stolen property. Magee v. State, 966 So. 2d 173, 2007 Miss. App. LEXIS 120 (Miss. Ct. App.), cert. denied, 966 So. 2d 172, 2007 Miss. LEXIS 567 (Miss. 2007).

Defendant should have been granted a continuance to discover past criminal "charges" against the confidential informant; however, any error was harmless as the jury was informed of illegal activity by the informant (cocaine use), and was sufficiently apprised of her questionable trustworthiness. Further, under Miss. R. Evid. 609, the charges were inadmissible for impeachment because there was no showing the charges resulted in convictions and because, even assuming the charges had resulted in conviction, the age and limited probative value of the charges rendered them inadmissible. Fuller v. State, 910 So. 2d 674, 2005 Miss. App. LEXIS 174 (Miss. Ct. App. 2005).

There is at least the possibility that a trial court's erroneous decision that a prior conviction may be used to impeach a testifying defendant may serve as such a deterrent that it will be seen as reversible error. On the other hand, once the trial court rules that a custodial statement is admissible, the State has the opportunity to offer it into evidence without regard to whether defendant takes the stand. Thus, where the trial court found defendant's statement bore directly on the central issue of defendant's guilt, rather than for some alternate and limited purpose such as witness impeachment, the trial court's ruling could not be seen as having had any chilling effect on defendant in deciding whether or not to take the stand. Bernardini v. State, 872 So. 2d 690, 2004 Miss. App. LEXIS 372 (Miss. Ct. App. 2004).

Where defendant testified on direct examination that defendant had not sold drugs, that defendant was not a drug dealer, and that defendant had a prior drug conviction that had been overturned, defendant opened the door to the State's admission for use as impeachment evidence of three prior videotaped drug sales for which defendant had been charged. Pulliam v. State, 873 So. 2d 124, 2004 Miss. App. LEXIS 119 (Miss. Ct. App. 2004).

The court did not err in refusing to allow defense counsel to cross-examine a state witness regarding his prior felony burglary convictions as burglary does not involve dishonesty or false statement and the defense failed to present anything of probative value regarding the burglary convictions and their relation to the instant case. Mitchell v. State, 792 So. 2d

192, 2001 Miss. LEXIS 76 (Miss. 2001), cert. denied, 535 U.S. 933, 122 S. Ct. 1308, 152 L. Ed. 2d 218, 2002 U.S. LEXIS 1623 (U.S. 2002).

The trial court did not err in refusing to allow the introduction of evidence regarding a 1981 conviction of a defense witness for embezzlement pursuant to the time limitation contained in the rule. Baine v. River Oaks Convalescent Ctr., 791 So. 2d 844, 2001 Miss. App. LEXIS 123 (Miss. Ct. App. 2001).

The trial court did not err in not allowing the defense to impeach a prosecution witness relative to evidence of a prior conviction for possession of cocaine with intent to distribute on the basis that that the prejudicial effect outweighed the probative value of the evidence. Keys v. State, 739 So. 2d 455, 1999 Miss. App. LEXIS 217 (Miss. Ct. App. 1999).

In a prosecution for armed robbery, the trial judge did not abuse his discretion in allowing the state to question the defendant regarding his prior conviction for second degree armed robbery, where the trial judge made an on-the-record determination that the probative value of the prior conviction outweighed any prejudicial effect. Lenox v. State, 727 So. 2d 753, 1998 Miss. App. LEXIS 1064 (Miss. Ct. App. 1998).

In a prosecution for armed robbery, the court properly allowed a prior armed robbery conviction and a prior purse snatching conviction into evidence where the prosecution made a prima facie showing that the conduct giving rise to the prior convictions was such that it reasonably bore upon the defendant's propensity for truthfulness and the trial judge then satisfied the requirements of subsection (a)(1) and made the appropriate on-the-record findings. McGowan v. State, 726 So. 2d 217, 1998 Miss. App. LEXIS 1070 (Miss. Ct. App. 1998).

In a prosecution for felonious driving under the influence and negligently causing the death of a pedestrian, the court committed reversible error when it refused to allow the defendant to present evidence of three prior burglary convictions of the state's key witness where the witness faced three counts of burglary, he cooperated with the state and was sentenced only to probation, and his testimony was the only evidence that the defendant drove negligently. Zoerner v. State, 725 So. 2d 811, 1998 Miss. LEXIS 303 (Miss. 1998).

Trial court did not err by excluding extortion conviction of deceased sheriff whose prior testimony during guilt phase of trial was read during defendant's resentencing trial. Wilcher v. State, 697 So. 2d 1087, 1997 Miss. LEXIS 100 (Miss. 1997), cert. denied, 522 U.S. 1053, 118 S. Ct. 705, 139 L. Ed. 2d 647, 1998 U.S. LEXIS 149 (U.S. 1998).

Defendant opened the door for admissibility of evidence of a prior conviction for distribution of cocaine, and therefore evidence was properly introduced as normal impeachment evidence to rebut false statements made by defendant while testifying at trial. Johnson v. State, 666 So. 2d 499, 1995 Miss. LEXIS 618 (Miss. 1995).

Evidence of defendant's prior conviction for sexual battery, of touching a child for lustful purposes, should not have been admitted, because it was manifestly prejudicial and mere reference to it during trial prejudiced jury irreparably. Hopkins v. State, 639 So. 2d 1247, 1993 Miss. LEXIS 486 (Miss. 1993).

Trial court did not abuse its discretion in allowing prosecution to bring out the fact of defendant's armed robbery conviction for purpose of impeaching his credibility as a witness in his own behalf; State successfully demonstrated that the prior conviction involved stealing of another's money and personal property and had some intrinsic probative value regarding defendant's propensity for truthfulness while under oath. Bogard v. State, 624 So. 2d 1313, 1993 Miss. LEXIS 404 (Miss. 1993).

Trial judge erred in denying armed robbery defendant's motion in limine to prohibit State from introducing evidence of his prior rape convictions; defendant was manifestly prejudiced because his own testimony in support of his alibi defense was kept from the jury by his fear of the prejudicial effect of his prior convictions, and there was no showing of any countervailing probative value. Jordan v. State, 592 So. 2d 522, 1991 Miss. LEXIS 960 (Miss. 1991).

Trial court did not err in allowing introduction of robbery defendant's prior conviction for armed robbery; since State had two witnesses, credibility of defendant's testimony was crucial and should have been known to jury to help them reach a verdict. Hawkins v. State, 538 So. 2d 1204, 1989 Miss. LEXIS 91 (Miss. 1989).

Defendant's prior conviction for rape should have been kept out of evidence; since his only defense to pending rape charge was alibi, prior conviction put his alibi testimony in direct conflict to the finding of another jury, and his testimony was thus futile. Johnson v. State, 525 So. 2d 809, 1988 Miss. LEXIS 238 (Miss. 1988).

## RESEARCH REFERENCES

**ALR.**

Construction and application of Rule 609(b) of Federal Rules of Evidence, setting time limit on admissibility of evidence of conviction of crime to attack credibility of witness. 160 A.L.R. Fed. 201.

Comment Note: What constitutes crime involving "dishonesty or false statement" under Rule 609(a)(2) of the Uniform Rules of Evidence or similar state rule? - general considerations. 82 A.L.R.5th 359.

What constitutes crime involving "dishonesty or false statement" under Rule 609(a)(2) of the Uniform Rules of Evidence. 83 A.L.R.5th 277.

What Constitutes Crime Involving "Dishonesty or False Statement" Under Rule 609(a)(2) of the Uniform Rules of Evidence or Similar State Rule – Nonviolent Crimes. 84 A.L.R.5th 487.

## Rule 610. Religious beliefs or opinions.

Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

**HISTORY: Restyled effective July 1, 2016.**

## ADVISORY COMMITTEE NOTE

The language of Rule 610 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

This rule prohibits impeaching a witness by questioning him concerning his religious beliefs and opinions. It does not prohibit questioning him as to those beliefs and opinions when testing his bias or interest. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

Closing argument.
Religion as motivation.

**Closing argument.**

Where defendant was charged with sexual battery against his daughter and presented no evidence that he was sexually overcome by her, defendant was not entitled to refer to a biblical passage in his closing argument for an evidentiary purpose of attacking his daughter's credibility by using the conduct of Lot's daughters from the Bible to show that a daughter can sexually overcome her father. Wilson v. State, 72 So. 3d 1145, 2011 Miss. App. LEXIS 236 (Miss. Ct. App.), cert. denied,

71 So. 3d 1207, 2011 Miss. LEXIS 513 (Miss. 2011).

**Religion as motivation.**

Trial court did not abuse its discretion by permitting tire manufacturer's employees who were testifying on behalf of the plaintiff in a products liability suit against the tire manufacturer to state that the reason they were testifying on behalf of the plaintiff was because their religious beliefs led them to believe it was the right thing to do; further, the tire manufacturer had opened the door to the employees testimony as to their motivation by referring to them as disgruntled employees. Cooper Tire & Rubber Co. v. Tuckier, 826 So. 2d 679, 2002 Miss. LEXIS 9 (Miss.), cert. denied, 537 U.S. 820, 123 S. Ct. 97, 154 L. Ed. 2d 27, 2002 U.S. LEXIS 5585 (U.S. 2002).

## Rule 611. Mode and order of examining witnesses and presenting evidence.

(a) *Control by the court; purposes.* — The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

(1) make those procedures effective for determining the truth;

(2) avoid wasting time; and

(3) protect witnesses from harassment or undue embarrassment.

(b) *Scope of cross-examination.* — The court may not limit cross-examination to the subject matter of the direct examination and matters affecting the witness's credibility.

(c) *Leading questions.* — Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:

(1) on cross-examination; and

(2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

**HISTORY: Restyled effective July 1, 2016.**

### ADVISORY COMMITTEE NOTE

The language of Rule 611 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Subdivision (a) is a verbatim restatement of M.R.C.P. 43(b)(l). Subdivision (a) gives the court the discretion to control the order of interrogation. The three principles underlying an orderly presentation of evidence are effectiveness in determining the issues, avoidance of needless waste of time, and protection of the witness from harassment and embarrassment. Subdivision (a) is designed in part to give the judge the discretion to determine whether presentation of the evidence must be in question-and-answer form or whether it may be in narrative form. *See* FRE 611, Advisory Committee Notes.

Subdivision (b) reflects prior Mississippi practice. Subdivision (b) permits a wide-open cross-examination. In this respect Mississippi follows the English rule. *See* Weinstein's Evidence, /P¶ 611 [02-03]. Under this wide-open cross-examination any matter may be probed that is relevant. Nonetheless, under Rule 611(a) the judge may still limit cross-examination to serve one of the purposes therein stated.

Rule 611(c) discusses the use of leading questions. It reflects common law practice. Leading questions as a general rule should not be used on direct examination since they suggest the answers the attorney wants from his own witness. This gives an unfair advantage to the party who is presenting his case. However, the judge has some discretion in allowing leading questions. Thus, leading questions are frequently used in developing preliminary matters. *See Seals v. St. Regis Paper Company,* 236 So. 2d 388 (Miss. 1970); *Thomas v. State,* 217 So. 2d 287 (Miss. 1969). When determining whether a child is competent to testify, a judge might also allow leading questions. *See Allen v. State,* 384 So. 2d 605 (Miss. 1980). Other instances may occur with the witness whose recollection is exhausted and with the witness who has communication difficulties.

The last sentence gives a party the right of cross-examination when questioning witnesses who are hostile or when questioning an adverse party or someone identified with an adverse party. The issue of who may be considered as "identified with an adverse party" was confronted in *Harris v. Buxton T. V, Inc.,* 460 So. 2d 828 (Miss. 1984 ).

The Advisory Committee is cognizant of the *Harris* decision but considers the interpretation and application of the phrase "identified with the adverse party" to be broader than that expressed in *Harris.*

Assuming the witness is deemed sufficiently "identified with an adverse party," the use of leading questions falls within the area of control by the judge over "the mode and order of interrogating witnesses . . . ." Accordingly, the last sentence of 611(c) is phrased in words of discretion rather than command.

The rule also conforms to tradition in making the use of leading questions on cross-examination a matter of right. The purpose of the qualification "ordinarily" is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as, for example, the "cross-examination" of a party by his own counsel after being called by the opponent (savoring more of re-direct) or of an insured defendant who proves to be friendly to the plaintiff. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

Bias.
Child witness.
Control by court.
Expert witness.
Hostile witness.
Impeachment.
Leading questions.
Rebuttal.
Recalling witnesses.
Redirect.
Scope of cross-examination.
Time limitations.
Illustrative cases.

**Bias.**

Evidence that defendant had had an affair with witness's wife was probative of witness' bias and hostility toward defendant, and should have been allowed on cross-examination. Sayles v. State, 552 So. 2d 1383, 1989 Miss. LEXIS 472 (Miss. 1989).

**Child witness.**

In a prosecution for the rape of a 12-year-old girl, leading questions asked of the victim were proper where the victim testified as to the details of the event without any difficulty, but testified using terms in the vernacular, and the leading questions only clarified the terms used in order to obtain the anatomically correct terminology. Gandy v. State, 788 So. 2d 812, 2001 Miss. App. LEXIS 108 (Miss. Ct. App. 2001).

The classic example of a situation ripe for leading questions on direct is where the witness is a child. Smith v. State, 733 So. 2d 793, 1999 Miss. LEXIS 85 (Miss. 1999).

Trial court did not err in allowing State to use leading questions in examining child victim of sexual abuse; leading questions were only used to develop victim's testimony and set stage for demonstration with dolls, and leading questions were by no means excessive in light of child's age.

Jones v. State, 606 So. 2d 1051, 1992 Miss. LEXIS 442 (Miss. 1992).

**Control by court.**

Defendant failed to show any abuse of discretion or prejudice resulting from the trial court's decision allowing the prosecution to recall one of its witnesses. Merritt v. State, 127 So. 3d 1150, 2013 Miss. App. LEXIS 431 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 14 (Miss. 2014).

Trial court did not abuse its discretion in sustaining the state's objection to defendant's cross-examination of victim relating to her failure to notice defendant's gunshot wound, where she had previously stated that she did not notice the wound; although Miss. R. Evid. 611(b) permits wide-open cross-examination, Miss. R. Evid. 611(a) provides the trial court the discretion necessary "to exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence," which includes preventing needless consumption of time in the proceedings. McLaurin v. State, 31 So. 3d 1263, 2009 Miss. App. LEXIS 808 (Miss. Ct. App. 2009).

**Expert witness.**

Trial court did not err in admitting into evidence plaintiff's expert's opinion evidence concerning codes an investigating officer used on the accident report because the expert had been qualified as an expert for accident reconstruction; plaintiff's attorney elicited the expert's testimony concerning the accident report and some of the coded information opened the door for the defense to pursue that line of questioning further. Fleming v. Floyd, 969 So. 2d 881, 2006 Miss. App. LEXIS 717 (Miss. Ct. App. 2006), rev'd, 969 So. 2d 868, 2007 Miss. LEXIS 651 (Miss. 2007).

State was entitled to cross-examine forensic psychologist on the basis of his opinions, including any medical records he considered in forming those opinions, and no medical privilege existed since defendant had placed his mental and emotional condition in issue. Holland v. State, 705 So. 2d 307, 1997 Miss. LEXIS 388 (Miss. 1997), cert. denied, 525 U.S. 829, 119 S. Ct. 80, 142 L. Ed. 2d 63, 1998 U.S. LEXIS 5017 (U.S. 1998).

**Hostile witness.**

There was no plain error in the trial court's finding that the State demonstrated the threshold requirements for the rule because a prosecution witness had previously admitted under oath being a member of a gang and, at defendant's trial, denied it; the witness did not deny making any prior statement which the State questioned him about, and the transcripts containing his prior sworn testimonies, along with his prior unsworn written statements made to investigators, were submitted into evidence. Thames v. State, 310 So. 3d 1163, 2021 Miss. LEXIS 17 (Miss. 2021).

It was not an error for the trial court to grant the prosecution's request to treat a witness as an adverse witness where the witness's statement to police, that the door of the victim's vehicle was closed at the time of the shooting, supported the prosecution's theory that defendant did not act in self-defense in shooting the victim, but the witness's trial testimony, that the victim's vehicle's door was ajar, supported defendant's version of events. Bailey v. State, 952 So. 2d 225, 2006 Miss. App. LEXIS 393 (Miss. Ct. App. 2006), cert. denied, 2007 Miss. LEXIS 166 (Miss. Mar. 1, 2007), cert. denied, 951 So. 2d 563, 2007 Miss. LEXIS 167 (Miss. 2007).

Court did not abuse its discretion in overruling defendant's objection to the prosecution's questioning of its witness because the witness, defendant's girlfriend, became hostile during questioning; questioning was relevant for the purpose of impeaching the witness. Questioning was not harassing under Miss. R. Evid. 611(a) because it was not repetitive, no abusive language was used, and it was over in a matter of seconds. Brassfield v. State, 905 So. 2d 754, 2004 Miss. App. LEXIS 1108 (Miss. Ct. App. 2004).

Where defendant's nephew was called by the State to testify as to what timber was authorized by the victim for cutting, and began to vacillate, the trial judge properly granted the State permission to treat him as a hostile witness and to impeach his trial testimony, since under Miss. R. Evid. 611(c) the trial judge could have found that the nephew was a "witness identified with an adverse party."

Chisolm v. State, 856 So. 2d 681, 2003 Miss. App. LEXIS 868 (Miss. Ct. App. 2003).

Trial court did not abuse its discretion under Miss. R. Evid. 611(c) in permitting the prosecution to ask the witness leading questions, as the witness was a potentially hostile witness due to her relationship with defendant as defendant's girlfriend's mother. Neal v. State, 805 So. 2d 520, 2002 Miss. LEXIS 19 (Miss. 2002).

Trial court's failure to declare school psychologist a hostile witness was error, where his acts were the predicate for defendant's defense that she had been hypnotized; error was harmless, however, since defense counsel was able to ask psychologist leading questions anyway, resulting in no prejudice to defendant. Alexander v. State, 610 So. 2d 320, 1992 Miss. LEXIS 580 (Miss. 1992).

Brakeman of train was a witness identified with defendant railroad, an adverse party, and he was thereby subject to leading questions from plaintiff, and trial judge therefore erred when he failed to designate brakeman as an adverse witness. Slay v. Illinois C. G. R. Co., 511 So. 2d 875, 1987 Miss. LEXIS 2495 (Miss. 1987).

In action against city due to water damage, superintendent of meter reading division of city's water department was a person identified with an adverse party, namely the city, and he was thus a person whom plaintiff had the right to cross-examine. Maryland Casualty Co. v. Jackson, 493 So. 2d 955, 1986 Miss. LEXIS 2595 (Miss. 1986).

If defendant is subject to potential liability in substantial part because of actions or omissions of witness, or if conduct of witness plays such an integral part in a transaction or occurrence which gives rise to defendant's potential liability so that defendant would have prima facie a claim for indemnity over against the witness, then that witness is ordinarily sufficiently identified with an adverse party and may be called as an adverse witness and interrogated by leading questions. Harris v. Buxton T.V., Inc., 460 So. 2d 828, 1984 Miss. LEXIS 2006 (Miss. 1984).

**Impeachment.**

Defendant's sole reason for attempting to present to the jury evidence of a witness's mental condition – schizophrenia and bipolar illness – was for impeachment purposes; however, the facts of the case supported a finding that, if the trial court had allowed defendant's attorney to cross-examine the witness before the jury about the witness's mental condition, the evidence would not have supported defendant's theory that the witness hallucinated. Thus, the trial court was within its discretion to exclude the evidence because the prejudicial value of the evidence outweighed the probative value. Jackson v. State, 924 So. 2d 531, 2005 Miss. App. LEXIS 451 (Miss. Ct. App. 2005), cert. denied, 927 So. 2d 750, 2006 Miss. LEXIS 175 (Miss. 2006).

In a prosecution for felony driving under the influence and negligently causing the death of a pedestrian, the court erroneously refused to allow the defendant to present evidence that the state's key witness, whose testimony was largely uncorroborated, had had three prior burglary convictions but received only probation after cooperating with the state; such evidence was proper to impeach the witness' credibility. Zoerner v. State, 725 So. 2d 811, 1998 Miss. LEXIS 303 (Miss. 1998).

**Leading questions.**

Trial court had discretion to overrule defendant's objection to a leading question asked by the State of Mississippi regarding defendant's age as defendant's age at the time of the alleged statutory rape was relevant information for the jury to hear as an essential element of the charge. Day v. State, 285 So. 3d 171, 2019 Miss. App. LEXIS 559 (Miss. Ct. App. 2019).

Alleged leading question did not entitle defendant to relief because the witness did not answer the question. Brisco v. State, 295 So. 3d 498, 2019 Miss. App. LEXIS 481 (Miss. Ct. App. 2019), cert. denied, 293 So. 3d 834, 2020 Miss. LEXIS 142 (Miss. 2020).

Trial court did not err in allowing a leading question in an effort to clarify that the address on the police report was the location of the cell tower from where the cell phone call was transmitted to 9-1-1. Waldon v. State, 262 So. 3d 588, 2018 Miss. App. LEXIS 621 (Miss. Ct. App. 2018).

There was no abuse of discretion based on the trial court's refusal to allow the owners to ask witnesses leading questions during direct examination; the witnesses were not designated as adverse-party witnesses, and they did not respond evasively or refuse to answer questions, and as for the witness who was designated as an adverse-party, the circuit court permitted the witness to explain his answer if he chose to do so. McDonald v. Lemon-Mohler Ins. Agency, LLC, 183 So. 3d 118, 2015 Miss. App. LEXIS 672 (Miss. Ct. App. 2015).

Trial court did not abuse its discretion in overruling defendant's objection to a leading question because the question was posed to an investigator on direct examination to develop a preliminary matter that had already been put into evidence in order to show how the arresting officer was involved and defendant suffered no substantial injury as a result. Seales v. State, 138 So. 3d 282, 2014 Miss. App. LEXIS 267 (Miss. Ct. App. 2014).

There was no plain error in the State of Mississippi asking leading questions that were necessary to develop the child sexual abuse victim's testimony. Nunnery v. State, 126 So. 3d 105, 2013 Miss. App. LEXIS 764 (Miss. Ct. App. 2013).

Defendant failed to show that trial counsel's failure to object to the 50 alleged leading questions asked of the victim by the prosecutor constituted ineffective assistance of counsel. Harris v. State, 979 So. 2d 721, 2008 Miss. App. LEXIS 197 (Miss. Ct. App. 2008).

Defendant's conviction for capital rape in violation of Miss. Code Ann. § 97-3-65(1)(b) was proper because, while Miss. R. Evid. 611(c) disallowed the use of leading questions during direct examination, that general prohibition was qualified with the phrase "except as may be necessary to develop the witness's testimony." The classic example of a situation ripe for leading questions on direct was where the witness was a child and thus; the trial court did not err in allowing the leading questions that the State asked the victim. Gordon v. State, 977 So. 2d 420, 2008 Miss. App. LEXIS 169 (Miss. Ct. App. 2008).

Even if the state should not have asked an officer leading questions when the officer was recalled to the stand, there was no showing of any prejudicial effect where one question was asked about his close proximity to defendant during a drug investigation. Walker v. State, 962 So. 2d 39, 2006 Miss. App. LEXIS 911 (Miss. Ct. App. 2006), cert. denied, 962 So. 2d 38, 2007 Miss. LEXIS 419 (Miss. 2007).

When determining whether a witness is identified with an adverse party for purposes of allowing leading questions under Mississippi R. Evid. 611(c), the trial court should determine from the facts and circumstances of the case whether the witness proposed to be called is one who is identified with the adverse party within the meaning and contemplation of the rule. Parks v. State, 930 So. 2d 383, 2006 Miss. LEXIS 283 (Miss. 2006).

Defendant's conviction for aggravated assault was appropriate under Miss. R. Evid. 611(c) because the name of the victim's daughter was not an issue at trial and the question on the part of the state was merely to provide a name for the victim's daughter in the development of his testimony concerning how he arrived at the emergency room after being shot; thus, the trial court did not err in overruling defendant's objection as to leading. Gates v. State, 936 So. 2d 335, 2006 Miss. LEXIS 384 (Miss. 2006).

Court did not abuse its discretion in overruling defendant's objection to the prosecution's questioning of its witness because the witness, defendant's girlfriend, became hostile during questioning; questioning was relevant for the purpose of impeaching the witness. Court did not abuse its discretion in allowing the prosecution to use leading questions pursuant to Miss. R. Evid. 611(c). Brassfield v. State, 905 So. 2d 754, 2004 Miss. App. LEXIS 1108 (Miss. Ct. App. 2004).

When a witness becomes a hostile witness, a trial court clearly does not abuse its discretion in allowing leading questions pursuant to Miss. R. Evid. 611(c). Brassfield v. State, 905 So. 2d 754, 2004 Miss. App. LEXIS 1108 (Miss. Ct. App. 2004).

Trial court did not err in allowing 15-year-old victim to testify through the use of leading questions, pursuant to Miss. R. Evid. 611(c), in defendant's statutory rape trial; although some leading questions were used in questioning the victim, there was colloquy in the record that revealed that the victim testified, on own accord, to each of the three sexual acts. Hence, defendant's conviction for three counts of statutory rape was upheld. Boggan v. State, 894 So. 2d 581, 2004 Miss. App. LEXIS 722 (Miss. Ct. App. 2004), cert. denied, 896 So. 2d 373, 2005 Miss. LEXIS 162 (Miss. 2005).

Although a few of the questions asked could be considered leading questions, Miss. R. Evid. 611(c), because of the age of the witnesses and the limited manner in which the questions were used, it was doubtful that the trial judge would have disallowed the questions; therefore, defendant would have benefitted little by an objection from counsel. Thus, defendant's ineffective assistance of counsel claim was denied. Barrett v. State, 886 So. 2d 22, 2004 Miss. App. LEXIS 484 (Miss. Ct. App.), cert. denied, 887 So. 2d 183, 2004 Miss. LEXIS 1371 (Miss. 2004).

In a malpractice suit against a doctor and a hospital, where one of the doctor's theories of defense was that, if a heating pad was the cause of the patient's injuries, then the hospital was at fault, not him, the trial court did not abuse its discretion in finding there was sufficient adversity as to the theories of defense for each party to consider them adverse, and in allowing them to ask leading questions of one another's witnesses. Winters v. Wright, 869 So. 2d 357, 2003 Miss. LEXIS 415 (Miss. 2003).

Trial court did not err in allowing leading questions during direct examination because they were only used for the purpose of developing a witness' testimony. Crosby v. State, 856 So. 2d 523, 2003 Miss. App. LEXIS 403 (Miss. Ct. App.), cert. denied, 860 So. 2d 1223, 2003 Miss. LEXIS 814 (Miss. 2003).

The district attorney was properly permitted to examine a witness for the state with leading questions where the witness gave in-court testimony that differed significantly from her pretrial statement. Craft v. State, 764 So. 2d 1253, 2000 Miss. App. LEXIS 342 (Miss. Ct. App. 2000).

In a personal injury action in which the plaintiff called the defendant as an adverse witness during his case-in-chief, it was not error for the court to allow defense counsel, over the plaintiff's objection, to ask the defendant leading questions based on her "failure of memory and the passage of time" (the trial occurred 12 ½ years after the incident at issue) or to then refuse to allow the plaintiff to recross-examine her. Nolan v. Brantley, 767 So. 2d 234, 2000 Miss. App. LEXIS 149 (Miss. Ct. App. 2000).

In a prosecution for rape, sexual battery, and burglary, it was not reversible error for the state to ask leading questions of the victim where the victim was an 83 year old woman, who was beaten, raped, and sexually battered by her assailant and who was embarrassed and reluctant to testify about the incident. Price v. State, 749 So. 2d 166, 1999 Miss. App. LEXIS 432 (Miss. Ct. App. 1999).

**Rebuttal.**

Trial court in medical malpractice action erred in refusing to allow plaintiff's expert witness to offer rebuttal testimony that certain medical treatises refuted by defendant's expert were, indeed, authoritative. Kiddy v. Lipscomb, 628 So. 2d 1355, 1993 Miss. LEXIS 445 (Miss. 1993).

**Recalling witnesses.**

Trial judge did not abuse his discretion in denying defendant's request that defendant be allowed to retake the witness stand because defendant offered no evidence that testifying a second time would have provided any additional, helpful information to the jury. Clark v. State, 233 So. 3d 832, 2017 Miss. App. LEXIS 129 (Miss. Ct. App. 2017), cert. denied, 2017 Miss. LEXIS 518 (Miss. Dec. 12, 2017).

Because the court allowed defendant to recall the State witness during his case-in-chief for inquiry once the defense had laid the proper evidentiary foundation, the trial court did not preclude testimony, but controlled the order of the testimony for the purposes of providing the proper evidentiary foundation for the admission of testimony pursuant to its authority under Miss. R. Evid. 611(a). Robinson v. State, 40 So. 3d 570, 2009 Miss. App. LEXIS 720 (Miss. Ct. App. 2009).

Trial court did not violate Miss. R. Evid. 613 by denying the defense's request to call defendant's girlfriend on surrebuttal after a police investigator testified as a rebuttal witness about a phone conversation she had with the girlfriend because it was very likely that the girlfriend's testimony would not have changed from her original testimony. Fraise v. State, 17 So. 3d 160, 2009 Miss. App. LEXIS 171 (Miss. Ct. App. 2009).

Trial court did not err in not allowing a witness to be recalled; the witness was called to testify on the fourth day of trial as the State's final witness and the decision was made in the interest of efficiency as contemplated by Miss. R. Evid. 611(a)(2). Williams v. State, 994 So. 2d 808, 2008 Miss. App. LEXIS 183 (Miss. Ct. App.), cert. denied, 998 So. 2d 1010, 2008 Miss. LEXIS 665 (Miss. 2008).

Trial court did not err by allowing the State to recall a witness to testify, after the witness had already testified on direct and cross, as the State did not call the witness for the purpose of redirect, but rather, a second direct. Also, defendant provided no law that indicated that recalling the witness was improper. Cooper v. State, 911 So. 2d 665, 2005 Miss. App. LEXIS 654 (Miss. Ct. App. 2005).

There is no hard and fast rule that a witness, once her testimony is complete, cannot be recalled to the stand; that is a matter vested in the sound discretion of the trial court. Ellis v. State, 799 So. 2d 159, 2001 Miss. App. LEXIS 412 (Miss. Ct. App. 2001).

The court exercised reasonable control over the order of interrogating witnesses and there was no abuse where sheriff was recalled to confirm that he took the photos and they corroborated prior testimony regarding the scene of the crime at the time of his arrival and the position and identity of the victim. Robinson v. State, 749 So. 2d 1054, 1999 Miss. LEXIS 371 (Miss. 1999).

It was within trial court's discretion to allow prosecution witness to be recalled to the stand for purpose of introducing exhibit into evidence, where was no showing of abuse of discretion nor did defendant allege any prejudice. Ellis v. State, 661 So. 2d 177, 1995 Miss. LEXIS 149 (Miss. 1995).

**Redirect.**

Circuit court did not abuse its discretion in refusing to let the owners question witnesses on certain things, as the questions during cross-examination differed from the matter the owners sought to investigate on redirect examination, and the circuit court did not prevent the owners from testing the accuracy of the testimony or caused the owners prejudice. McDonald v. Lemon-Mohler Ins. Agency, LLC, 183 So. 3d 118, 2015 Miss. App. LEXIS 672 (Miss. Ct. App. 2015).

**Scope of cross-examination.**

Cross-examination of defendant was not improper because the cross-examination went directly to defendant's credibility. Griffin v. State, 269 So. 3d 337, 2018 Miss. App. LEXIS 187 (Miss. Ct. App. 2018), cert. denied, 260 So. 3d 796, 2019 Miss. LEXIS 6 (Miss. 2019).

Trial court erred in entering a final judgment against a hospital because it prohibited the hospital from cross examining the process server on the disputed issue of whether process was served upon the hospital's registered agent; by cutting off the hospital's request to question the process server entirely, the trial court failed to exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to make those procedures effective for determining the truth. Wesley Health Sys., LLC v. Estate of Love, 200 So. 3d 440, 2016 Miss. LEXIS 387 (Miss. 2016).

Defendant's cross-examination of an officer was not improperly limited because (1) defendant sought to examine the officer about an unrelated traffic stop, and (2) such inquiry would have elicited irrelevant evidence that would have confused the jury. Johnson v. State, 194 So. 3d 191, 2016 Miss. App. LEXIS 384 (Miss. Ct. App. 2016).

There was no abuse of discretion in the circuit court's refusal to allow owners to recross a witness about the matters raised during her redirect examination. McDonald v. Lemon-Mohler Ins. Agency, LLC, 183 So. 3d 118, 2015 Miss. App. LEXIS 672 (Miss. Ct. App. 2015).

As for the mode of cross-examination, the circuit court's ruling did not reflect any basis or cause the owners irreparable prejudice. McDonald v. Lemon-Mohler Ins. Agency, LLC, 183 So. 3d 118, 2015

Miss. App. LEXIS 672 (Miss. Ct. App. 2015).

In a statutory rape prosecution, it was not error to bar defense counsel from asking a witness about a desire to drop the charges because (1) this did not tend to make facts constituting the crime more or less probable, and (2) this did not show bias, prejudice, or interest by tending to make facts the witness testified to less probable. Cage v. State, 149 So. 3d 1038, 2014 Miss. LEXIS 536 (Miss. 2014).

Defendant's convictions for manslaughter and rape were proper because a fingerprint expert admitted at trial and during the proffered examination that the FBI had formerly required a 12-point system in order to make a fingerprint identification, but the FBI abandoned that standard in favor of using the scientific methodology of examining the uniqueness of the print itself. The trial court did not improperly limit the cross-examination of the fingerprint expert at trial; defendant's argument that he was unable to sufficiently question the expert about whether the FBI required the use of a 12-point standard to properly identify the owner of a set of prints was without merit, Miss. R. Evid. 611(b). Brown v. State, 999 So. 2d 853, 2008 Miss. App. LEXIS 320 (Miss. Ct. App. 2008), cert. denied, 999 So. 2d 852, 2009 Miss. LEXIS 44 (Miss. 2009).

Where defendant was convicted for killing his former girlfriend, given his testimony that her male friend had previously threatened him with a gun, whether or not the male friend owned a gun at the time of the alleged threats was relevant because it tended to increase or decrease, however minimally, the probability of the truth of defendant's testimony supporting his defense of self-defense. Therefore, the trial court abused its discretion when it prohibited the question on the male friend's prior gun ownership, even though same was ultimately found to constitute harmless error in the case at bar. Raiford v. State, 907 So. 2d 998, 2005 Miss. App. LEXIS 279 (Miss. Ct. App. 2005).

In a capital murder case, the trial court was within its discretion to limit defense counsel's cross-examination of the sheriff during the suppression hearing regarding the content of a co-conspirator's missing statements as everything the co-conspirator told the sheriff was in the sheriff's report, which the defense possessed, and defense counsel's questions exceeded the scope of the suppression hearing by asking the sheriff to testify as to the contents of the conversation. Byrom v. State, 863 So. 2d 836, 2003 Miss. LEXIS 535 (Miss. 2003), cert. denied, 543 U.S. 826, 125 S. Ct. 71, 160 L. Ed. 2d 40, 2004 U.S. LEXIS 5754 (U.S. 2004).

Trial court did not err in refusing to allow eastern area annexation objectors to cross-examine the western area annexation objectors because the parties were not in opposition and essentially asserted the same argument that their area should not have been annexed to the city. Prestridge v. City of Petal, 841 So. 2d 1048, 2003 Miss. LEXIS 53 (Miss. 2003).

One accused of a crime has the right to broad and extensive cross-examination of the witnesses against him on any material matter as long as the issues are relevant. Kittler v. State, 830 So. 2d 1258, 2002 Miss. App. LEXIS 297 (Miss. Ct. App.), cert. denied, 830 So. 2d 1251, 2002 Miss. App. LEXIS 743 (Miss. Ct. App. 2002).

Trial court did not err in refusing to allow the defense to cross-examine a Mississippi crime lab expert regarding an ongoing federal investigation as defendant neither made an offer of proof as to what the witness would have testified to or that the testimony would have been relevant to defendant's trial for possession of cocaine. Kittler v. State, 830 So. 2d 1258, 2002 Miss. App. LEXIS 297 (Miss. Ct. App.), cert. denied, 830 So. 2d 1251, 2002 Miss. App. LEXIS 743 (Miss. Ct. App. 2002).

The trial judge did not err by limiting cross-examination of state's witnesses since (1) the trial judge did not preclude the defendant from asking the questions at issue altogether, but instead asked him to establish a proper predicate for the questions, and (2) the questions did not appear to be relevant to the case. Rochell v. State, 748 So. 2d 103, 1999 Miss. LEXIS 295 (Miss. 1999).

In a prosecution for delivery of cocaine in which there was testimony that the defendant sold crack cocaine at a specified address, the court properly permitted cross-examination of the defendant with regard to whether the defendant was living or had ever lived at that address, as such fact would have made it more probable that he was there on the day of the transaction at issue. Ruffin v. State, 724 So. 2d 942, 1998 Miss. App. LEXIS 1002 (Miss. Ct. App. 1998).

Contrary to his argument on appeal, record revealed that defendant was given wide latitude in his questions and was specifically permitted to question informant about any possible favorable treatment from police. Craft v. State, 656 So. 2d 1156, 1995 Miss. LEXIS 271 (Miss. 1995).

Trial court properly prohibited cross-examination on issue of rape victim's virginity, because whether victim was a virgin was irrelevant to whether she was raped. Heflin v. State, 643 So. 2d 512, 1994 Miss. LEXIS 470 (Miss. 1994), overruled, Owens v. State, 666 So. 2d 814, 1995 Miss. LEXIS 625 (Miss. 1995).

Prosecution witness' refusal to talk to defendant's attorney prior to trial was not indicative of lack of veracity, and trial judge correctly excluded this evidence as irrelevant. Sayles v. State, 552 So. 2d 1383, 1989 Miss. LEXIS 472 (Miss. 1989); Alexander v. State, 610 So. 2d 320, 1992 Miss. LEXIS 580 (Miss. 1992).

**Time limitations.**

Although trial court imposed a time limitation of two and one-half hours for each party to present his and her case, which seemed to be an extraordinarily short period of time for the trial court to consider the important issues of custody, division of property and alimony that were necessary to finally adjudicate the dissolution of a fifteen-year marriage, Miss. R. Evid. 611 permits judges to exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence in order to control the operation of trials and the smooth flow of the litigation process. The fact that the wife was allowed additional time and the husband was not, was not reversible error because the husband did not articulate the prejudice or harm that he would suffer by the trial court's time limitation nor did he move the court for additional time or proffer into the record what evidence he would have presented with additional time. Hammers v. Hammers, 890 So. 2d 944, 2004 Miss. App. LEXIS 764 (Miss. Ct. App. 2004), cert. denied, 892 So. 2d 824, 2005 Miss. LEXIS 7 (Miss. 2005), cert. denied, 2005 Miss. LEXIS 72 (Miss. Jan. 6, 2005).

The husband's right to due process was not violated when the judge limited the trial in a divorce proceeding to one day where (1) the husband could have requested a continuance, but did not; (2) the husband could have objected on the record to the time limit, but did not; (3) the record showed that the husband's counsel indicated a readiness to go forward at the end of the wife's case-in-chief after the husband's motion for a directed verdict was overruled by the trial court; and (4) there was no indication in the record from the husband that the time limits placed on the trial were problematic. Moore v. Moore, 757 So. 2d 1043, 2000 Miss. App. LEXIS 125 (Miss. Ct. App. 2000).

**Illustrative cases.**

Trial court did not err in limiting defendant's cross-examination of the victim's mother after the defense failed to make a proffer regarding her testimony regarding alternative reasons for defendant's controlling behavior toward the victim. Pustay v. State, 221 So. 3d 320, 2016 Miss. App. LEXIS 643 (Miss. Ct. App. 2016), cert. denied, 216 So. 3d 1150, 2017 Miss. LEXIS 232 (Miss. 2017).

Chancellor, in a grandparent visitation case, did not abuse the chancellor's discretion by failing to admit relevant evidence and testimony that was unfavorable to the grandparents due to a nonjudicial philosophy was incompatible with trying cases and controversies. Smith v. Martin, 202 So. 3d 263, 2016 Miss. App. LEXIS 110 (Miss. Ct. App. 2016), aff'd, 222 So. 3d 255, 2017 Miss. LEXIS 151 (Miss. 2017).

Trial court judge did not abuse his discretion by limiting the scope of the inmate's testimony where the trial judge intervened only to limit the inmate's testimony to relevant matters and to instruct the inmate not to rehash every argument in his petition for postconviction relief. Magee v. State, 124 So. 3d 71, 2012 Miss. App. LEXIS 817 (Miss. Ct. App. 2012), aff'd, 124 So. 3d 64, 2013 Miss. LEXIS 562 (Miss. 2013).

In a wrongful death action, the trial court erred in denying two heirs the right to participate fully in the trial; the heirs were denied the right to question the deceased child's mother, an employee, and the employee's coworker, the only witnesses who were present when the motor vehicle accident occurred. Dooley v. Byrd (In re Dooley), 64 So. 3d 951, 2011 Miss. LEXIS 297 (Miss. 2011).

Where defendant was charged with sexual battery against his daughter and presented no evidence that he was sexually overcome by her, defendant was not entitled to refer to a biblical passage in his closing argument for an evidentiary purpose of attacking his daughter's credibility by using the conduct of Lot's daughters from the Bible to show that a daughter can sexually overcome her father. Wilson v. State, 72 So. 3d 1145, 2011 Miss. App. LEXIS 236 (Miss. Ct. App.), cert. denied, 71 So. 3d 1207, 2011 Miss. LEXIS 513 (Miss. 2011).

Trial judge's ruling that witnesses could be called only once to the witness stand violated the judge's discretion under Miss. R. Evid. 611(a) because the judge forced the defendant to present evidence by questioning two of the defendant's witnesses before the plaintiff finished presenting the plaintiff's case. Deviney Constr. Co. v. Marble, 60 So. 3d 797, 2011 Miss. LEXIS 244 (Miss. 2011).

Trial court did not abuse its discretion by ruling that the State could ask an undercover officer if he could identify the person that sold him drugs when the officer was recalled by the State during an identification hearing, because defense counsel was given ample opportunity both in the presence of the jury and during voir dire to question the officer concerning the identification of defendant. Therefore, defendant was not denied his right to cross-examine the undercover police office in violation of Miss. R. Evid. 611. Johnson v. State, 908 So. 2d 100, 2005 Miss. LEXIS 363 (Miss. 2005).

Defendant's brief testimony regarding her church activities was proper in as much as it was used to relax her at the beginning of her testimony and was not used to address her specific religious beliefs nor to bolster an image of credibility. Sherman v. Keith, 737 So. 2d 411, 1998 Miss. App. LEXIS 1013 (Miss. Ct. App. 1998).

## Rule 612. Writing used to refresh a witness's memory.

(a) *Scope.* — This rule gives an adverse party certain options when a witness uses a writing, recording, or object to refresh memory:

(1) while testifying; or

(2) before testifying, if the court decides that justice requires the party to have those options.

(b) *Adverse party's options; deleting unrelated matter.* — An adverse party is entitled to have the writing, recording, or object produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing, recording, or object includes unrelated matter, the court must examine the writing, recording, or object in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

(c) *Failure to produce or deliver.* — If a writing, recording, or object is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or – if justice so requires – declare a mistrial.

**HISTORY: Amended effective August 12, 1992; restyled effective July 1, 2016.**

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective August 12, 1992, Rule 612 was amended to allow recordings and objects to be used to refresh a witness's memory. 603-605 So. 2d XXIV (West Miss. Cas. 1993).

## ADVISORY COMMITTEE NOTE

The language of Rule 612 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. The contents of the Rule – formerly contained in a single paragraph – have been divided into subdivisions. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 612, while reflecting existing federal practice, deviates in some respects from pre-rule Mississippi practice. The purpose of Rule 612 is to stimulate memory in order to ascertain credible evidence.

If the witness uses a writing, recording or object (e.g., a photograph) while testifying, the adversary has the right to see such writing, recording or object, to cross-examine on the basis of these items, and to have the relevant portions introduced into evidence. If, on the other hand, the witness uses such items to refresh his memory before testifying, then it is within the trial court's discretion to allow the adversary to see them.

Additionally, the rule provides for an offer of proof when the trial court withholds certain portions of a writing, recording or object from the cross-examiner's use. The rule also provides sanctions for the occasions when such items are not produced pursuant to a court order.

The pre-rule Mississippi practice of using a writing to refresh a witness's memory has often been confused with the past recollection recorded exception to the hearsay rule. Prior to the rules, a party who simply wanted to refresh a witness's memory often felt compelled to satisfy the foundation requirements of the hearsay exception. Rule 612 eliminates this state of confusion and permits any writing, recording or object to be used, regardless of whether it is in compliance with the foundation requirements of the hearsay exception. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

In general.
Prior inconsistent statement.
Writing requirement.

**In general.**

Trial court had discretion to overrule defendant's objection to a leading question regarding defendant's age as defendant's age was an essential element of the statutory rape charge. In any event, a sheriff's office investigator would have eventually testified as to defendant's date of birth because that information was within the investigative file the investigator brought to trial and those papers could have been used to refresh the investigator's memory if the investigator had not been able to recall defendants date of birth. Day v. State, 285 So. 3d 171, 2019 Miss. App. LEXIS 559 (Miss. Ct. App. 2019).

State did not have the right to assert the rule as authority to give the witness either a copy of the transcript of his prior statement or have him listen to the audio recording, as there was nothing about his testimony that could or needed to be refreshed; although the correct procedure was not followed, the error did not result in a manifest miscarriage of justice because defenaw counsel requested that the witness's entire statement be played to the jury. Abram v. State, 270 So. 3d 1105, 2018 Miss. App. LEXIS 518 (Miss. Ct. App. 2018).

When a document or recording is offered to a witness to refresh the witness's recollection, the producing party is not allowed to produce the document to the jury or to play the audio recording to the jury; the producing party may not publish the document or recording to the jury by reading the document, providing the jury with a transcript, or letting the jury listen to the recording. The rule gives only an adverse party or the nonproducing party the right to ask that the writing or recording be published to the jury. Abram v. State, 270 So. 3d 1105, 2018 Miss. App. LEXIS 518 (Miss. Ct. App. 2018).

Defendant waived any objection to the playing of an audio recording of an interview to refresh the memory of a witness as to a prior statement by the witness to law enforcement by insisting that the entire recording was to be played. Furthermore, the trial court did not abuse its discretion by allowing the jurors to have transcripts of the interview, to aid in following the interview, that were collected from the jurors before they entered deliberations. Page v. State, 269 So. 3d 440, 2018 Miss. App. LEXIS 305 (Miss. Ct. App. 2018), cert. dismissed, 2018 Miss. LEXIS 524 (Miss. Dec. 13, 2018).

Because a document used to refresh a witness's recollection does not need to be admissible under the Mississippi Rules of Evidence, and because the former detective stated that he had no present memory that defendant's brother had used defendant's identity and social security number, the State's argument that the defense could not use a National Crime Information Center report and a witness location form to refresh the detective's memory on cross-examination was without merit. Ervin v. State, 136 So. 3d 1053, 2014 Miss. LEXIS 216 (Miss. 2014).

Two defendants' convictions for depraved-heart murder were appropriate under Miss. R. Evid. 612 because even though any testimony that a state witness read from her prior statement was hearsay, the appellate court was unable to say that the trial court's decision regarding the witness's statement prejudiced either defendant; the record contained a great deal of other evidence of their guilt, including other testimony corroborating the witness's testimony. McDowell v. State, 984 So. 2d 1003, 2007 Miss. App. LEXIS 669 (Miss. Ct. App. 2007), cert. denied, 984 So. 2d 277, 2008 Miss. LEXIS 328 (Miss. 2008).

A necessary predicate for refreshing memory of witness with a writing is that it must appear that witness has no present memory and that present memory may be refreshed from the writing; the writing may be used even though it would not be admissible. Livingston v. State, 525 So. 2d 1300, 1988 Miss. LEXIS 223 (Miss. 1988), overruled in part, Wright v. State, 958 So. 2d 158, 2007 Miss. LEXIS 202 (Miss. 2007).

**Prior inconsistent statement.**

A witness's inconsistent prior statement can be used to refresh the witness's memory. Blankenship v. State, 792 So. 2d 1009, 2001 Miss. App. LEXIS 96 (Miss. Ct. App. 2001).

**Writing requirement.**

Trial court correctly excluded testimony that witness's memory had been refreshed by a conversation with another person; this rule is clearly limited to writing, and the testimony was really an original attempt to introduce inadmissible hearsay through the witness. Eastover Bank for Sav. v. Hall, 587 So. 2d 266, 1991 Miss. LEXIS 670 (Miss. 1991).

## Rule 613. Witness's prior statement.

(a) *Showing or disclosing the statement during examination.* — When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

(b) *Extrinsic evidence of a prior inconsistent statement.* — Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

**HISTORY: Restyled effective July 1, 2016.**

## ADVISORY COMMITTEE NOTE

The language of Rule 613 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Subdivision (a) abolishes the requirement that a cross-examiner, prior to questioning the witness about a prior statement in writing, must first show this writing to the witness. This requirement was developed in *The Queen's Case,* 2 Br. & B. 284, 129 Eng.Rep. 976 (1820). Although it was abolished in Britain and later in our federal courts, the rule lingered on in Mississippi.

This rule explicitly applies to both written and oral statements.

The provision allowing disclosure to counsel is designed to protect against unwarranted insinuations that a statement has been made when the fact is to the contrary.

The rule does not defeat the application of Rule 1002 relating to the production of the original when the contents of a writing are sought to be proved. Nor does it defeat the application of M.R.C.P. 26(b)(3), entitling a person on request to a copy of his own statement, though the operation of the latter may be suspended temporarily.

Subdivision (b) preserves the foundation requirement in *The Queen's Case* with some modifications when impeachment is by extrinsic evidence. The traditional insistence that the attention of the witness be directed to the statement on cross-examination is relaxed in favor of simply providing the witness an opportunity to explain and the opposite party an opportunity to examine the statement, with no specification of any particular time or sequence. Under this procedure, several collusive witnesses can be examined before disclosure of a joint prior inconsistent statement.

In order to allow for such eventualities as the witness becoming unavailable by the time the statement is discovered, a measure of discretion is conferred upon the judge.

The rule does not apply to impeachment by evidence of prior inconsistent conduct by virtue of the principles of *expression unius.* The use of inconsistent statements to impeach a hearsay declaration is treated in Rule 806. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

Admission by party opponent.
Admission of prior inconsistent statements.
Availability to opposing counsel.
Impeachment.
Opportunity to explain or deny statement.
Proper foundation.
Illustrative cases.

**Admission by party opponent.**

Subsection (b) of this rule does not apply to admissions of a party-opponent as defined in M.R.E. 801(d)(2). Ratcliff v. State, 752 So. 2d 435, 1999 Miss. App. LEXIS 680 (Miss. Ct. App. 1999).

**Admission of prior inconsistent statements.**

In the sexual battery case of the seven-year-old victim, to the extent that defendant intended to use the victim's counseling records to impeach her testimony with prior inconsistent statements, the trial judge correctly ruled that the records were not admissible for that purpose because defendant made no attempt to confront the victim with any of the statements while she was on the stand; and he did not attempt to recall the victim for that purpose. McCammon v. State, 299 So. 3d 873, 2020 Miss. App. LEXIS 28 (Miss. Ct. App.), cert. denied, 299 So. 3d 794, 2020 Miss. LEXIS 297 (Miss. 2020).

Trial court did not err in admitting taped statement by the victim's adoptive mother under this rule, as she did not admit to all the various factual assertions contained in her pretrial statements, stating that she had lied out of fear, and her testimony at trial directly contradicted the facts and circumstances of voluntariness documented in her pretrial statements. Pustay v. State, 221 So. 3d 320, 2016 Miss. App. LEXIS 643 (Miss. Ct. App. 2016), cert. denied, 216 So. 3d 1150, 2017 Miss. LEXIS 232 (Miss. 2017).

Trial court properly excluded a defense witness's testimony regarding the victim's statement because defendant failed to lay a proper foundation to impeach the victim with her prior inconsistent statement. Scott v. State, 231 So. 3d 1024, 2016 Miss. App. LEXIS 404 (Miss. Ct. App. 2016), aff'd, 231 So. 3d 995, 2017 Miss. LEXIS 440 (Miss. 2017).

Circuit court did not abuse its discretion in refusing to admit a victim's police statement into evidence, despite defendant's claim the statement was admissible under Miss. R. Evid. 613(b), because the victim admitted on cross-examination that his police statement erroneously identified someone else, instead of defendant, as the person who had hit him in the face; despite refusing to allow extrinsic evidence of the victim's prior inconsistent statement, the circuit court allowed defendant to cross-examine the victim regarding the statement for impeachment purposes. Jones v. State, 64 So. 3d 1033, 2011 Miss. App. LEXIS 346 (Miss. Ct. App. 2011).

On appeal from her convictions for felonious child abuse, the appellate court found that there had been substantial testimony before the jury concerning prior inconsistent statements by the victim and therefore, an excluded exhibit was cumulative of other evidence and defendant suffered no prejudice from the failure to admit the extrinsic evidence, Miss. R. Evid. 613(b). Clark v. State, 40 So. 3d 531, 2010 Miss. LEXIS 410 (Miss. 2010).

On appeal from her convictions for felonious child abuse, the appellate court found that there had been substantial testimony before the jury concerning prior inconsistent statements by the victim and therefore, an excluded exhibit was cumulative of other evidence and defendant suffered no prejudice from the failure to admit the extrinsic evidence, Miss. R. Evid. 613(b). Clark v. State, 40 So. 3d 531, 2010 Miss. LEXIS 410 (Miss. 2010).

Trial court did not err when it denied a mistrial based on the prosecutor's comments on defendant's right to remain silent because at trial, defendant testified to a different sequence of events than he originally told detectives after his arrest, claiming the defenses of self-defense and heat-of-passion manslaughter; he put his credibility in issue by taking the stand and testifying to a different scenario than the one he provided previously to law enforcement. Therefore, the prosecutor's questions upon cross-examination were admissible under Miss. R. Evid. 613 to show that defendant's prior statements were inconsistent with his statements at trial and to inquire about the novelty of the new sequence of events stated at trial. Robinson v. State, 40 So. 3d 570, 2009 Miss. App. LEXIS 720 (Miss. Ct. App. 2009).

In defendant's trial on charges of sexual batttery and child fondling, the trial court did not err in permitting the State to introduce prior statements of the victim's mother in cross-examining her. Because the victim's mother testified that her daughter was lying about the abuse and because, by the time of trial, the mother had abandoned her child and resumed her residence with defendant, the mother's prior statements–including the affidavit that she signed under oath charging defendant with the child molestation of her daughter and her statement that defendant promised her that he would not touch her daughter again–were relevant and admissible. Tate v. State, 20 So. 3d 623, 2009 Miss. LEXIS 529 (Miss. 2009).

Trial court erred when it found that evidence of mere drinking, without sufficient proof of intoxication, was so prejudicial as to outweigh its probative value, rendering the evidence inadmissible under Miss. R. Evid. 403. This analysis incorrectly evaluated a prior inconsistent statement for the truth of the matter it asserted rather than evaluating the probative value of a prior inconsistent statement used to impeach the credibility of the accuser pursuant to Miss. R. Evid. 613. Mendenhall v. State, 18 So. 3d 915, 2009 Miss. App. LEXIS 670 (Miss. Ct. App. 2009).

In a statutory rape case, the prior sexual activity of a minor victim was properly excluded from evidence because defendant did not lay a proper predicate under Miss. R. Evid. 613; moreover, the exceptions to Miss. R. Evid. 412 did not apply, and defendant did not comply with the requirements of Rule 412. Ladd v. State, 969 So. 2d 141, 2007 Miss. App. LEXIS 762 (Miss. Ct. App. 2007).

Information contained in the National Crime Information Center (NCIC) report and the justice court's computer print out containing his address was not a statement by defendant, and thus would not qualify as a prior inconsistent statement; therefore, as the two documents in question did not fall under either Miss. R. Evid. 803(8) or Miss. R. Evid. 613(b), the trial court erred in admitting them over defendant's objections, but the errors did not warrant reversal because they did not prejudice defendant. Singleton v. State, 948 So. 2d 465, 2007 Miss. App. LEXIS 52 (Miss. Ct. App. 2007).

Because the two witnesses admitted making the prior inconsistent statements and explained them, extrinsic evidence of their statements could not be admitted into evidence under Miss. R. Evid. 613(b); thus, defendant's claim that he was denied the right to cross-examine the witnesses failed. Davis v. State, 970 So. 2d 164, 2006 Miss. App. LEXIS 907 (Miss. Ct. App. 2006), cert. denied, 968 So. 2d 948, 2007 Miss. LEXIS 652 (Miss. 2007).

Discrepancies in a child's prior statements regarding sexual abuse by defendant, a male relative, were not so damaging to the child's credibility as to have compelled the conclusion that the jury had abused its discretion in finding that she had truthfully related the events of the two encounters with defendant that led to the charges; the examining doctor testified, based on her professional experience, that it was not uncommon for a child sexual abuse victim to give different versions of events when talking to different people because, among other considerations, a child in that situation was often inclined to conceal or even deny matters if the child was made uncomfortable or fearful of the person making the inquiry. Sharp v. State, 862 So. 2d 576, 2004 Miss. App. LEXIS 7 (Miss. Ct. App. 2004).

Detective's testimony regarding statements given previously by a witness in an armed robbery case were admissible to impeach the witness as to the identity of the perpetrators; therefore, a trial court did not abuse its discretion in allowing the testimony. Quinn v. State, 873 So. 2d 1033, 2003 Miss. App. LEXIS 1006 (Miss. Ct. App. 2003), cert. denied, 873 So. 2d 1032, 2004 Miss. LEXIS 597 (Miss. 2004).

Trial court did not err in refusing to admit a witness's unsworn affidavit to impeach his trial testimony under Miss. R. Evid. 613(b) because there was no contradiction between the affidavit and the witness' trial testimony regarding the manner in which he ejected defendant and the victim from a nightclub; however, the trial court erred in allowing an officer to read the statement into evidence. Everett v. State, 835 So. 2d 118, 2003 Miss. App. LEXIS 4 (Miss. Ct. App. 2003).

The trial court committed no error by refusing to admit a prior statement into evidence where the witness admitted making the prior inconsistent statement, he did not deny it nor claim not to remember it, he frankly stated he was at a loss to explain why he had made the statement to the police, and he was extensively examined as to the inconsistencies and was cooperative. Shelton v. State, 728 So. 2d 105, 1998 Miss. App. LEXIS 958 (Miss. Ct. App. 1998).

Once a witness "explains" a prior inconsistent statement by admitting it, the statement cannot be admitted into evidence. Conner v. State, 632 So. 2d 1239, 1993 Miss. LEXIS 541 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276, 1994 U.S. LEXIS 7088 (U.S.

1994), overruled, Weatherspoon v. State, 732 So. 2d 158, 1999 Miss. LEXIS 4 (Miss. 1999).

**Availability to opposing counsel.**

The trial court erred when it failed to make the prosecution give the defense a transcription of a statement previously obtained from a witness before using the statement to impeach the witness; however, since nothing new was gleaned from the use of the statement, the error was harmless. Jones v. State, 710 So. 2d 870, 1998 Miss. LEXIS 144 (Miss. 1998).

**Impeachment.**

To impeach a witness, the lawyer may choose to use a prior statement to show the jury an inconsistency in the witness's testimony; the producing party may not simply introduce the statement into evidence, and if the producing party wants to introduce the transcript or the audio recording in evidence, it is considered to be extrinsic evidence and the State must comply with the rule, which did not happen in this case. Abram v. State, 270 So. 3d 1105, 2018 Miss. App. LEXIS 518 (Miss. Ct. App. 2018).

Defendant's murder conviction was appropriate because his argument that he should have been allowed to impeach a witness with a prior inconsistent statement that she made to an investigator was without merit since the witness admitted to making the prior inconsistent statements. Once a witness explained a prior inconsistent statement by admitting it, extrinsic evidence of the statement could not be admitted into evidence, Miss. R. Evid. 613(a), (b). Ross v. State, 22 So. 3d 400, 2009 Miss. App. LEXIS 861 (Miss. Ct. App. 2009).

Trial court violated defendant's right of confrontation by prohibiting defendant's impeachment of sole eyewitness with his prior inconsistent oral statement because the court's analysis incorrectly evaluated the prior inconsistent statement for the truth of matter it asserted rather than evaluating the probative value of the prior inconsistent statement used to impeach credibility of the accuser under Miss. R. Evid. 613(a). Mendenhall v. State, 18 So. 3d 915, 2009 Miss. App. LEXIS 670 (Miss. Ct. App. 2009).

Circuit court did not err in permitting the impeachment of the accomplice where he made a number of denials and was evasive in his responses to the prosecutor; there was a rational theory under which his prior testimony could lead to a different conclusion from his testimony during defendant's trial. Ames v. State, 17 So. 3d 130, 2009 Miss. App. LEXIS 144 (Miss. Ct. App.), cert. denied, 17 So. 3d 99, 2009 Miss. LEXIS 433 (Miss. 2009).

Where defendant was charged with drug offenses stemming from a transaction with a confidential informant, impeachment evidence of the informant's prior conviction for possession of a controlled substance was excluded. The informant's testimony was not contradicted by any prior statements. Gray v. State, 921 So. 2d 393, 2006 Miss. App. LEXIS 81 (Miss. Ct. App. 2006).

The state improperly cross-examined witnesses on prior inconsistent statements where no evidence was ever presented to prove that any of the alleged prior statements had ever actually been made. Flowers v. State, 773 So. 2d 309, 2000 Miss. LEXIS 266 (Miss. 2000).

Testimony by a witness that he decided to become a confidential informant because he needed the money could be an indication of bias or prejudice in favor of the state. Boyd v. State, 767 So. 2d 1032, 2000 Miss. App. LEXIS 362 (Miss. Ct. App. 2000).

Where a witness to a murder initially indicated a lack of any knowledge of the assailant, apparently out of fear for her safety, but was then taken to police headquarters and gave a formal statement in which she claimed to be able to identify the defendant as the shooter and also testified at trial that the defendant was the shooter, her prior inconsistent statement at the scene was admissible to impeach her credibility. Brown v. State, 764 So. 2d 463, 2000 Miss. App. LEXIS 139 (Miss. Ct. App. 2000).

In a prosecution for delivery of cocaine in which there was testimony that the defendant sold crack cocaine at a specified address and in which the defendant denied ever living at that address, the prosecution was properly allowed to impeach the defendant with his prior inconsistent statements in which he gave that address as his address. Ruffin v. State, 724 So. 2d 942, 1998 Miss. App. LEXIS 1002 (Miss. Ct. App. 1998).

Trial court's exclusion of statement as hearsay was error, because it was a prior inconsistent statement that was not being offered in evidence to prove the truth of the matter asserted; rather, statement was being offered as circumstantial evidence from which jury could infer that trial testimony of declarant was unreliable. Hall v. State, 691 So. 2d 415, 1997 Miss. LEXIS 73 (Miss. 1997).

**Opportunity to explain or deny statement.**

Criminal, in his only sworn statement to the trial court, had testified that he had received a key to the victim's apartment from an apartment manager, and that in later depositions he refused to subject himself to cross-examination; testimony given by the criminal in his deposition that he knew the manager, had knowledge of other apartments in the complex, and had knowledge of a master key that would unlock all units including the unit in question, meant that the parties should have been given an opportunity to explore those matters. Doe v. Stegall, 900 So. 2d 363, 2003 Miss. App. LEXIS 1068 (Miss. Ct. App. 2003), cert. denied, 898 So. 2d 679, 2005 Miss. LEXIS 284 (Miss. 2005).

Where defendant failed to give a witness an opportunity to deny or explain an inconsistency in an unsworn affidavit given to police regarding his location during a shooting, a trial court properly ruled that the statement was inadmissible. Everett v. State, 835 So. 2d 118, 2003 Miss. App. LEXIS 4 (Miss. Ct. App. 2003).

In a murder and armed robbery case where an eyewitness did not deny making inconsistent statements and was allowed to explain the inconsistencies, there was no reason for the judge to admit the statements, which would have been superfluous or extrinsic evidence; the trial judge properly found that no purpose would be served in admitting the statement which the eyewitness had admitted to giving. Jones v. State, 856 So. 2d 389, 2003 Miss. App. LEXIS 226 (Miss. Ct. App.), cert. denied, 860 So. 2d 1223, 2003 Miss. LEXIS 802 (Miss. 2003).

One of the essential conditions to introducing a prior inconsistent statement for impeachment purposes is that, first, the witness has to be confronted with the statement and permitted to either (a) admit it and be given the opportunity to explain the inconsistency or (b) deny having made such a statement; this requirement is more than merely a technical rule to trip up the unwary. Toche v. Killebrew, 734 So. 2d 276, 1999 Miss. App. LEXIS 40 (Miss. Ct. App. 1999).

If counsel desires to impeach the testimony of a witness with some pretrial, out-of-court statement that is inconsistent with his trial testimony, it is only fair that witness, while he is on the stand, be asked about it, and be given an opportunity to explain or deny it, and it is manifestly unfair, after witness has been excused, to attempt to offer a pretrial inconsistent statement in the absence of laying any foundation. Whigham v. State, 611 So. 2d 988, 1992 Miss. LEXIS 821 (Miss. 1992).

**Proper foundation.**

There was no plain error in allowing the State to use a prosecution witness's unsworn statements because the inconsistency requirement of subsection (d)(1)(A) was met, as were the foundational requirements, so as to allow for proper cross-examination by the defense; because the witness often did not deny having made most of his prior unsworn statements, claiming at times that he had lied when he made the statement, there arguably was no use for that particular statement as impeachment evidence. Thames v. State, 310 So. 3d 1163, 2021 Miss. LEXIS 17 (Miss. 2021).

There was error in the State's failure to offer proof that three defense witnesses lied during cross-examination. A line of questioning without evidentiary basis was found to be inflammatory and highly prejudicial, and was prejudicial to the case at bar. Flowers v. State, 2003 Miss. LEXIS 67 (Miss. Feb. 20, 2003), op. withdrawn, sub. op., 842 So. 2d 531, 2003 Miss. LEXIS 149 (Miss. 2003).

Under this rule, impeachment no longer requires detailed prior examination of party with a disclosure of exact place, time, and persons present on occasion of a prior inconsistent statement; however, a reasonable predicate is still required to be laid. Harris v. State, 704 So. 2d 1286, 1997 Miss. LEXIS 47 (Miss.), cert. denied, 522 U.S. 827, 118 S. Ct. 90, 139 L. Ed. 2d 47, 1997 U.S. LEXIS 4857 (U.S. 1997).

When a witness fails to acknowledge making a statement, impeacher is obligated to offer proof establishing the making of that statement; trier of fact must have valid means to decide whether witness's claimed lack of recollection is anything more than a "refuge," and by being apprised of prior statement, the trier has such a means. Harrison v. State, 534 So. 2d 175, 1988 Miss. LEXIS 534 (Miss. 1988).

**Illustrative cases.**

That defendant in a sexual battery case sought to introduce a statement to show the child victim's mother reported that other children had said they did not see anything showed that defendant's true intent was not to impeach the victim's mother, but rather to attack the children's trial testimony about what they purportedly saw defendant do. Because the extrinsic evidence defendant proffered was not proper impeachment evidence, the trial judge did not reversibly err by prohibiting a police sergeant from being recalled. Blake v. State, 256 So. 3d 1161, 2018 Miss. LEXIS 404 (Miss. 2018).

Trial court did not err in excluding a video recording of the victim's interview at the Children's Advocacy Center because much of it was incomprehensible. Lomax v. State, 192 So. 3d 975, 2016 Miss. LEXIS 235 (Miss. 2016).

In an armed robbery case, the issue of whether the trial court erred when it allowed the State to present evidence of defendant's prior inconsistent statement was not a proper issue for the appellate court because defendant failed to raise the issue before the trial court. Hoffman v. State, 189 So. 3d 715, 2016 Miss. App. LEXIS 217 (Miss. Ct. App. 2016).

Trial did not err by excluding the guilty-plea petitions of a witness because the petitions were not substantive evidence and could not have been used for impeachment purposes until the witness testified one way or the other. Even if the petitions could have been used for such purposes, the petitions would not have qualified as prior inconsistent statements because the witness failed to disclose the prior convictions in the petitions, so that the petitions would have been consistent with the untruthful testimony of the witness. Collier v. State, 183 So. 3d 885, 2016 Miss. LEXIS 56 (Miss. 2016).

Although defendant should have been allowed to impeach a confidential informant with her prior convictions when she did not provide accurate testimony about her criminal history, the trial judge did not err in excluding the guilty-plea petition, disclosing the informant's 1970s-era convictions and elaborating on the nature of her 2000s-era forgery conviction, from evidence because until the confidential informant testified one way or the other about her allegedly inconsistent criminal history, her guilty-plea petition could not be used for impeachment purposes; and, even if it could be used for such purposes, the statement could not be introduced as substantive evidence. Collier v. State, 2015 Miss. LEXIS 172 (Miss. Apr. 16, 2015), op. withdrawn, 2016 Miss. LEXIS 64 (Miss. Feb. 4, 2016), sub. op., 183 So. 3d 885, 2016 Miss. LEXIS 56 (Miss. 2016).

Although defendant's mother's proposed testimony was proper extrinsic evidence to impeach the victim's earlier denial of bias against defendant, pursuant to Miss. R. Evid. 613(b), due to the overwhelming evidence of defendant's guilt, the complained of error in failing to allow that testimony was harmless. Banks v. State, 45 So. 3d 676, 2010 Miss. App. LEXIS 84 (Miss. Ct. App. 2010).

Circuit court did not abuse its discretion in prohibiting cross-examination regarding a victim's statement to the police about defendant's other possible sexual encounters with other teenage girls because it was within the circuit court's discretion to find that the victim had insufficient personal knowledge about the other encounters and that her statement was too speculative to be deemed relevant for impeachment as a prior inconsistent statement under Miss. R. Evid. 613(b); furthermore, what the victim could have been told by another teenage girl was inadmissible hearsay under Miss. R. Evid.

801 and 802. Timmons v. State, 44 So. 3d 1021, 2010 Miss. App. LEXIS 32 (Miss. Ct. App.), cert. denied, 49 So. 3d 106, 2010 Miss. LEXIS 517 (Miss. 2010).

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The circuit court did not abuse its discretion in prohibiting cross-examination regarding a victim's statement to the police about defendant's other possible sexual encounters with other teenage girls; it was within the circuit court's discretion to find that the victim had insufficient personal knowledge about the other encounters and that her statement was too speculative to be deemed relevant for impeachment as a prior inconsistent statement under Miss. R. Evid. 613(b), and furthermore, what the victim could have been told by another teenage girl was inadmissible hearsay under Miss. R. Evid. 801 and 802. Timmons v. State, 44 So. 3d 1021, 2010 Miss. App. LEXIS 32 (Miss. Ct. App.), cert. denied, 49 So. 3d 106, 2010 Miss. LEXIS 517 (Miss. 2010).

Because there was no prior statement from a testifying witness, and there was nothing in the record to establish that defendant agreed with his counsel's representation that he had read the deputies' statements, the court could not conclude that defendant had adopted his attorney's statements as his own. Thus, defendant's attorney's representations were not prior inconsistent statements under Miss. R. Evid. 613(b) and should not have been used for impeachment purposes under these circumstances. Lynch v. State, 24 So. 3d 1043, 2010 Miss. App. LEXIS 15 (Miss. Ct. App. 2010).

Trial court violated Miss. R. Evid. 613(a) when it granted defense counsel permission to ask a shooting victim whether he consumed alcohol on the night of the shooting, but prohibited defense counsel from engaging in a full cross-examination as to whether the victim made a prior statement to the doctor the night of the shooting inconsistent with his trial testimony. The prior inconsistent statement at issue was highly probative of the credibility of the victim's testimony identifying the perpetrator of the crimes charged. Mendenhall v. State, 18 So. 3d 915, 2009 Miss. App. LEXIS 670 (Miss. Ct. App. 2009).

Trial court did not violate Miss. R. Evid. 613 by denying the defense's request to call defendant's girlfriend on surrebuttal after a police investigator testified as a rebuttal witness about a phone conversation she had with the girlfriend because it was very likely that the girlfriend's testimony would not have changed from her original testimony. Fraise v. State, 17 So. 3d 160, 2009 Miss. App. LEXIS 171 (Miss. Ct. App. 2009).

Defendant failed to show how a witness's prior statement was inconsistent with his trial testimony for purposes of Miss. R. Evid. 613(b); the prior statement, while not identical to his trial testimony, could not be said to have possessed a reasonable tendency to discredit the witness's testimony. Williams v. State, 994 So. 2d 808, 2008 Miss. App. LEXIS 183 (Miss. Ct. App.), cert. denied, 998 So. 2d 1010, 2008 Miss. LEXIS 665 (Miss. 2008).

In a capital murder trial, the trial court properly refused to allow defendant to impeach a key state witness with prior inconsistent statements made in her statement to a defense expert and properly refused to admit the expert's statement into evidence; although elements of the statement taken by the expert might have been used to impeach the witness's testimony, introduction of the entire statement as impeachment testimony would have been inappropriate since a crucial element of the defense was undermining the witness's credibility. Ross v. State, 954 So. 2d 968, 2007 Miss. LEXIS 235 (Miss. 2007).

Defendant's conviction for aggravated domestic violence against his girlfriend was appropriate because his mother's proffered testimony regarding the victim's recollection was consistent with the victim's testimony, and as such defendant's mother's testimony could not have been admissible as prior inconsistent testimony under Miss. R. Evid. 801(d)(1) and Miss. R. Evid. 613(b). Fugate v. State, 951 So. 2d 604, 2007 Miss. App. LEXIS 145 (Miss. Ct. App. 2007).

Where the only attempt by the prosecutor to prove that three defense witnesses had lied during cross-examination about statements made to one of the witnesses was to ask one question during redirect that was stricken from the record, there was error in the State's failure to offer proof that the witnesses had lied; the line of questioning concerning false testimony without evidentiary basis was inflammatory and highly prejudicial. Flowers v. State, 842 So. 2d 531, 2003 Miss. LEXIS 149 (Miss. 2003).

In defendants' murder trial, where the court limited the questioning by the State after a witness denied having made a statement to his wife and the State was not allowed to conduct further inquiry, the trial court was within its discretion in allowing the State to inquire about an alleged statement by the witness to his wife in an attempt to impeach the witness's prior testimony that the witness had never told anyone that the witness had killed. Caston v. State, 823 So. 2d 473, 2002 Miss. LEXIS 178 (Miss. 2002).

Plain error occurred when (1) the state attempted to impeach a witness by asking her whether she made a specific statement, (2) the witness flatly stated that she did not make the statement, and (3) the state failed to either show a basis in fact for the question or to offer a subsequent witness in rebuttal to prove that the witness' prior statement was true and that she lied. Flowers v. State, 2000 Miss. LEXIS 116 (Miss. May 11, 2000), op. withdrawn, sub. op., 773 So. 2d 309, 2000 Miss. LEXIS 266 (Miss. 2000).

Trial court properly prohibited cross-examination on issue of rape victim's virginity, because whether victim was a virgin was irrelevant to whether she was raped. Heflin v. State, 643 So. 2d 512, 1994 Miss. LEXIS 470 (Miss. 1994), overruled, Owens v. State, 666 So. 2d 814, 1995 Miss. LEXIS 625 (Miss. 1995).

Statement of paramour at divorce trial was properly admitted as a prior inconsistent statement, where she testified at trial, her prior statement was inconsistent with her later testimony, her prior statement was given under oath, and husband's attorney was given a fair opportunity to question her concerning her statement. Ferguson v. Ferguson, 639 So. 2d 921, 1994 Miss. LEXIS 352 (Miss. 1994).

Trial court did not err in refusing, on relevance grounds, to let manufacturer impeach father of accident victim with a prior inconsistent statement given to his liability insurer. Sperry-New Holland, Div. of Sperry Corp. v. Prestage, 617 So. 2d 248, 1993 Miss. LEXIS 124 (Miss. 1993).

## Rule 614. Court's calling or examining a witness.

(a) *Calling.* — The court may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.

(b) *Examining.* — The court may examine a witness regardless of who calls the witness.

(c) *Objections.* — A party may object to the court's calling or examining a witness either at that time or at the next opportunity when the jury is not present.

**HISTORY: Restyled effective July 1, 2016.**

### ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 2017, the Advisory Committee Note to Rule 614 was amended to delete a reference to a superseded Uniform Rule of Circuit Court Practice.

Effective July 1, 2016, the Rule was amended as part of the general restyling of the Evidence Rules.

Effective June 16, 2016, the "Comment" was retitled "Advisory Committee Note."

## ADVISORY COMMITTEE NOTE

The language of Rule 614 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 614 is, in general, similar to Mississippi practice.

Subdivision (a) reflects the recognized authority of the trial judge to call witnesses. When the court calls its own witness, any party has the right to cross-examine that witness.

Subdivision (b) codifies the traditional authority, recognized in Mississippi and elsewhere, of the judge to interrogate the witness directly. The judge abuses this authority, however, when he abandons his judicial detachment and assumes an advocacy position. *See Jones v. State,* 223 Miss. 812, 79 So. 2d 273 (1955), appeal dismissed, cert. denied, 350 U.S. 869 [76 S. Ct. 116, 100 L. Ed. 770] (1955), rehearing denied, 350 U.S. 919 [76 S. Ct. 192, 100 L. Ed. 805 (1955). The appellate court can in such cases reverse for abuse of discretion. *See Breland v. State,* 180 Miss. 830, 178 So. 817 (1938).

The case of *Griffin v. Tate,* 171 Miss. 70, 156 So. 652 (1934), established guidelines for judicial interrogation which may be helpful in setting the parameters of subdivision (b). *Griffin* mentions by way of illustration some instances in which judicial interrogation would be appropriate: when a nervous witness needs to be calmed or is reluctant to testify or is confused as well as when the witness has important information which has not been elicited from him.

Subdivision (c) is an attempt to relieve counsel from the embarrassing position of objecting in the jury's presence to the judge's interrogation. It allows, moreover, sufficient time for counsel to make the objections in time for corrective measures.

["Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended July 1, 2016, to note restyling.]

## JUDICIAL DECISIONS

### ANALYSIS

Interrogation by court.
Nonjury proceedings.
Preservation for review.

**Interrogation by court.**

Although the trial judge erred by questioning defendant's psychiatrist about the significance of a hypothetical person's efforts to cover up or hide their actions, the error was harmless because nothing in defendant's testimony provided the slightest support for an insanity defense. Bell v. State, 287 So. 3d 944, 2019 Miss. App. LEXIS 316 (Miss. Ct. App. 2019), cert. denied, — So. 3d —, 2020 Miss. LEXIS 135 (Miss. 2020).

Although the chancery court interrogated witnesses and even sometimes interrupted witnesses as they testified, the chancery court did not overstep its judicial authority and abuse its discretion in its examination of the witnesses. SKL Invs., Inc. v. Hardin, 170 So. 3d 588, 2014 Miss. App. LEXIS 654 (Miss. Ct. App. 2014), cert. denied, 166 So. 3d 38, 2015 Miss. LEXIS 330 (Miss. 2015).

Trial court did not abuse its discretion or abandon its impartial position when it interrogated witnesses because the trial court's questions were intended to clear up confusing testimony or encourage testimony from recalcitrant witnesses; additionally, the trial court gave the attorneys the opportunity to ask further questions of witnesses, if necessary, based on the trial court's questions. Knights' Piping, Inc. v.

Knight, 123 So. 3d 451, 2012 Miss. App. LEXIS 814 (Miss. Ct. App. 2012), cert. denied, 123 So. 3d 450, 2013 Miss. LEXIS 521 (Miss. 2013), cert. denied, 2013 Miss. LEXIS 526 (Miss. Oct. 3, 2013).

Defendant's conviction for murder was appropriate under Miss. R. Evid. 614(b) because the trial judge did not ask questions in the presence of the jury and the trial judge was not advocating the position of the state and did not display partiality by asking a question to ensure that a photo would assist a forensic pathologist in describing the wounds that the victim received. McCain v. State, 971 So. 2d 608, 2007 Miss. App. LEXIS 295 (Miss. Ct. App. 2007), cert. denied, 973 So. 2d 244, 2007 Miss. LEXIS 700 (Miss. 2007), cert. denied, 553 U.S. 1056, 128 S. Ct. 2478, 171 L. Ed. 2d 772, 2008 U.S. LEXIS 4228 (U.S. 2008).

Drug conviction was reversed and remanded for a new trial; the judge's questioning of the defendant exceeded his authority by asking questions that went beyond clarifying questions as contemplated by Miss. R. Evid. 614(b), in an attempt to identify the confidential informant for the search warrant. Brent v. State, 929 So. 2d 952, 2005 Miss. App. LEXIS 702 (Miss. Ct. App. 2005), cert. denied, 929 So. 2d 923, 2006 Miss. LEXIS 292 (Miss. 2006).

In a child custody case, a judge did not err in asking the father questions regarding the secret tape recording of the wife's conversations with another man because such questioning was permitted under Miss. R. Evid. 614. Copeland v. Copeland, 904 So. 2d 1066, 2004 Miss. LEXIS 1490 (Miss. 2004).

Trial court's actions in questioning witnesses during defendant's trial for embezzlement of funds from a casino did not deprive defendant of a fair trial where the judge rephrased leading questions asked by the prosecutor, clarified the answers of casino employees regarding casino procedures, and had witnesses repeat answers that the judge had not been able to hear; defendant's failure to object to the alleged errors at trial waived the issue on appeal, and the alleged errors were not so severe as to justify waiving the contemporaneous objection rule. Golden v. State, 860 So. 2d 820, 2003 Miss. App. LEXIS 245 (Miss. Ct. App.), cert. denied, 860 So. 2d 1223, 2003 Miss. LEXIS 809 (Miss. 2003).

Because no objection was made regarding the chancellor's questions to the mother at the hearing to determine child visitation and custody, the issue was waived on appeal. Lacey v. Lacey, 822 So. 2d 1132, 2002 Miss. App. LEXIS 425 (Miss. Ct. App. 2002).

The trial judge did not abuse his discretion in questioning a witness as to whether she had denied having made certain statements to a deputy; to the contrary, the judge was attempting to discover the truth of the matter at issue in the midst of testimony from an extremely uncooperative witness and the question posed by the trial judge was a rephrasing or repetition of a line of questioning by the prosecutor with which the witness had refused to comply. Davis v. State, 811 So. 2d 346, 2001 Miss. App. LEXIS 47 (Miss. Ct. App. 2001).

The trial judge operated within statutory and case law when she interrupted a witness to ask pertinent clarification questions which were remedial in nature in a proceeding to determine paternity. Groves v. Slaton, 733 So. 2d 349, 1999 Miss. App. LEXIS 36 (Miss. Ct. App. 1999).

The judge properly called the co-defendant as the court's witness in order to allow both sides to cross-examine him due to his prior inconsistent statements since the court made every effort to maintain his impartiality where (1) the judge instructed the jury at great length both from the bench and in the written jury instructions to ensure that they understood that his calling the co-defendant did not indicate any opinion regarding the merits of the case or any favor to either side, (2) the judge also carefully instructed the jury on its duty to weigh evidence and evaluate witness credibility, and (3) the judge did not personally question the defendant. Gleeton v. State, 716 So. 2d 1083, 1998 Miss. LEXIS 312 (Miss. 1998).

Judge at murder trial did not act improperly in questioning witnesses and did not thereby assist State in prosecution of defendant; judge's questions were posed so that he could decide certain motions made by defense counsel prior to trial and questioning was done prior to empaneling of jury, and judge did no more than exercise authority granted him under this rule. Lanier v. State, 533 So. 2d 473, 1988 Miss. LEXIS 523 (Miss. 1988).

**Nonjury proceedings.**

At a hearing in which a mother was held in contempt of a visitation order, it was not error for the chancellor to question the mother, notwithstanding the assertion that the chancellor abandoned her impartiality and assumed an adversarial role, as the matter did not involve a jury and the concern regarding possible influence of a jury, therefore, did not arise. Grant v. Martin, 755 So. 2d 551, 2000 Miss. App. LEXIS 87 (Miss. Ct. App. 2000).

**Preservation for review.**

Defendant's failure to raise a timely objection to a trial judge's purported partiality to the State of Mississippi not only denied the opportunity for corrective measures during trial, it also precluded defendant from pursuing the claim on appeal. In any event there was no plain error as defendant failed to show that the conduct of the trial judge was so reprehensible and prejudicial as to deny defendant a fair trial as to a surgeon's testimony, the presentation of evidence, and the qualification of a medical examiner as an expert witness. Lott v. State, 270 So. 3d 49, 2018 Miss. App. LEXIS 346 (Miss. Ct. App. 2018).

## Rule 615. Excluding witnesses.

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

(a) a party who is a natural person;

(b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney; or

(c) a person whose presence a party shows to be essential to presenting the party's claim or defense.

**HISTORY: Restyled effective July 1, 2016.**

### ADVISORY COMMITTEE HISTORICAL NOTE

Effective January 31, 1990, the Advisory Committee Note was amended to include reference to a case. 553-560 So. 2d XXVII (West Miss. Cas. 1990).

### ADVISORY COMMITTEE NOTE

The language of Rule 615 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. Lower-case lettered subdivisions have replaced numbered paragraphs as first-level formatting. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing falsification, inaccuracy, and collusion. The rule of sequestration, or simply "the rule" as it has been known in Mississippi, has a time-honored tradition in state trial practice. Prior to these Rules, *Reagan Equipment Co. v. Vaughn Gin Co.,* 425 So. 2d 1045 (Miss. 1983), provided guidance for implementation of "the rule."

Under Rule 615 exceptions are made for several categories of witnesses. First, parties are excepted because their exclusion would raise serious problems of confrontation and due process. Secondly, as the equivalent of the right of a natural-person party to be present, a party that is not a natural person is entitled to have a representative present. The third category includes a person such as an agent who handled the transaction being litigated, an expert needed to advise counsel during the litigation, or an expert witness who must hear the testimony of other witnesses in order to form an opinion which he will later state testimonially. *Collins v. State,* 361 So. 2d 333 (Miss. 1978), provides guidance for permitting an expert to remain in the courtroom. In each instance the person's presence must be "shown by a party to be essential to the presentation of his case."

The sequestration may arise from a motion of a party or from the court on its own motion. This differs from pre-rule Mississippi practice in which a judge would not invoke the rule unless requested.

This rule differs from former Mississippi practice whereunder a party could be excluded during his case-in-chief only after he had the choice of testifying before his other witnesses. Under this rule, a party may remain in the courtroom at all times.

This rule does not discuss sanctions for violation of the sequestration order. Under existing Mississippi law the court has the discretion to exclude the offending witness from testifying. *See Johnson v. State,* 346 So. 2d 927 (Miss. 1977). The trial judge should not permit a witness who has violated the rule to testify unless he has first determined that the adversary would not be prejudiced by the violation of the rule. Other available remedies might be to strike the testimony of a witness who violated the rule, cite the witness for contempt, or allow a "fullbore" cross-examination. *See Douglas v. State,* 525 So. 2d 1312 (Miss. 1988). ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

In general.
Designated representative.
Expert witness.
Harmless error.
Prior proceedings.
Rebuttal testimony.
Remaining in courtroom after testifying.
Illustrative cases.

**In general.**

Trial court properly refused to grant defendant's motion for a new trial because he did not substantiate his claim that a witness's presence in the courtroom during part of the State's opening argument was a deliberate attempt to tailor the witness's testimony to the State's evidence and defendant did not show any prejudice resulting from the witness's presence in the courtroom. Duck v. State, 225 So. 3d 1, 2017 Miss. App. LEXIS 206 (Miss. Ct. App. 2017), cert. denied, 2018 Miss. LEXIS 20 (Miss. Jan. 11, 2018).

Although the trial court may order witness exclusion on its own motion, it is not required to do so. Nance v. State, 766 So. 2d 111, 2000 Miss. App. LEXIS 404 (Miss. Ct. App. 2000).

The Supreme Court will not per se reverse a trial court for failing to order a mistrial or to exclude testimony after a witness exclusion rule violation. Finley v. State, 725 So. 2d 226, 1998 Miss. LEXIS 615 (Miss. 1998).

**Designated representative.**

Where sheriff was a witness for State and remained in courtroom throughout proceedings, his presence did not warrant reversal of defendant's convictions; although prosecution's designation of sheriff as State's representative was insufficient, defendant failed to demonstrate any resulting prejudice, and thus any error was harmless. Jackson v. State, 684 So. 2d 1213, 1996 Miss. LEXIS 7 (Miss. 1996), cert. denied, 520 U.S. 1215, 117 S. Ct. 1703, 137 L. Ed. 2d 828, 1997 U.S. LEXIS 2937 (U.S. 1997).

Allowing chief investigator to sit at counsel table during trial as designated representative of State, as well as testify for State during guilt phase, did not taint jury deliberations by injection of sympathy into its decision. Russell v. State, 607 So. 2d 1107, 1992 Miss. LEXIS 474 (Miss. 1992).

Court at murder trial did not err in failing to sequester sheriff who later testified for State, where sheriff was needed in courtroom to control crowd, and judge was assured that sheriff had not come into any contact with jurors which would prejudice defendant. Perkins v. State, 600 So. 2d 938, 1992 Miss. LEXIS 264 (Miss. 1992).

Sheriff was not exempted from this rule simply by virtue of his being sheriff, where district attorney had not designated him as the State's representative. Douglas v. State, 525 So. 2d 1312, 1988 Miss. LEXIS 216 (Miss. 1988).

**Expert witness.**

Although a murder defendant had invoked the sequestration rule, the trial court did not err in allowing an expert witness for the State to remain in the courtroom during a witness's testimony in order to avoid the need to ask the expert hypothetical questions. Northup v. State, 793 So. 2d 618, 2001 Miss. LEXIS 224 (Miss. 2001).

**Harmless error.**

Trial court properly allowed a property manager to testify about the threats made by the tenant because, despite violating the sequestration rule, the tenant was not prejudiced, the information had already been presented, and there was no evidence that the property manager's testimony would have changed just because he was in the courtroom during the testimony of other witnesses. Figures v. Jackson Hous. Auth., 232 So. 3d 785, 2017 Miss. App. LEXIS 360 (Miss. Ct. App. 2017).

Even though the trial court erred by excluding one of the defense's rebuttal witnesses on the ground that this rule was violated, the error was harmless because the witness' testimony would have had only a negligible impact on the outcome of the trial. Johnson v. State, 242 So. 3d 145, 2017 Miss. App. LEXIS 335 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 69, 2018 Miss. LEXIS 190 (Miss. 2018).

Trial judge erred in refusing to sequester the witnesses at a post-trial hearing held to address defendant's claim that the judge had an improper ex parte communication with a juror, because a court had no discretion to deny a motion for sequestration; however, the error was harmless beyond a reasonable doubt because the evidence of guilt was strong and defendant presented no evidence that he was prejudiced. Avery v. State, 119 So. 3d 317, 2013 Miss. LEXIS 403 (Miss. 2013).

While the court erred in not allowing defendant's brother to testify on the ground that the defense had violated the court's sequestration rule, there was no evidence that had the jury heard the brother testify that the brother too was oblivious as to what the shooter was doing in the back of defendant's truck the outcome of the trial would have been any different. Hence, defendant's conviction for committing a drive-by shooting was upheld. Trotter v. State, 878 So. 2d 248, 2004 Miss. App. LEXIS 664 (Miss. Ct. App. 2004).

Any error inherent in the presence of a witness in chambers while his testimony was being discussed was harmless since he was promptly ordered to leave when the matter was raised by defense counsel and any prejudice suffered by the defendant did not rise to the level of discretionary abuse by the trial judge. Alexander v. State, 759 So. 2d 411, 2000 Miss. LEXIS 104 (Miss. 2000).

Where the Chancellor found that witnesses in the court room were not prejudiced by the testimony that they heard, that testimony was not discussed in their presence, and that they only heard discussions regarding the burden of proof and documents used by a party's expert, the witnesses were not prejudiced and their testimony should not be excluded because the rule was violated. Brown v. Jackson (In re Estate of Chambers), 711 So. 2d 878, 1998 Miss. LEXIS 251 (Miss. 1998).

Trial court did not err in allowing testimony of witness who had violated sequestration rule and heard a portion of trial testimony, where there was no evidence that witness deliberately attempted to circumvent the rule, and court held a hearing outside presence of jury to ascertain just what witness heard and to determine what, if any, prejudice defendant suffered, and defense counsel was given opportunity to fully cross-examine witness before the jury. Brown v. State, 682 So. 2d 340, 1996 Miss. LEXIS 427 (Miss. 1996), cert. denied, 520 U.S. 1127, 117 S. Ct. 1271, 137 L. Ed. 2d 348, 1997 U.S. LEXIS 1821 (U.S. 1997).

Although some other witnesses talked with witness about questions they had been asked, there was no error in allowing witness' testimony, where she was subject to a full-bore examination in presence of jury, and she stated that discussions in the witness room had no effect on how she would have testified, and her testimony was at best cumulative. Powell v. State, 662 So. 2d 1095, 1995 Miss. LEXIS 553 (Miss. 1995).

**Prior proceedings.**

There is no rule preventing a witness from being exposed to testimony in former proceedings, whether live or by transcript; the fact of such exposure in whatever form may be disclosed to a jury for its consideration, but it does not bar the witness. Lewis v. State, 580 So. 2d 1279, 1991 Miss. LEXIS 314 (Miss. 1991).

**Rebuttal testimony.**

Trial court did not err in violation of the witness sequestration rule in permitting the State to introduce the testimony of a victim's advocate who had been allowed to sit in on the majority of defendant's sexual battery trial because the victim's advocate was an unanticipated witness who left the courtroom as soon as it became apparent to the State that she would be called as a rebuttal witness and because her testimony was not based upon anything that could have been tailored to hearing other parts of the State's case-in-chief. Bolden v. State, 23 So. 3d 491, 2009 Miss. App. LEXIS 193 (Miss. Ct. App.), cert. denied, 22 So. 3d 1193, 2009 Miss. LEXIS 614 (Miss. 2009).

Trial court did not err in allowing the State to call a rebuttal witness who had remained in the courtroom after defendant had invoked the rule of sequestration as the trial court limited the witness's testimony on direct and allowed a full-bore cross-examination of the witness. Black v. State, 823 So. 2d 543, 2002 Miss. App. LEXIS 135 (Miss. Ct. App. 2002).

The trial court did not err in failing to grant a mistrial based on a violation of the rule where (1) a witness testified in the case-in-chief and then remained in the courtroom for some time, and (2) when the state realized that she was going to be a rebuttal witness concerning the testimony of another witness, she was removed from the courtroom and was not present during the testimony of the other witness. Finley v. State, 725 So. 2d 226, 1998 Miss. LEXIS 615 (Miss. 1998).

The trial court did not abuse its discretion by permitting a witness for the state to testify in rebuttal after remaining in the courtroom after his testimony where the questions asked did not concern the subject matter of the proceeding and where a cross rebuttal examination was permitted. One (1) 1979 Ford 15V v. State ex rel. Miss. Bureau of Narcotics, 721 So. 2d 631, 1998 Miss. LEXIS 401 (Miss. 1998).

**Remaining in courtroom after testifying.**

Defendant was not entitled to reversal of his conviction for fondling a child in violation of Miss. Code Ann. § 97-5-23 because, inter alia: (1) the evidence was sufficient to enable a reasonable juror to find defendant guilty beyond a reasonable doubt, (2) the trial court did not improperly limit cross-examination of the victim in violation of defendant's rights under USCS Const. Amend. 6 and Miss. Const. Art. III, § 26, because testimony concerning the victim's past sexual behavior was properly excluded under Miss. R. Evid. 412; (3) since defendant failed to object at trial to the qualification of an expert witness under Miss. R. Evid. 702, the issue was waived; and (4) under Miss. R. Evid. 615(3), the expert witness was properly allowed to remain in the court room so that she could base her opinion on facts learned at the trial pursuant to Miss. R. Evid. 703. Aguilar v. State, 955 So. 2d 386, 2006 Miss. App. LEXIS 903 (Miss. Ct. App. 2006).

The trial judge did not abuse his discretion in allowing a key state witness to remain in the courtroom after completing his testimony and being permanently excused. Rochell v. State, 748 So. 2d 103, 1999 Miss. LEXIS 295 (Miss. 1999).

**Illustrative cases.**

Trial court did not err when it did not, sua sponte, declare a mistrial after learning that witnesses apparently violated the witness sequestration rule by going in and out of the courtroom during trial and texted another witness because those acts did not constitute attempts to tailor witnesses' testimony and defendant failed to show prejudice. Anderson v. State, 293 So. 3d 279, 2019 Miss. App. LEXIS 440 (Miss. Ct. App. 2019), cert. denied, 291 So. 3d 1112, 2020 Miss. LEXIS 133 (Miss. 2020).

Circuit court committed no error by excluding the testimony of a witness because defendant did not show that the decision to exclude the witness's testimony prejudiced him; the witness was not offered as a rebuttal witness and did not profess to have any first-hand knowledge of the shooting or the events leading up to the incident. Hall v. State, 295 So. 3d 544, 2019 Miss. App. LEXIS 610 (Miss. Ct. App. 2019).

In a sexual assault case, there was no violation of Miss. R. Evid. 615 because a deputy was not present during the testimony of another witness, and defendant failed to show how he was prejudiced by the deputy's presence on the stand during a discussion between attorneys. Randle v. State, 220 So. 3d 217, 2017 Miss. App. LEXIS 94 (Miss. Ct. App. 2017).

Chancery court did not violate the rule when it allowed a child to testify outside of the father's presence because the father's attorney was present during the child's testimony, the attorney cross-examined the child, the chancery court also allowed the father to give rebuttal testimony to factual assertions by the child; there was no reported precedent of enforced exclusion of a party under the circumstances of testimony by a seventeen-year-old stepchild. Miller v. Smith, 229 So. 3d 148, 2016 Miss. App. LEXIS 749 (Miss. Ct. App. 2016), aff'd, 229 So. 3d 100, 2017 Miss. LEXIS 427 (Miss. 2017).

Trial court abused its discretion by excluding a defense witness's testimony for no basis other than a violation of the sequestration rule because it should have made a determination as to the prejudicial effect of the violation; White v. State, 127 So. 3d 170, 2013 Miss. LEXIS 577 (Miss. 2013).

Exclusion of a defense witness based on the violation by the witness of a sequestration order was an abuse of discretion because there was no evidence the State of Mississippi would have been prejudiced by the testimony of the witness. Clark v. State, 127 So. 3d 292, 2013 Miss. App. LEXIS 553 (Miss. Ct. App. 2013).

Denial of appellant's, an inmate's, motion for postconviction relief was proper because his argument that he was denied a fair trial as a result of witness and juror misconduct was without merit. The submitted affidavits lacked any mention of what was discussed, if it pertained to the inmate's trial, or any indication, other than the inmate's unsupported claim of prejudice, that there was any possibility that what the witnesses discussed affected the outcome of the inmate's trial, or had anything to do with it whatsoever; assuming arguendo that the affidavits were accurate, the inmate failed to show such an adverse affect. Conway v. State, 48 So. 3d 588, 2010 Miss. App. LEXIS 270 (Miss. Ct. App.), cert. denied, 49 So. 3d 1139, 2010 Miss. LEXIS 627 (Miss. 2010).

Witness and witness's child, who was also slated to testify, were seen together during a break in the witness's testimony; the trial court did not err in refusing to preclude the child's testimony because there was no reason to believe that the child and the witness had discussed testimony. Harris v. State, 937 So. 2d 474, 2006 Miss. App. LEXIS 644 (Miss. Ct. App. 2006).

Defendant's convictions for murder and aggravated assault were proper where a detective's testimony went to an uncontested and purely technical matter of the procedure for introducing a shotgun into evidence and establishing its chain of custody. Because of that, none of the reasons behind the witness sequestration rule, Miss. R. Evid. 615, were implicated. Johnson v. State, 910 So. 2d 1174, 2005 Miss. App. LEXIS 404 (Miss. Ct. App. 2005).

Appellant could not show prejudice by the trial court in allowing a witness to return to the witness room after testifying; it did not appear that any material issue of the case was discussed. Though the case was discussed generally, the record was devoid of a showing that any witness had discussed his or her personal testimony with the others. Partain v. Sta-Home Health Agency of Jackson, Inc., 904 So. 2d 1112, 2004 Miss. App. LEXIS 976 (Miss. Ct. App. 2004).

Trial court did not err in excluding from the courtroom certain witnesses after the sequestration rule, Miss. R. Evid. 615, was invoked because the 500 names of the other witnesses were not originally listed as parties on the original complaint pursuant to Miss. R. Civ. P. 10(a), and thus they were not considered parties. Prestridge v. City of Petal, 841 So. 2d 1048, 2003 Miss. LEXIS 53 (Miss. 2003).

The investigating officer was properly permitted to remain in the courtroom as the case agent; he qualified as a representative of the state, and the defendant raised no specific ways in which he was prejudiced by his being allowed to remain in the courtroom. Whittington v. State, 748 So. 2d 716, 1999 Miss. LEXIS 312 (Miss. 1999).

The court did not err in denying the defendant's motion that his mother be excluded from sequestration during the guilt phase of the trial, since the rule is mandatory in nature, and there was no evidence that his mother fit within one of the exceptions provided by the rule. Puckett v. State, 737 So. 2d 322, 1999 Miss. LEXIS 122 (Miss. 1999).

Where there was no clear evidence that witness sequestration rule was violated, it could not be said that husband in divorce action was prejudiced as a result, and without proof of collusion in witnesses' testimony, chancellor did not err in denying husband's motion for new trial based on violation of the rule. Bland v. Bland, 629 So. 2d 582, 1993 Miss. LEXIS 567 (Miss. 1993).

Where husband of aggravated assault victim spoke to witnesses about his wife's testimony, this violated the spirit of this rule; error was found harmless, however, in absence of any showing of prejudice to defendant. Lewis v. State, 580 So. 2d 1279, 1991 Miss. LEXIS 314 (Miss. 1991).

The trial judge was correct to deny the defendant a mistrial on the grounds of the improper contact between himself and his wife during a recess; the trial judge correctly treated the issue as a Rule 615 violation and allowed cross-examination in the presence of the jury on the improper contact. Hughes v. State, 735 So. 2d 238, 1999 Miss. LEXIS 131 (Miss. 1999), cert. denied, 528 U.S. 1083, 120 S. Ct. 807, 145 L. Ed. 2d 680, 2000 U.S. LEXIS 242 (U.S. 2000).

### RESEARCH REFERENCES

**ALR.**

Exclusion of witnesses under Rule 615 of Federal Rules of Evidence. 181 A.L.R. Fed. 549.

## Rule 616. Witness's bias.

Evidence of a witness's bias, prejudice, or interest – for or against any party – is admissible to attack the witness's credibility.

**HISTORY: Adopted effective March 1, 1989; restyled effective July 1, 2016.**

### ADVISORY COMMITTEE HISTORICAL NOTE

Effective March 1, 1989, the Court adopted amended Rule 616. 536-538 So. 2d XXXII (West Miss. Cas. 1989).

## ADVISORY COMMITTEE NOTE

The language of Rule 616 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The common law permitted inquiry into a witness's bias, prejudice, or interest in a case for credibility purposes. *See* Ellis & Williams, *Mississippi Evidence,* § 4-4. The Mississippi Rules of Evidence did not originally include a rule permitting examination of a witness's bias, prejudice, or interest. Despite a similar omission in the Federal Rules of Evidence, the United States Supreme Court reaffirmed the common law use of impeachment by bias, prejudice, or interest in *United States v. Abel,* 469 U.S. 45, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984). MRE 616 codifies this longstanding principle in Mississippi as well as the holding in *United States v. Abel.* MRE 616 tracks the language of Uniform Rule of Evidence 616. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

In general.
Gangs.
Prior crimes.
Racial prejudice.
Remoteness.
Settlement agreements.
Threats.
Illustrative cases.

**In general.**

Court rejected defendant's contention that the State violated Miss. R. Evid. 404(b) in asking the girlfriend whether defendant had coerced her to lie on the stand; given the change in the girlfriend's testimony from what she said in a previous statement, the State was permitted to present evidence under Miss. R. Evid. 616, and the question was not so inflammatory as to have constituted prosecutorial misconduct. Pipkins v. State, 878 So. 2d 119, 2004 Miss. App. LEXIS 15 (Miss. Ct. App.), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 946 (Miss. 2004).

It is permissible to adduce evidence to the effect that a witness has exercised the right to refuse to discuss the case with a party, and to examine the witness in that regard. Lacy v. State, 629 So. 2d 591, 1993 Miss. LEXIS 572 (Miss. 1993).

**Gangs.**

In a prosecution for murder, the state was properly permitted to show that a defense witness was married to a member of the defendant's gang, notwithstanding the contention that such evidence was inadmissible as the only proper way to attack a witness's credibility is by opinion or reputation evidence relating to the witness's character for truthfulness; a witness's credibility may be attacked by showing evidence of bias of the witness for any party to the case and the fact that the witness was married to a member of the defendant's gang sufficiently invoked considerations of bias on the part of the witness to permit the introduction of such evidence. Street v. State, 754 So. 2d 497, 1999 Miss. App. LEXIS 579 (Miss. Ct. App. 1999).

**Prior crimes.**

Circuit court properly sentenced defendant to 30 years in custody for aggravated assault because, inter alia, three witnesses' descriptions of the shooter matched defendant's physical appearance, the jury instruction regarding the identification of defendant. by the single eyewitness who knew him before the shooting and identified him in a photo array and at trial, was a correct statement of law and left it to the jury to judge the witness's credibility and weigh it against the other evidence presented at trial, defendant failed to inform the trial court of the witness's alleged bias, prejudice, or interest, and he also failed to inform the prosecution of his alibi defense. Robinson v. State, 247 So. 3d 1212, 2018 Miss. LEXIS 175 (Miss. 2018).

Trial court erred in refusing to allow defendant to cross-examine an informant about prior convictions and an arrest because favorable treatment the informant received on prior charges in exchange for his testimony was a material point that affected his credibility as a witness, and was allowable cross-examination under Miss. R. Evid. 616. Anthony v. State, 108 So. 3d 394, 2013 Miss. LEXIS 7 (Miss. 2013).

Where defendant argued that failure to admit documentary evidence of a murder indictment against the codefendant, who testified against defendant, was improper, defendant's claim failed; although evidence tending to show bias was admissible pursuant to Miss. R. Evid. 616, the evidence was needlessly cumulative under Miss. R. Evid. 403, as this evidence was already admitted by defense counsel, who read from the plea hearing transcript related to the codefendant's murder charge and ably cross-examined the codefendant about the codefendant's motive to lie. Smith v. State, 848 So. 2d 195, 2003 Miss. App. LEXIS 350 (Miss. Ct. App. 2003).

Where defendant fired shots at victim's legs, trial court did not err in prohibiting defense counsel from inquiring into victim's prior criminal history. McNair v. State, 814 So. 2d 153, 2001 Miss. App. LEXIS 428 (Miss. Ct. App. 2001).

In a prosecution for felony driving under the influence and negligently causing the death of a pedestrian, the court committed reversible error when it refused to allow the defendant to present evidence that defendant had three prior burglary convictions, but received only probation as a result of cooperating with the state. Zoerner v. State, 725 So. 2d 811, 1998 Miss. LEXIS 303 (Miss. 1998).

Trial court in drug prosecution did not err in allowing district attorney to cross-examine defense witness as to whether he had ever been indicted for possession of cocaine, as this was admissible to show bias on part of witness. Bradley v. State, 562 So. 2d 1276, 1990 Miss. LEXIS 267 (Miss. 1990).

**Racial prejudice.**

There was no legitimate evidentiary purpose for defense counsel's questions to a witness concerning his feelings about black people, as the witness, the defendant, and the victim were all white. Kolberg v. State, 829 So. 2d 29, 2002 Miss. LEXIS 268 (Miss. 2002), cert. denied, 538 U.S. 981, 123 S. Ct. 1787, 155 L. Ed. 2d 672, 2003 U.S. LEXIS 3010 (U.S. 2003), overruled in part, Harrell v. State, 134 So. 3d 266, 2014 Miss. LEXIS 52 (Miss. 2014), overruled in part, Rowsey v. State, 188 So. 3d 486, 2015 Miss. LEXIS 573 (Miss. 2015).

In a prosecution for the sale of less than one ounce of marijuana, defense counsel was properly precluded from questioning a state's witness who purchased the marijuana at issue from the defendant regarding his racial prejudices in order to show his prejudice against the defendant since the motive of the witness for telling a law enforcement officer about the pending drug transaction was not relevant to whether the defendant sold marijuana to the witness. Westbrook v. State, 770 So. 2d 1038, 2000 Miss. App. LEXIS 500 (Miss. Ct. App. 2000).

**Remoteness.**

Whether fight between defendant and confidential informant occurred twelve or twenty years before sale of crack cocaine by defendant to undercover agent, trial court did not err in ruling that evidence of fight was too remote to be allowed for impeachment purposes on cross-examination. Tillis v. State, 661 So. 2d 1139, 1995 Miss. LEXIS 491 (Miss. 1995).

**Settlement agreements.**

Settlement agreement between motorist and driver of truck which pulled in front of him gave truck driver an interest in the outcome of motorist's suit against truck driver's employer, and trial court erred in denying employer the right to show its driver's interest. W.J. Runyon & Son v. Davis, 605 So. 2d 38, 1992 Miss. LEXIS 423 (Miss. 1992).

**Threats.**

In a prosecution for discharging a shotgun into a dwelling, the court erroneously refused to permit defense counsel to question the owner of the house with regard to her attempt to obtain a loan from defense counsel and her statement, when denied, that her testimony would be harmful to the defendant. Johnson v. State, 756 So. 2d 4, 1999 Miss. App. LEXIS 165 (Miss. Ct. App. 1999).

**Illustrative cases.**

In a statutory rape prosecution, it was not error to bar defense counsel from asking a witness about a desire to drop the charges because (1) this did not tend to make facts constituting the crime more or less probable, and (2) this did not show bias, prejudice, or interest by tending to make facts the witness testified to less probable. Cage v. State, 149 So. 3d 1038, 2014 Miss. LEXIS 536 (Miss. 2014).

Investigator's testimony was properly admitted and a recording of a defense witness's conversation with the investigator was properly played for the jury as they evidenced the witness's bias since the witness acknowledged that she and defendant were friends, and stated in the recording that she was worried that when defendant found out the witness went against her, defendant would revoke her bond. Pearson v. State, 115 So. 3d 148, 2013 Miss. App. LEXIS 348 (Miss. Ct. App. 2013).

Evidence that plaintiffs but not defendants pressed theft charges against defendants' employee, who testified for defendants, was properly excluded; it was not probative of his bias because the alleged thefts and the criminal charges arose and were resolved after plaintiffs had deposed him. Tellus Operating Group, LLC v. Tex. Petroleum Inv. Co., 105 So. 3d 274, 2012 Miss. LEXIS 488 (Miss. 2012).

Although defendant's mother's proposed testimony was proper extrinsic evidence to impeach the victim's earlier denial of bias against defendant, pursuant to Miss. R. Evid. 613(b) and 616, due to the overwhelming evidence of defendant's guilt, the complained of error in failing to allow that testimony was harmless. Banks v. State, 45 So. 3d 676, 2010 Miss. App. LEXIS 84 (Miss. Ct. App. 2010).

Defense counsel was given an opportunity to explore bias sufficient to expose the jury to facts to assess the credibility of witnesses pursuant to Miss. R. Evid. 616; petitioner inmate suffered no substantial violation of Confrontation Clause rights by the restrictions placed upon cross-examination of the witnesses. Manning v. Epps, 695 F. Supp. 2d 323, 2009 U.S. Dist. LEXIS 120719 (N.D. Miss. 2009).

During defendant's trial for possession of cocaine, a defense witness testified that she did not see defendant throw any drugs on the ground; during cross-examination, the prosecutor questioned the witness about her son's murder conviction, eliciting testimony that he himself had been the prosecutor at her son's murder trial. The trial court correctly permitted the State's cross-examination of a defense witness regarding her sons' criminal records under Miss. R. Evid. 616, because it was relevant and admissible to show her possible bias in her testimony against the State. Butler v. State, 19 So. 3d 111, 2009 Miss. App. LEXIS 154 (Miss. Ct. App.), cert. denied, 19 So. 3d 82, 2009 Miss. LEXIS 490 (Miss. 2009).

In a medical malpractice action, evidence that a doctor's experts were all members of the same insurer was properly not admitted because the probative value of the evidence that the doctor's experts could incur a financial penalty of $ 136 if the patient was successful on her claim was substantially outweighed by the danger of unfair prejudice resulting from the admission of evidence concerning the existence of a liability insurance policy. Wells v. Tucker, 997 So. 2d 908, 2008 Miss. LEXIS 480 (Miss. 2008).

In defendant's criminal case, defendant's argument that he should have been allowed to cite the many times that a witness received favorable treatment by the police was erroneous. The witness was far from a material or key witness and there was nothing in the record that showed what the witness's arrests were for, their disposition, or even proof that the arrests occurred at all. Vickers v. State, 994 So. 2d 200, 2008 Miss. App. LEXIS 208 (Miss. Ct. App.), cert. denied, 998 So. 2d 1010, 2008 Miss. LEXIS 675 (Miss. 2008).

Defendant's proffer showed that not only did a witness believe that the prosecutor's office had the power to offer him leniency, but in fact his lawyer was working on it; that was permissible evidence of bias and interest, which defendant was entitled to show under Miss. R. Evid. 616, and without testimony about his beliefs of leniency, the jury was unable to consider if the change in the witness's statements to police and his testimony at trial was because he hoped to ingratiate himself to the district attorney's office. Davis v. State, 970 So. 2d 164, 2006 Miss. App. LEXIS 907 (Miss. Ct. App. 2006), cert. denied, 968 So. 2d 948, 2007 Miss. LEXIS 652 (Miss. 2007).

During the cross examination of a murder defendant's alibi witness and his purported eyewitness to shooting at issue, evidence was allowed establishing that neither of these witnesses had ever reported their valuable exculpatory evidence to investigating officers and that both witnesses had a personal friendship with the defendant as such evidence was admissible as an indication of their possible bias in favor of the defendant. Brown v. State, 764 So. 2d 463, 2000 Miss. App. LEXIS 139 (Miss. Ct. App. 2000).

Defendant's claim that he should have been allowed to examine witness for prejudice based on an alleged criminal complaint witness had previously filed against defendant was denied where there was no evidence on the record describing this charge. Fields v. State, 758 So. 2d 440, 1999 Miss. App. LEXIS 693 (Miss. Ct. App. 1999).

A chancery court order forbidding the child abuse victim to be in the presence of her stepfather was valuable evidence to be considered in assessing the victim's mother's credibility as to whether she told her daughter to lie about visiting her home, and the order was therefore admissable. Herrington v. State, 690 So. 2d 1132, 1997 Miss. LEXIS 8 (Miss. 1997).

## Rule 617. Taking testimony of a child by closed circuit television.

(a) *Grounds.* — On the motion of a person named in subdivision (b), or on its own, the court may order that a child's testimony be taken outside the courtroom and shown in the courtroom by means of closed-circuit television if the court determines that:

(1) the child is under the age of 16 years;

(2) the testimony is that an unlawful sexual act, contact, intrusion, penetration, or other sexual offense was committed on the child; and

(3) there is a substantial likelihood that the child will suffer traumatic emotional or mental distress if compelled to testify:

(A) in open court; and

(B) in a criminal case, in the presence of the accused.

(b) *Procedure on the motion.* —

(1) *Motion.*The motion may be filed by:

(A) the child;

(B) the child's attorney, parent, legal guardian, or guardian *ad/litem;*

(C) the prosecutor; or

(D) any party.

(2) *Hearing and order.* In ruling on the motion, the court must:

(A) conduct a hearing *in camera;* and

(B) make specific findings of fact, on the record, as to the basis of the ruling.

(c) *Taking testimony.* —

(1) *Methods.*Closed-circuit television testimony may be taken by any method for taking testimony outside the courtroom and showing it in the courtroom that is not inconsistent with the Confrontation Clauses of the United States and Mississippi Constitutions or applicable rules adopted by the Mississippi Supreme Court.

(2) *Counsel.* All parties must be represented by counsel when testimony is taken.

(3) *Criminal case.* If the conditions in subdivision (a) are met in a criminal case, the court may exclude the defendant from the room where the testimony is taken if:

(A) an appropriate private electronic or telephonic device enables the defense attorney to be in continual contact with the defendant; and

(B) the defendant, the court, and the jury can observe the demeanor of the child witness.

(4) *Expert assistance.* If the parties agree, the court may appoint a person to aid in formulating methods of questioning the child and to assist the court in interpreting the child's answers. The person appointed must be a child sexual abuse expert who has dealt with the child in a therapeutic setting concerning the offense or act.

(d) *Identifying the defendant.* — When the child is asked to identify the defendant, both may be present in the courtroom simultaneously.

**HISTORY: Adopted effective March 27, 1991; restyled effective July 1, 2016.**

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective March 27, 1991, the Court adopted Rule 617. 574-576 So. 2d XXVIII (West Miss. Cas. 1991).

## ADVISORY COMMITTEE NOTE

The language of Rule 617 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. The Rule has been restructured, using fewer subdivisions in favor of additional paragraphs and subparagraphs. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

This rule provides an exceptional procedure for the taking of testimony from children said to have been the victims of sexual abuse. If this rule is applied in a criminal case, the rights of the defendant under the Confrontation Clauses of Federal and State Constitutions must be respected. *Maryland v. Craig,* 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990); *Coy v. Iowa,* 487 U.S. 1012, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988). (Amended effective July 1, 2009 to update citations; "Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

Confrontation.
Objection.
Suffering of traumatic and emotional distress.
Unavailability of child witness.

**Confrontation.**

Chancery court did not violate the rule when it allowed a child to testify outside of the father's presence because the father's attorney was present during the child's testimony, the attorney cross-examined the child, the chancery court also allowed the father to give rebuttal testimony to factual assertions by the child; there was no reported precedent of enforced exclusion of a party under the circumstances of testimony by a seventeen-year-old stepchild. Miller v. Smith, 229 So. 3d 148, 2016 Miss. App. LEXIS 749 (Miss. Ct. App. 2016), aff'd, 229 So. 3d 100, 2017 Miss. LEXIS 427 (Miss. 2017).

Chancery court did not violate the rule because no interview was taken using closed-circuit television, as provided in the rule. Miller v. Smith, 229 So. 3d 148, 2016 Miss. App. LEXIS 749 (Miss. Ct. App. 2016), aff'd, 229 So. 3d 100, 2017 Miss. LEXIS 427 (Miss. 2017).

In a case involving sexual abuse of children, defendant's Sixth Amendment claim was rejected because he failed to show that he was prejudiced by the denial of the right to view the demeanor of the children as they testified via closed circuit television, pursuant to Miss. R. Evid. 617. Therefore, defendant's motions for a mistrial and a new trial were properly denied. Rollins v. State, 970 So. 2d 716, 2007 Miss. LEXIS 707 (Miss. 2007).

**Objection.**

In a case involving sexual abuse of children, defendant was unable to appeal based on a jury's inability to hear the testimony of children through a closed circuit television because his defense counsel specifically failed to object; at any rate, the record revealed that the trial judge's court administrator was in the courtroom with the jury during the closed-circuit testimony of the minor children, and that the court administrator was to immediately inform the trial judge if technical difficulties arose so that the problems could be remedied and questions and responses could be repeated. Rollins v. State, 970 So. 2d 716, 2007 Miss. LEXIS 707 (Miss. 2007).

**Suffering of traumatic and emotional distress.**

Trial court conducted a hearing, outside the presence of the jury, in order to make a ruling regarding the giving of testimony of the children by closed circuit television; the parents testified that both children feared defendant because of threats which he made at the time of the abuse, and there was sufficient evidence to support that there was a substantial likelihood that the victims would suffer traumatic and emotional distress if they were compelled to come into court and testify; the witnesses established that both children were frightened of defendant, more than just nervousness, and that the use of closed circuit television for their testimony was necessary for their welfare. Bradley v. State, 921 So. 2d 385, 2005 Miss. App. LEXIS 865 (Miss. Ct. App. 2005).

**Unavailability of child witness.**

In a termination of parental rights proceeding, the county department of human services failed to show that the children at issue were unavailable and, therefore, their prior statements were not admissible under the tender years exception to the hearsay rule, where the department failed to show that there was no reasonable alternative means of testifying, such as closed-circuit television or videotape deposition, that would eliminate the trauma that would have been caused by in-person testimony in the presence of their parents. J. L. W. W. v. Clarke County Dep't of Human Servs., 759 So. 2d 1183, 2000 Miss. LEXIS 92 (Miss. 2000).

The procedural requirements of this rule are not incorporated into the "unavailability" analysis of Rule 804(a)(6); thus, whether a party filed a motion under this rule does not affect the determination of whether a child witness was unavailable within the meaning of Rule 804(a)(6). J.L.W.W. v. Clarke County Dep't of Human Servs., 1999 Miss. App. LEXIS 476 (Miss. Ct. App. July 20, 1999), aff'd, 759 So. 2d 1183, 2000 Miss. LEXIS 92 (Miss. 2000).

## ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

### Rule 701. Opinion testimony by lay witnesses.

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

**HISTORY: Amended March 2, 1987, effective October 1, 1987; amended April 17, 2000, effective December 1, 2000; amended effective May 29, 2003, to prohibit opinion testimony under Rule 701 based on scientific, technical, or other specialized knowledge within the scope of Rule 702; restyled effective July 1, 2016.**

### ADVISORY COMMITTEE NOTE

The language of Rule 701 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

All reference to an "inference" has been deleted, on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

The traditional rule regarding lay opinions has been, with some exceptions, to exclude them from evidence. Rule 701 is a departure from the traditional rule. It favors the admission of lay opinions when two considerations are met. The first consideration is the familiar requirement of first-hand knowledge or observation. The second consideration is that the witness's opinion must be helpful in resolving the issues. Rule 701, thus, provides flexibility when a witness has difficulty in expressing the witness's thoughts in language which does not reflect an opinion. Rule 701 is based on the recognition that there is often too thin a line between fact and opinion to determine which is which.

The 2003 amendment of Rule 701 makes it clear that the provision for lay opinion is not an avenue for admission of testimony based on scientific, technical or specialized knowledge which must be admitted only under the strictures of Rule 702. (Amended effective May 29, 2003; "Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

### JUDICIAL DECISIONS

#### ANALYSIS

In general.
Accident reconstruction.
Computer information.
Identification evidence.
Medical testimony.
Opinions.
Police testimony.
Sanity.
Slip and fall.
Sobriety tests.
Testimony regarding state law.
Illustrative cases.

**In general.**

Victim's opinion testimony regarding the value of the stolen desk was based on her personal knowledge that her husband paid $3,000 for the desk, her personal knowledge that antique furniture tended to appreciate rather than depreciate, and her personal knowledge that a similar desk was currently for sale for $4,399; the facts that the victim used to establish the value of the desk were all based on her personal knowledge, and there was no scientific or technical basis for her valuation of the desk and her opinion of the estimated value of the desk was therefore admissible. Thompson v. State, 910 So. 2d 60, 2005 Miss. App. LEXIS 31 (Miss. Ct. App. 2005).

Testimony of lay witness at scene of accident that defendant, while at the accident scene, smelled of alcohol, and lay witness believed defendant to be drunk, coupled with testimony of nurse at hospital that defendant had slurred speech, smelled of alcohol, was unsteady, and appeared to have drunk too much alcohol, was admissible where defendant was charged with felony driving under the influence of alcohol causing death, as the combined testimony was rationally based on the respective witness's perception and helpful to understanding of defendant's state of intoxication. Havard v. State, 800 So. 2d 1193, 2001 Miss. App. LEXIS 308 (Miss. Ct. App. 2001).

Where, in order to express an opinion, a witness must possess some experience or expertise beyond that of the average, randomly selected adult, it is an expert opinion and not a lay opinion. Langston v. Kidder, 670 So. 2d 1, 1995 Miss. LEXIS 392 (Miss. 1995).

Opinions admitted under this rule must be helpful to determination of case; questions which would merely allow witness to tell jury what result to reach are not permitted. Whittington v. State, 523 So. 2d 966, 1988 Miss. LEXIS 75 (Miss.), cert. denied, 488 U.S. 923, 109 S. Ct. 304, 102 L. Ed. 2d 323, 1988 U.S. LEXIS 4871 (U.S. 1988).

**Accident reconstruction.**

Accident reconstructionist testified that given the slow speed at which the tractor trailer was turning, if the injured person ( who skidded into the rear of the trailer), had been keeping a proper lookout and operating his vehicle under control at a safe speed, the accident would not have happened. Even though the testimony embraced an ultimate issue on the subject of negligence, such an invasion of the province of the jury was not absolutely barred, and it was not inadmissible as the testimony was helpful to the determination of the case. McKenzie v. Supervalu, Inc., 883 So. 2d 1188, 2004 Miss. App. LEXIS 955 (Miss. Ct. App. 2004).

In a prosecution for DUI manslaughter, the trial court erred when it allowed the introduction into evidence of a sketch of the accident scene that depicted the point of impact where the officer who drew the sketch was not an accident reconstruction expert, there was no evidence concerning debris or skid marks, and the vehicles were not on the road and had traveled post-impact beyond the point of impact. Ware v. State, 790 So. 2d 201, 2001 Miss. App. LEXIS 87 (Miss. Ct. App. 2001).

In a prosecution for DUI manslaughter, a police officer was properly permitted to state his lay opinion regarding the location of the point of impact between the defendant's vehicle and the victim's riding lawn mower as one need not be an expert accident reconstructionist to offer an opinion that tire marks appearing at the scene of accident indicate with some measure of precision the path the vehicle followed at the time of the accident. Jones v. State, 761 So. 2d 907, 2000 Miss. App. LEXIS 157 (Miss. Ct. App. 2000).

**Computer information.**

Because a detective's testimony in a murder case failed to constitute expert testimony, the trial court did not abuse its discretion when it admitted into evidence the detective's testimony or the map he created with a computer software program during the course of his investigation. Collins v. State, 172 So. 3d 813, 2014 Miss. App. LEXIS 563 (Miss. Ct. App. 2014), rev'd, 172 So. 3d 724, 2015 Miss. LEXIS 435 (Miss. 2015).

A police officer was properly permitted to testify that he checked a computer for a document that the defendant claimed was on the hard drive, but did not find any such document. Boone v. State, 811 So. 2d 402, 2001 Miss. App. LEXIS 78 (Miss. Ct. App. 2001).

**Identification evidence.**

Although a trial court erred in allowing a police officer's in-court identification of defendant, as the officer was not sufficiently familiar with defendant, the error was harmless given the weight of the evidence against defendant. Dennis v. State, 271 So. 3d 722, 2018 Miss. App. LEXIS 630 (Miss. Ct. App. 2018).

Trial court did not abuse its discretion in permitting witnesses to testify that they viewed a surveillance video of the armed robbery of a store and, based on their familiarity with how defendant walked, were of the opinion that one of the robbers in the video was defendant. Defendant's claims of lack of sufficient familiarity with how defendant walked and bias against defendant were weight-and-credibility issues for defendant to expose on cross-examination, and not reasons to reverse the trial court's evidentiary ruling. Lenoir v. State, 222 So. 3d 273, 2017 Miss. LEXIS 193 (Miss. 2017).

An investigator's testimony was admissible as opinion testimony by a lay witness where it was not only based upon his personal perception of the gun's trigger tension, but was also based upon his past experiences with guns similar to the one used in the shooting. His testimony was further helpful to a determination by the jury of whether the shooting was accidental or intentional. Sheppard v. State, 910 So. 2d 1182, 2005 Miss. App. LEXIS 606 (Miss. Ct. App. 2005).

Trial court did not err in allowing the employee who identified defendant testify that defendant was the man in the videotape who was caught shoplifting, as under Miss. R. Evid. 701, the employee's face-to-face confrontation with defendant gave the employee a greater familiarity with defendant than the jury had. Ratliff v. State, 879 So. 2d 1062, 2004 Miss. App. LEXIS 749 (Miss. Ct. App. 2004).

Testimony of witnesses as to what a criminal suspect looked like was admissible evidence, as it was not opinion testimony, but rather merely a statement describing the suspect's appearance as the witnesses saw him and the opinions they formed based upon what they saw. Edwards v. State, 797 So. 2d 1049, 2001 Miss. App. LEXIS 370 (Miss. Ct. App. 2001).

In a prosecution for the sale of cocaine in which the core of the defense was the issue of mistaken identity, the court committed reversible error when it refused to allow the defendant's mother to testify that she had viewed the videotape of the transaction at issue and was of the opinion that the person shown making the drug sale was not her son; the error could not be overlooked as harmless as a review of the evidence showed the court that there was a legitimate disputed issue of fact as to whether the person caught on camera was, in fact, the defendant. Bennett v. State, 757 So. 2d 1074, 2000 Miss. App. LEXIS 158 (Miss. Ct. App. 2000).

**Medical testimony.**

In a case in which strangulation was an element of the crime charged in the indictment, the trial court did not commit plain error by permitting a law enforcement officer to testify to medical causation that the victim's injuries appeared to be a result of strangulation because defendant failed to object to the testimony at trial and, in fact, emphasized at on cross examination. Kirk v. State, 160 So. 3d 685, 2015 Miss. LEXIS 68 (Miss. 2015).

Pursuant to Miss. R. Evid. 701, a lay witness could not render an opinion as to whether the symptoms exhibited by a patient were associated with infection. Vaughn v. Miss. Baptist Med. Ctr., 20 So. 3d 645, 2009 Miss. LEXIS 531 (Miss. 2009).

In defendant's trial on a charge of sexual battery, a nurse did not give improper opinion testimony regarding the dried secretions obtained during the administration of the victim's rape kit because the State questioned the nurse regarding hospital protocol in administering a rape kit, which was within her personal knowledge as a nurse who assisted doctors in performing the rape kit and because the nurse did not give any opinions beyond what she was qualified to render; the nurse's testimony helped the jury understand the process by which evidence was gathered and analyzed. The nurse did not state that the dried secretions were seminal fluid but only stated that a foreign substance was found by a process that was used to detect seminal fluid; this was not an opinion but was information gained through her personal observations and experiences. Bolden v. State, 23 So. 3d 491, 2009 Miss. App. LEXIS 193 (Miss. Ct. App.), cert. denied, 22 So. 3d 1193, 2009 Miss. LEXIS 614 (Miss. 2009).

Neither the emergency physician nor the nurse practitioner's testimony constituted impermissible expert testimony where the testimony by the nurse practitioner merely provided information that she had gathered during her treatment of the driver and the physician merely examined the photographs in order to explain her initial diagnosis of the driver immediately after the injury occurred. APAC Miss., Inc. v. Johnson, 15 So. 3d 465, 2009 Miss. App. LEXIS 136 (Miss. Ct. App. 2009).

In an aggravated assault case, an orthopedic surgeon should have been qualified as an expert witness under Miss. R. Evid. 702 and not been allowed to give a lay opinion under Miss. R. Evid. 701 because he was acting in his professional capacity when he testified that a broken bone was caused by high-energy force. However, the error was harmless because it did not deny a substantial right or render the trial fundamentally unfair; photographs of the injuries suffered by defendant's girlfriend were shown, and the girlfriend testified that defendant forced her out of the car, threw her down, kicked her, and stomped on her back. O'Neal v. State, 977 So. 2d 1252, 2008 Miss. App. LEXIS 177 (Miss. Ct. App. 2008).

Doctor's testimony, in a medical malpractice suit where he was the defendant but not designated as an expert witness, was permissible where it was explanatory of the doctor's treatment of the patient and of his records and nursing records about the patient's care; however, some of the doctor's testimony as to the symptoms that the patient would have developed had the doctor negligently perforated the patient's bowel in a surgical procedure was clearly impermissible expert testimony. Therefore, the trial court erred in permitting the expert testimony; however, the error did not warrant reversal as the doctor's expert testimony was largely cumulative to that of his expert witnesses and the doctor presented no new information. Griffin v. McKenney, 877 So. 2d 425, 2003 Miss. App. LEXIS 942 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 867 (Miss. 2004).

**Opinions.**

Witness's testimony was admissible because the testimony was not an expert opinion but was a lay opinion probative of defendant's self-defense claim. Brisco v. State, 295 So. 3d 498, 2019 Miss. App. LEXIS 481 (Miss. Ct. App. 2019), cert. denied, 293 So. 3d 834, 2020 Miss. LEXIS 142 (Miss. 2020).

There was no abuse of discretion in the trial judge's admission of testimony of the director of the domestic violence shelter that the victim appeared frightened and emotionally traumatized when she arrived at the shelter because, as a lay witness, the director could testimony about his personal observations of the victim's mental state. Bell v. State, 287 So. 3d 944, 2019 Miss. App. LEXIS 316 (Miss. Ct. App. 2019), cert. denied, — So. 3d —, 2020 Miss. LEXIS 135 (Miss. 2020).

Simply because a gang investigator's testimony relied on personal knowledge did not automatically place his testimony outside the scope of Miss. R. Evid. 702 because the portions of the testimony concerning the victim's gang membership and the investigator's opinion about a gang rivalry were based on his specialized knowledge, experience, and training; therefore, the State was required to tender the investigator as an expert for those portions of his testimony. Croft v. State, 283 So. 3d 1, 2019 Miss. LEXIS 201 (Miss. 2019).

Defense witness was not allowed to testify as an expert witness, but was allowed to testify as a lay witness, as the witness's testimony was not based on sufficient facts and data because it concerned firearm shooting and not the actual mechanics of the firearm; the witness admitted that he had never written any articles or periodicals on shooting firearms, and could not provide the court with any reliable principles and methods on which his testimony was based; and the witness's testimony was largely contingent upon his own personal observations of the handgun's functionality, in light of defendant's theory of defense. Jones v. State, 269 So. 3d 378, 2018 Miss. App. LEXIS 218 (Miss. Ct. App. 2018).

In a capital murder case, the trial court did not err in allowing a witness to testify that red stains on a hog-feed-container appeared to be blood, as the record clearly indicated that the witness personally observed the red substance while taking photos of the crime scene. And because the witness's testimony concerned the crime scene and the condition of the victim's body, the witness's opinion was helpful to the clear understanding of his testimony and a fact at issue. Hutto v. State, 227 So. 3d 963, 2017 Miss. LEXIS 180 (Miss. 2017), cert. denied, — U.S. —, 138 S. Ct. 983, 200 L. Ed. 2d 262, 2018 U.S. LEXIS 1361 (U.S. 2018).

In an aggravated assault case, defendant did not have firsthand knowledge of the victim's alleged cocaine use on the night of the assault; as such, defendant's testimony regarding the victim's intoxication was opinion testimony and the trial court properly excluded it. Lewis v. State, 198 So. 3d 431, 2016 Miss. App. LEXIS 179 (Miss. Ct. App. 2016).

Coroner's determination that the victim's death was the result of a homicide was not based upon scientific, technical, or other specialized knowledge but rather upon her statutorily required duty to report and her personal observations about the circumstances of the victim's death. Tillis v. State, 176 So. 3d 37, 2014 Miss. App. LEXIS 446 (Miss. Ct. App. 2014), cert. denied, 178 So. 3d 333, 2015 Miss. LEXIS 528 (Miss. 2015).

Trial court's exclusion of opinion testimony from the defense witnesses that the victim was reaching for a weapon when defendant shot him did not violate defendant's right to present a meaningful defense and did not constitute reversible error because two of the defense witnesses testified that the victim was reaching behind his back during their exchange, from which the jury was free to infer that the victim was going for a gun; defendant testified that the victim was the aggressor and that the victim had previously threatened him with a pistol and even shot at him a little over a week earlier; and defendant testified that he believed the victim was reaching for a gun when he shot him. Love v. State, 121 So. 3d 952, 2013 Miss. App. LEXIS 387 (Miss. Ct. App. 2013).

Although defendant argued a police officer provided inadmissible lay opinion testimony, pursuant to Miss. R. Evid. 701, the only matter the officer testified to was that, in his opinion, it was necessary to send two detectives to determine whether defendant was selling drugs; the officer did not testify that, in his opinion, defendant was selling narcotics. Hosey v. State, 77 So. 3d 507, 2011 Miss. App. LEXIS 348 (Miss. Ct. App. 2011), cert. denied, 78 So. 3d 906, 2012 Miss. LEXIS 19 (Miss. 2012).

Defendant's argument that an investigator's testimony as to the path of the bullets was an area requiring expert testimony was without merit. The investigator's testimony was nothing more than his opinion based on his personal observations and the testimony was not intended to prove any ballistic evidence since defendant admitted to shooting the officers. Mayers v. State, 42 So. 3d 33, 2010 Miss. App. LEXIS 88 (Miss. Ct. App.), cert. denied, 42 So. 3d 24, 2010 Miss. LEXIS 437 (Miss. 2010).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the trial court did not err in allowing the sister of the decedent's to testify about the substance found in the decedent's pocket pursuant to Miss. R. Evid. 701. His sister stated that she was familiar with crystal meth, having smoked it as a teenager; she testified that she knew what it looked like and what it smelled like; she actually saw the substance that her mother found and opened the package and smelled it; and the substance smelled like ammonia, as did crystal meth. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450, 2010 Miss. LEXIS 200 (Miss. 2010).

The trial court did not err in allowing an investigator with the Mississippi Department of Corrections to testify regarding the injuries to the victim of a prison stabbing; it was clear that the testimony was opinion testimony, rather than expert testimony, as the investigator simply testified about what he perceived the victim's injuries to have been after speaking with the victim, and furthermore, the testimony was not based on scientific, technical, or specialized knowledge. Kendrick v. State, 21 So. 3d 1186, 2009 Miss. App. LEXIS 811 (Miss. Ct. App. 2009).

Grant of summary judgment in favor of a railway and an engineer in the decedent's wife's action alleging that they caused the wrongful death of her husband was appropriate because a witness's opinion was not admissible as lay testimony since it was based on scientific technical, or other specialized knowledge. In essence, the witness's opinion was that of an expert, except that he was not qualified as one. Kilhullen v. Kan. City S. Ry., 8 So. 3d 186, 2008 Miss. App. LEXIS 195 (Miss. Ct. App. 2008), rev'd, 8 So. 3d 168, 2009 Miss. LEXIS 87 (Miss. 2009).

In a criminal prosecution for conspiracy to commit armed robbery, the store manager was permitted to give his lay opinion testimony as to the view of the safe from where he was standing. The manager was familiar with the store's layout so his testimony was based on personal knowledge under Miss. R. Evid. 701(a). Herring v. State, 938 So. 2d 1251, 2006 Miss. App. LEXIS 82 (Miss. Ct. App.), cert. denied, 939 So. 2d 805, 2006 Miss. LEXIS 752 (Miss. 2006).

Finding against the driver in her action for injuries resulting from a collision with a train at a railroad crossing was appropriate where a witness would not have qualified as an expert on the dynamics of accidents at the crossing; at best he was a lay witness whose opinions were rationally based on his perceptions. Bowman v. CSX Transp., Inc., 931 So. 2d 644, 2006 Miss. App. LEXIS 418 (Miss. Ct. App. 2006).

In a prosecution of defendant for vehicular homicide, opinion testimony from a prosecution witness that some glass he found at the base of a tree came from a passenger window rather than from the windshield did not require specialized knowledge of vehicle construction for which the witness was not qualified as an expert. Dunaway v. State, 919 So. 2d 67, 2005 Miss. App. LEXIS 300 (Miss. Ct. App. 2005), cert. dismissed, 920 So. 2d 1008, 2005 Miss. LEXIS 652 (Miss. 2005), cert. denied, 921 So. 2d 1279, 2006 Miss. LEXIS 35 (Miss. 2006).

**Police testimony.**

In a domestic aggravated assault case, the admission of a sergeant's testimony regarding his lay opinion about the subject of the recorded conversations between defendant and his girlfriend was at best harmless error because the jury was presented with overwhelming evidence in support of defendant's conviction, including the victim's DNA found on a hammer used in the assault and corroborating testimony from the victim and the witnesses she encountered on the date of the incident. Chase v. State, — So. 3d —, 2020 Miss. App. LEXIS 47 (Miss. Ct. App. Feb. 18, 2020), cert. denied, — So. 3d —, 2020 Miss. LEXIS 432 (Miss. 2020).

Trial court did not err in admitting a deputy's testimony that he believed the victim's body was moved after the shooting, as the deputy testified as a lay witness based on his personal perceptions, that required no specialized knowledge. Herrington v. State, 242 So. 3d 909, 2017 Miss. App. LEXIS 601 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 67, 2018 Miss. LEXIS 221 (Miss. 2018).

Admitting an officer's lay opinion testimony was not reversible error because erroneously letting an officer opine based on the officer's law enforcement experience was not prejudicial, as (1) counsel cross-examined the officer on the officer's opinion, (2) a medical examiner contradicted defendant's attempt to show the victim's threat, and (3) defendant said defendant acted irrationally when killing the victim. Crump v. State, 237 So. 3d 808, 2017 Miss. App. LEXIS 385 (Miss. Ct. App. 2017), cert. denied, 237 So. 3d 1268, 2018 Miss. LEXIS 93 (Miss. 2018).

While a police officer's testimony that simply described the information in a cell phone record and the location of cell phone towers may properly have been admitted as lay testimony when it was based upon the personal observations of the witness, the officer should have been qualified as an expert prior to giving opinion testimony regarding the pinpointing of the general locations of defendant's and the victim's cell phones based on historical cellular data. Collins v. State, 172 So. 3d 724, 2015 Miss. LEXIS 435 (Miss. 2015).

Even though the trial court improperly admitted the officer's narration of the video, defense counsel did not raise a proper objection to the narration, and therefore defendant waived the narration argument on appeal. Regardless, the error did not amount to plain error because it did not result in a miscarriage of justice, as the officer's simple description that the man said "goodnight," had little, if any, bearing on the case at hand. Gales v. State, 153 So. 3d 632, 2014 Miss. LEXIS 501 (Miss. 2014).

Because the sergeant's testimony regarding his personal observations of the scene as to where the bullets appeared to have impacted the ground and where he recovered the shell casings was not based on scientific, technical, or other specialized knowledge, but was helpful to the clear understanding of the testimony or the determination of a fact in issue, the sergeant's testimony required no expert certification, and was admissible non-expert testimony. Barber v. State, 143 So. 3d 586, 2013 Miss. App. LEXIS 701 (Miss. Ct. App. 2013), cert. denied, 139 So. 3d 74, 2014 Miss. LEXIS 350 (Miss. 2014).

During defendant's trial for possession of a firearm by a convicted felon, the court erred in allowing an officer to testify as a lay witness about external factors that affected whether or not fingerprints could be recovered off of a gun because the officer's testimony was based on the officer's experience as an officer and the training the officer had received in fingerprint analysis. Conner v. State, 45 So. 3d 300, 2010 Miss. App. LEXIS 546 (Miss. Ct. App. 2010).

Pursuant to Miss. R. Evid. 701, which mirrors Fed. R. Evid. 701, there was no error in allowing a sheriff to detail his theory of the crime for the jury in a capital murder case because the sheriff was present at the crime scene and had first-hand knowledge of the facts from which he drew reasonable inferences. Manning v. Epps, 695 F. Supp. 2d 323, 2009 U.S. Dist. LEXIS 120719 (N.D. Miss. 2009).

Officer's descriptions of the victim's and defendant's wounds that he observed first-hand and their relative severity were factual descriptions that did not require expert testimony. Hicks v. State, 6 So. 3d 1099, 2008 Miss. App. LEXIS 481 (Miss. Ct. App. 2008), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 161 (Miss. 2009).

Major's testimony concerning the manner in which he had ordinarily encountered cocaine during his career as a law enforcement officer was based on his experience and did not exceed what was allowed under Miss. R. Evid. 701. Barlow v. State, 8 So. 3d 196, 2008 Miss. App. LEXIS 471 (Miss. Ct. App. 2008), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 204 (Miss. 2009).

In a rape case, there was no error in allowing a police officer to testify under Miss. R. Evid. 701 that there was evidence to show that a rape had taken place; he did not testify that defendant had committed the crime, but was recounting this belief based on his personal perception of the victim upon arriving at the crime scene. The officer saw that the victim was partially nude, and she had visible injuries to her face and body. McGriggs v. State, 987 So. 2d 455, 2008 Miss. App. LEXIS 191 (Miss. Ct. App.), cert. dismissed, 998 So. 2d 1010, 2008 Miss. LEXIS 641 (Miss. 2008).

In a criminal prosecution for murder and attempted arson, defendant argued that her written confession given to law enforcement was rendered involuntary because she suffered from post-traumatic stress disorder and borderline personality disorder; the circuit court did not err by admitting lay opinion testimony of defendant's mental status under Miss. R. Evid. 701. The investigating officer was permitted to testify that defendant did not appear to be suffering from any mental disease or illness; he did not have to be qualified as an expert prior to tendering his opinion. Brown v. State, 981 So. 2d 1007, 2007 Miss. App. LEXIS 806 (Miss. Ct. App. 2007), cert. denied, 981 So. 2d 298, 2008 Miss. LEXIS 222 (Miss. 2008).

Where defendant's blood alcohol content was over the legal limit, and while there was no eyewitness testimony that defendant in fact drove the car that hit the victim, there was sufficient circumstantial evidence to convict defendant of a DUI homicide under Miss. Code Ann. § 63-11-30(1)(c) and (5) because: (1) the early morning time and rural location of the collision allowed the jury to form a reasonable inference that defendant drove the car that hit the victim; (2) the jury could have found based on the time and location that it was unlikely that defendant would have been walking in that area; (3) the jury could have reasonably inferred that defendant was at the scene of the collision because he drove one of the two cars involved in the collision and would not have been able to leave the scene of the accident; (4) the jury could have found that defendant's proximity to the collision and his status as the sole non-emergency personnel present indicated his involvement in the collision; (5) defendant told an officer that he could not remember how the collision happened, not that he did not know how the collision occurred; (6) defendant never mentioned anyone else who could have possibly been driving; and (7) pursuant to Miss. R. Evid. 701, the officer testified that he concluded that defendant was driving based on his presence, the presence of emergency responders, and common sense. Travis v. State, 972 So. 2d 674, 2007 Miss. App. LEXIS 342 (Miss. Ct. App. 2007), cert. denied, 973 So. 2d 244, 2008 Miss. LEXIS 1 (Miss. 2008).

In a DUI homicide case under Miss. Code Ann. § 63-11-30(1)(c) and (5), the trial court did not abuse its discretion in admitting an officer's testimony that defendant was driving the car that hit the victim because the officer concluded that defendant was driving that car based on defendant's presence as the sole non-emergency personnel present at the scene, the presence of emergency responders, and common sense. Travis v. State, 972 So. 2d 674, 2007 Miss. App. LEXIS 342 (Miss. Ct. App. 2007), cert. denied, 973 So. 2d 244, 2008 Miss. LEXIS 1 (Miss. 2008).

In a murder trial, the investigating police officer testified that if a pistol had been fired when held by the handle, no gunpowder residue would have been present on one's hand, while if one fired a pistol and held it the way defendant claimed he had held the pistol, there would have been powder burns on one's person or clothing; while the officer was not designated as an expert, the latter testimony was admissible as it was based on his experience and perception as a law enforcement officer and he did not state his opinion of whether or not defendant held the pistol in the manner he claimed. Marbra v. State, 904 So. 2d 1169, 2004 Miss. App. LEXIS 1040 (Miss. Ct. App. 2004).

Detective's testimony that two people could murder the same person was not improper because it did not require any expertise and he was not testifying as an expert, and furthermore, because defendant's defense was that another person whom defendant had been with at the victim's residence was the more appropriate suspect, the testimony was helpful to the determination of a fact in issue. Bailey v. State, 2006 Miss. App. LEXIS 508 (Miss. Ct. App. June 27, 2006), op. withdrawn, sub. op., modified, 956 So. 2d 1016, 2007 Miss. App. LEXIS 112 (Miss. Ct. App. 2007).

Officer's opinion as a lay witness that defendant appeared to be aiming at officers and seemed unsure of which one he wanted to shoot was admissible because the statements were rationally based on what the officer had observed. Stringer v. State, 862 So. 2d 566, 2004 Miss. App. LEXIS 4 (Miss. Ct. App. 2004).

Where defendant was charged with driving under the influence, the trial court did not commit reversible error under Miss. R. Evid. 701 and 704 in allowing police officers to give their opinions that defendant was under the influence because the opinions were rationally based on the perceptions of the officers, helpful to the trier of fact, and not based on scientific knowledge. Christian v. State, 859 So. 2d 1068, 2003 Miss. App. LEXIS 1074 (Miss. Ct. App. 2003).

Although the police officer had the opportunity to smell burning marijuana previously during his police career, this did not make him an expert on burning plant matter; the officer was properly allowed to express an opinion upon his personal observation and perception at the scene itself and any error in allowing the testimony was harmless because the substance found in the room, after testing, proved to be marijuana. Bailey v. State, 837 So. 2d 228, 2003 Miss. App. LEXIS 55 (Miss. Ct. App. 2003).

Court rejected defendant's claim that a police officer's testimony was inadmissible under Miss. R. Evid. 701; although the officer referred to the substance found in defendant's residence as a controlled substance, because the trial court gave the jury a curative instruction, there was no abuse of discretion in the trial court's refusal to grant a mistrial pursuant to Miss. Unif. Cir. & County Ct. Prac. R. 3.12 on this basis. Mooneyham v. State, 842 So. 2d 579, 2002 Miss. App. LEXIS 472 (Miss. Ct. App. 2002), cert. denied, 2003 Miss. App. LEXIS 394 (Miss. Ct. App. Feb. 27, 2003), cert. denied, 837 So. 2d 771, 2003 Miss. LEXIS 223 (Miss. 2003).

A police officer was properly permitted to testify that, at the time of his arrest, the defendant was wearing boots with a tread pattern similar to a boot print found under the door knob of the victim's home as such testimony met the criteria set out by the rule and, as a 12-year veteran investigator, the officer's job was to notice details. Adams v. State, 794 So. 2d 1049, 2001 Miss. App. LEXIS 170 (Miss. Ct. App. 2001).

The trial court did not err by admitting a police officer's testimony about his opinion that the defendant had burglarized a store, notwithstanding the argument that the statement did not meet the requirements for lay opinions under Rule 701 and that the officer had not been determined to be an expert as required for expert opinions under Rule 702, since the statement was made in the context of the officer's thought process during the investigation to explain why he acted and proceeded in the manner that he did. Desalvo v. State, 776 So. 2d 704, 2000 Miss. App. LEXIS 339 (Miss. Ct. App. 2000).

In a prosecution for robbery, it was error to allow a police officer to testify that, based on the victim's description of the events that occurred, the victim was subjected to strong-arm robbery since the issue of whether a robbery occurred was an issue for the jury to the decide and any rational juror could determine whether a robbery occurred without the comment from the officer. Holliday v. State, 758 So. 2d 1078, 2000 Miss. App. LEXIS 166 (Miss. Ct. App. 2000).

Two police officers were improperly allowed to offer their opinion that the defendant intended to run them off the road when he swerved his vehicle at their patrol car; while the officers could have testified as whether the defendant appeared to deliberately or involuntarily swerve his vehicle since such question would only have called for a "common-sense observance," the prosecutor's request for the officers' opinions as to whether the defendant had the intent to run them off the road or to cause them injury went beyond the purview of the rule's requirement that the opinion must be rationally based on the perception of the witness. Morris v. State, 748 So. 2d 143, 1999 Miss. LEXIS 310 (Miss. 1999).

In a prosecution for murder, it was error to allow a police officer to comment on the similarity between a kitchen knife discovered in the defendant's dresser and a knife discovered near the victim's class ring, since the jury was clearly able to examine the knives themselves and draw lay conclusions; however, the error was harmless as the officer merely commented on what was plainly obvious and made no attempt to positively match the knives, he did he base his opinion on any expertise, and the knives were of little importance to the case. Hughes v. State, 735 So. 2d 238, 1999 Miss. LEXIS 131 (Miss. 1999), cert. denied, 528 U.S. 1083, 120 S. Ct. 807, 145 L. Ed. 2d 680, 2000 U.S. LEXIS 242 (U.S. 2000).

A police officer's testimony that a shoe print he observed on the kicked-in back door of the victim's home was of the same pattern as a pair of shoes he observed in the defendant's house was a permissible lay opinion. Smith v. State, 725 So. 2d 922, 1998 Miss. App. LEXIS 512 (Miss. Ct. App. 1998).

Trial court did not err in refusing to allow investigating police officers to give testimony, as lay witnesses, concerning cause of accident, where opinion which plaintiffs attempted to solicit was an expert opinion based on training and experience. Couch v. City of D'Iberville, 656 So. 2d 146, 1995 Miss. LEXIS 258 (Miss. 1995).

A police officer should not have been allowed to testify as either an expert witness or a lay witness where he was not tendered or qualified as an expert witness, and at the same time, lacked the first-hand knowledge necessary to be a lay witness; finally his testimony was duplicative and not helpful to the clear understanding of the fact at issue. Roberson v. State, 569 So. 2d 691, 1990 Miss. LEXIS 666 (Miss. 1990).

Testimony of officer, that after two-month investigation he and other officers were unable to identify anyone other than defendant who had been at scene of crime, was permissible lay opinion testimony, where it consisted of both fact and opinion, and was rationally based on officer's personal perceptions. Jackson v. State, 551 So. 2d 132, 1989 Miss. LEXIS 330 (Miss. 1989).

Trial court did not err by allowing officer to testify as a lay witness that, in her opinion, defective brake lights contributed to automobile accident; it did not take an expert to know that if brake lights were not functioning, an accident could occur. M & M Pipe & Pressure Vessel Fabricators, Inc. v. Roberts, 531 So. 2d 615, 1988 Miss. LEXIS 437 (Miss. 1988).

**Sanity.**

Non-expert witnesses may give their opinion as to sanity of defendant only if they first detail relevant facts known to them, based on events which they have observed, on which their opinion will be based. Conner v. State, 632 So. 2d 1239, 1993 Miss. LEXIS 541 (Miss. 1993), cert. denied, 513 U.S. 927, 115 S. Ct. 314, 130 L. Ed. 2d 276, 1994 U.S. LEXIS 7088 (U.S. 1994), overruled, Weatherspoon v. State, 732 So. 2d 158, 1999 Miss. LEXIS 4 (Miss. 1999).

**Slip and fall.**

In an action to recover for injuries sustained in a slip and fall caused by paint spilled near a store end-cap display, a defense lay witness was properly not allowed to testify with regard to whether the end-cap was a corporate end-cap or an in-store end-cap where he had already testified unequivocally that he did not have firsthand knowledge as to whether the end-cap was a corporate end-cap or not. K-Mart Corp. v. Hardy, 199 Miss. LEXIS 102 (Miss. 1999).

**Sobriety tests.**

Trial court did not err in admitting the officer's testimony of the results of defendant's field sobriety tests because the walk and turn and the one-legged stand tests relied upon the officer's observation and did not require qualification as an expert. Pulido v. City of Oxford, 991 So. 2d 1223, 2008 Miss. App. LEXIS 51 (Miss. Ct. App.), cert. denied, 997 So. 2d 924, 2008 Miss. LEXIS 511 (Miss. 2008).

There was sufficient evidence for a driving under the influence conviction, even though there was no scientific evidence of intoxication because an officer's testimony regarding defendant's conduct, as well as the reading on a breath test and his refusal to cooperate with an Intoxilyzer test, showed that he was intoxicated; the officer did not have to qualify as an expert to so testify. Ouzts v. State, 947 So. 2d 1005, 2006 Miss. App. LEXIS 698 (Miss. Ct. App. 2006).

A police officer need not be rendered an expert to give opinion testimony regarding the administration of field sobriety tests, including the horizontal gaze nystagmus test. Graves v. State, 761 So. 2d 950, 2000 Miss. App. LEXIS 289 (Miss. Ct. App. 2000).

**Testimony regarding state law.**

The court erred wen it permitted two lay witnesses to testify regarding the history and requirements of the law in Mississippi with regard to stolen vehicles, searches and seizures of vehicles, and the authority of investigators to inspect automobile rebuilders, dealers, and salvage yards without search warrants, since only the trial judge can instruct the jury on the law. Logan v. State, 1999 Miss. App. LEXIS 182 (Miss. Ct. App. Apr. 20, 1999), rev'd, 2000 Miss. LEXIS 128 (Miss. May 25, 2000).

**Illustrative cases.**

Chancellor did not err in excluding a witness's lay-opinion testimony regarding the decedent's mental capacity because the witness did not observe or perceive anything unusual following the use of the medications, and thus there was no underlying basis for her opinion that the decedent had a diminished mental capacity. Quinn v. Quinn, 278 So. 3d 1160, 2019 Miss. App. LEXIS 57 (Miss. Ct. App. 2019).

In a grand larceny case, the trial court did not err in allowing the victim's brother, who was the attorney-in-fact for the victim, to testify as to his opinions of the present value of the property; and the brother's lay opinions were admissible as they were based on his personal knowledge of the stolen items. Miles v. State, 249 So. 3d 362, 2018 Miss. LEXIS 316 (Miss. 2018).

Although the admission of a witness's testimony on direct examination that she believed the victim's statement to her that defendant inappropriately touched her was improper, he error was harmless given defendant's own admission and the weight of the evidence against him. Roberson v. State, 287 So. 3d 219, 2017 Miss. App. LEXIS 526 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 67, 2018 Miss. LEXIS 239 (Miss. 2018).

Admission of the medical records of doctors who treated a patient after the patient's surgery was appropriate, in a medical malpractice action, as testimony by treating physicians. Furthermore, no redactions of certain words from the records were required because the words did not speak to the causation of the patient's injury, or to any standard of care that a doctor may have owed to the patient, post-surgery. Thomas v. Purdy, 231 So. 3d 190, 2017 Miss. App. LEXIS 190 (Miss. Ct. App.), cert. denied, 229 So. 3d 712, 2017 Miss. LEXIS 477 (Miss. 2017).

Trial court did not err in allowing the victim's friend to testify that whenever the victim said she had to do chores around the house it meant that defendant required her to perform sexual acts with him, as the friend came to that conclusion after the victim "hinted" to her that when she had to do chores that was what it meant. Pustay v. State, 221 So. 3d 320, 2016 Miss. App. LEXIS 643 (Miss. Ct. App. 2016), cert. denied, 216 So. 3d 1150, 2017 Miss. LEXIS 232 (Miss. 2017).

Although the officer should not have been allowed to give a narrative of the video-surveillance recording because he had no first-hand knowledge of the events recorded, the error was harmless because, even without that narration, there was more than enough evidence to support defendant's conviction, including defendant's own confession. Land v. State, 198 So. 3d 388, 2016 Miss. App. LEXIS 43 (Miss. Ct. App. 2016), cert. denied, 202 So. 3d 615, 2016 Miss. LEXIS 366 (Miss. 2016), cert. denied, 580 U.S. 1175, 137 S. Ct. 1229, 197 L. Ed. 2d 469, 2017 U.S. LEXIS 1722 (U.S. 2017).

Testimony by the owner of a business company was admissible because it was based on the owner's personal knowledge about the equipment at issue and on the owner's perception of the deterioration of the equipment. While the value of specific item's of equipment may have been outside the realm of the knowledge of most lay witnesses, the owner, as the owner of the equipment, had personal knowledge of the value, and the testimony of the owner was helpful to the jury in determining an award of damages. Lampkin Constr. Co. v. Sand Specialties & Aggregates, LLC, 179 So. 3d 1095, 2015 Miss. LEXIS 607 (Miss. 2015).

Trial court was well within its discretion in excluding a husband's testimony as to the speed of the vehicle that crashed into the car in which he and his wife were driving where he appropriately was allowed to give his lay opinion that the driver's car "was barreling down on top of us," but allowing him to give the jury his opinion about the exact speed at which the driver's vehicle was traveling would have elevated his role from lay witness to that of an expert. Heflin v. Merrill, 154 So. 3d 857, 2014 Miss. LEXIS 558 (Miss. 2014).

In a burglary case, the circuit court did not abuse its discretion when it allowed the owner of the tire shop to testify that the shoe prints found behind the shop had four distinctive circles and looked the same as the bottom of defendant's shoes as the circuit court could have reasonably concluded that the owner was able to recognize the distinctive pattern without having any scientific, technical, or specialized knowledge. Ramer v. State, 156 So. 3d 919, 2014 Miss. App. LEXIS 487 (Miss. Ct. App. 2014), cert. denied, 157 So. 3d 835, 2015 Miss. LEXIS 77 (Miss. 2015).

Chancellor did not abuse her discretion in finding that a lay witness's testimony regarding the general symptoms of domestic abuse was unhelpful and irrelevant in an undue influence action where there was no evidence of undue influence. In re Estate of Langston v. Langston, 141 So. 3d 28, 2014 Miss. App. LEXIS 147 (Miss. Ct. App. 2014).

Grant of summary judgment in favor of two lawyers in the clients' action claiming the lawyers had breached their fiduciary duty was improper because the trial court erred in applying a negligence standard to the clients' claims of breach of fiduciary duty. Because a lawyer's discretionary disbursement of the settlement funds to his clients did not implicate the kind of specialized knowledge implicated by Miss. R. Evid. 702, to the extent his testimony constituted opinion, it was admissible under Miss. R. Evid. 701; therefore, the trial court erred in excluding the testimony regarding how he devised the settlement matrix and how he disbursed the settlement funds to his clients. Crist v. Loyacono, 65 So. 3d 837, 2011 Miss. LEXIS 217 (Miss. 2011).

Defendant's convictions for conspiracy, burglary of a building other than a dwelling, attempted grand larceny, and attempted aggravated assault were appropriate because a statement by a witness that he was worried that the vehicle was going to come back and try to run over him again was rationally based upon what he had observed that night; the witness had personal knowledge as to what he felt, which was that defendant had attempted to run him over and might try again. That statement was allowable under Miss. R. Evid. 701. Commodore v. State, 994 So. 2d 864, 2008 Miss. App. LEXIS 658 (Miss. Ct. App. 2008).

In a murder case, defendant's objection that testimony regarding the trajectory of bullets fired into a car exceeded the proper scope of lay testimony and intruded into the realm of expert testimony was too late; moreover, even if there was error, it was harmless due to the cumulative nature of the testimony. Witnesses observed defendant shooting into an occupied vehicle from the doorway of her residence. Cooper v. State, 977 So. 2d 1220, 2007 Miss. App. LEXIS 701 (Miss. Ct. App. 2007), cert. denied, 977 So. 2d 1144, 2008 Miss. LEXIS 141 (Miss. 2008).

Finding against the life insurance company in the beneficiary's action after her claim was denied was proper because the training of agents who solicited answers from prospective insureds that might result in material misrepresentations was pertinent to the resolution of the issues of the case and met the requirements of Miss. R. Evid. 701 and its comment; thus, the trial judge did not abuse his discretion by allowing the testimony. United Am. Ins. Co. v. Merrill, 978 So. 2d 613, 2007 Miss. LEXIS 510 (Miss. 2007), cert. denied, 552 U.S. 1185, 128 S. Ct. 1257, 170 L. Ed. 2d 68, 2008 U.S. LEXIS 1280 (U.S. 2008).

Defendant's conviction for aggravated domestic violence against his girlfriend was appropriate because, if defendant did not cause the victim's injuries, as he had claimed, and no one else could have subjected the victim to such injuries, the next obvious inquiry was to ask just how the victim ended up injured; in that sense, defendant's responses were helpful to the clear understanding of his statement and they were helpful to the determination of the fact in issue, which was whether defendant caused the victim's injuries. Fugate v. State, 951 So. 2d 604, 2007 Miss. App. LEXIS 145 (Miss. Ct. App. 2007).

In a prosecution of defendant for vehicular homicide, a prosecution witness's testimony about damaged trees at the accident scene consisted of lay opinions, did not stray into the realm of expert testimony, and was properly admitted by the trial court pursuant to Miss. R. Evid. 701. Dunaway v. State, 919 So. 2d 67, 2005 Miss. App. LEXIS 300 (Miss. Ct. App. 2005), cert. dismissed, 920 So. 2d 1008, 2005 Miss. LEXIS 652 (Miss. 2005), cert. denied, 921 So. 2d 1279, 2006 Miss. LEXIS 35 (Miss. 2006).

Defendant's conviction for aggravated assault was appropriate under Miss. R. Evid. 701 because an officer appropriately testified as to his personal experience with the use of the blades at issue and his first-hand observation of the scratches on the car during the course of his investigation; the court concluded that based on its review of the record, the trial court did not err in admitting the officer's testimony. Gates v. State, 936 So. 2d 335, 2006 Miss. LEXIS 384 (Miss. 2006).

Defendant, tried for embezzlement, was employed by the owner for approximately nine months and the owner testified that he had become familiar with defendant's handwriting during said period. By virtue of his familiarity with defendant's handwriting, the owner was fully qualified to offer his opinion as to whether or not the writing was in fact defendant's signature; such testimony was rationally based upon his perception, was helpful in making a determination of a fact in issue, was not based on scientific, technical, or other specialized knowledge within the scope of Miss. R. Evid. 702, and it therefore met the requirements for both Miss. R. Evid. 701 and 901(b)(2). Bell v. State, 910 So. 2d 640, 2005 Miss. App. LEXIS 159 (Miss. Ct. App. 2005).

Defendants' conspiracy convictions were proper where testimony regarding a telephone conversation between one of the defendants and the other defendant's mother was permissible pursuant to Miss. R. Evid. 701 because it was clear that the identities of the parties to the telephone call were facts at issue for the conspiracy prosecution. Thus, the warden's testimony would have been helpful to the jury in resolving that issue. Farris v. State, 906 So. 2d 113, 2004 Miss. App. LEXIS 1126 (Miss. Ct. App. 2004).

Under Miss. R. Evid. 701, an investigator properly testified that persons he interviewed were both frightened, because one does not have to be a behavioral psychologist to determine that someone is frightened, an emotion commonly experienced at one time or another by everybody. Brown v. State, 890 So. 2d 901, 2004 Miss. LEXIS 1104 (Miss. 2004), cert. denied, 544 U.S. 981, 125 S. Ct. 1842, 161 L. Ed. 2d 735, 2005 U.S. LEXIS 3424 (U.S. 2005).

Trial court erred in allowing a store employee to add commentary to a videotape that caught defendant shoplifting as the employee did not actually see defendant do the actions depicted on the videotape, but the error was harmless. Ratliff v. State, 879 So. 2d 1062, 2004 Miss. App. LEXIS 749 (Miss. Ct. App. 2004).

In defendant's capital murder case, where the victim's mother's testimony regarding her belief that defendant killed her daughter was rationally based on her perception of her feelings and beliefs at the time she wrote the letter, and helpful to the clear understanding of her testimony, namely what motivated her to write the letter to defendant, a court did not abuse its discretion in allowing the mother to testify as to her motivation for writing the letter to defendant. McGowen v. State, 859 So. 2d 320, 2003 Miss. LEXIS 413 (Miss. 2003).

In a negligence suit against the Mississippi Department of Transportation, the trial court properly allowed a witness who lived near the scene of the plaintiff's accident to testify about his opinion as to the cause of the accident – the accumulation of water at the site – and the causes of other accidents along the same stretch of highway, as the opinions were based on his firsthand knowledge gained from observing the road on which he had lived for 25 years; he had a familiarity with the road that the jury did not have. Miss. DOT v. Cargile, 847 So. 2d 258, 2003 Miss. LEXIS 255 (Miss. 2003), overruled in part, Miss. Transp. Comm'n v. Montgomery, 2011 Miss. LEXIS 609 (Miss. Oct. 20, 2011), overruled in part, Miss. Transp. Comm'n v. Montgomery, 80 So. 3d 789, 2012 Miss. LEXIS 96 (Miss. 2012), overruled, Little v. Miss. DOT, 129 So. 3d 132, 2013 Miss. LEXIS 551 (Miss. 2013).

Trial court abused its discretion by allowing a designated lay witness's testimony to stray into the realm of scientific, technical, and specialized knowledge that only could be admitted as expert testimony after assessment pursuant to Miss. R. Evid. 702. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564, 2003 Miss. App. LEXIS 752 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 2005 Miss. LEXIS 21 (Miss. Jan. 13, 2005), aff'd in part and rev'd in part, 904 So. 2d 1077, 2005 Miss. LEXIS 247 (Miss. 2005).

Trial court abused its discretion by allowing a designated laywitness for a car manufacturer to testify as to how an air bag system in a car worked; however, the admission of the testimony was harmless error as the witness's description of how an air bag worked was neutral information that did not harm the plaintiffs. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564, 2003 Miss. App. LEXIS 752 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 2005 Miss. LEXIS 21 (Miss. Jan. 13, 2005), aff'd in part and rev'd in part, 904 So. 2d 1077, 2005 Miss. LEXIS 247 (Miss. 2005).

Police officer's testimony regarding the type of shotgun shells he observed at the scene of a shooting did not constitute expert testimony; the officer was permitted to testify because the matter was within his personal knowledge, and the testimony was helpful to the trier of fact. Lane v. State, 841 So. 2d 1163, 2003 Miss. App. LEXIS 52 (Miss. Ct. App. 2003).

Accident victim was clearly incompetent to testify regarding the victim's own medical prognosis and treatment. Haggerty v. Foster, 838 So. 2d 948, 2002 Miss. LEXIS 398 (Miss. 2002).

Even though defendant pleaded guilty to transferring cocaine, the person to whom defendant sold the cocaine and who was then shot because he could not pay, might have been competent to testify under Miss. R. Evid. 701 that the substance he purchased from defendant was, in fact, cocaine; unavailability of the cocaine for chemical analysis did not, therefore, result in there being an insufficient factual basis for defendant's plea when that fact was considered along with other evidence considered by the trial court prior to accepting the plea. Boddie v. State, 850 So. 2d 1205, 2002 Miss. App. LEXIS 545 (Miss. Ct. App. 2002), aff'd, 2004 Miss. LEXIS 667 (Miss. June 10, 2004).

In a burglary prosecution, testimony by a police officer that a white powdery substance on the defendant's clothing was consistent with the sheet rock powder found near the hole cut in a sheet rock wall was a lay opinion that required no specialized knowledge. Florence v. State, 786 So. 2d 409, 2000 Miss. App. LEXIS 544 (Miss. Ct. App. 2000).

In a divorce proceeding in which the wife's use of the Internet to meet men was at issue, it was error for the court to allow a counselor to testify with regard to Internet addiction and Internet pornography where the counselor was not qualified as an expert witness and had no personal knowledge of the wife's computer usage. Bower v. Bower, 758 So. 2d 405, 2000 Miss. LEXIS 80 (Miss. 2000).

Where welfare worker had no firsthand knowledge of how a baby ingested cocaine, her testimony was merely speculative and based on what she heard others say; it was therefore beyond her knowledge or expertise and created undue prejudice, constituting reversible error. Jones v. State, 678 So. 2d 707, 1996 Miss. LEXIS 411 (Miss. 1996).

Court at embezzlement trial erred in allowing store owner to state his opinions and interpretations of clerk's actions as depicted in surveillance videotape, where owner was not at store on day tape was made, and instances in which owner alleged that clerk was pocketing cash from register could not be viewed since clerk was turned away from camera. Wells v. State, 604 So. 2d 271, 1992 Miss. LEXIS 379 (Miss. 1992).

In a wrongful death action against arising from an incident in which a three-year old child was hit by a car and died in the parking lot of the defendant store, the court properly sustained an objection and refused to permit the plaintiff father to answer the question whether, ". . .If there had been any speed barriers in front of the Jitney Jungle, which would have slowed that car down, based entirely on your perception, would you have been able to get to Jeremy before that car hit him?" Jones v. Jitney Jungle Stores of Am., 730 So. 2d 555, 1998 Miss. LEXIS 568 (Miss. 1998).

## ATTORNEY GENERAL OPINIONS

A landowner's opinion as to the value of property irrationally based on his perception (one based on factors not legally relevant), is inadmissible as it is simply irrelevant. Mitchell, May 19, 2006, A.G. Op. 06-0192.

## RESEARCH REFERENCES

**ALR.**

Admissibility of lay witness interpretation of surveillance photograph or videotape. 74 A.L.R.5th 643.

Vertical gaze nystagmus test: Use in impaired driving prosecution. 117 A.L.R.5th 491.

## Rule 702. Testimony by expert witnesses.

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

**HISTORY: Amended effective May 29, 2003, to clarify the gatekeeping responsibilities of the court in evaluating the admissibility of expert testimony; restyled effective July 1, 2016.**

### ADVISORY COMMITTEE NOTE

The language of Rule 702 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. Lower-case lettered subdivisions have replaced numbered paragraphs as first-level formatting. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The use of the hypothetical question has been justly criticized. Rule 702 permits an expert to testify by giving an opinion or any other form of testimony, such as an exposition. Rule 702 seeks to encourage the use of expert testimony in non-opinion form when counsel believes the trier can draw the requisite inference. The rule, however, does not abolish the use of opinions. As the Federal Rules Advisory Committee Note pointed out, it will still be possible for an expert to take the next step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts.

As has long been the practice in Mississippi, Rule 702 recognizes that one may qualify as an expert in many fields in addition to science or medicine, such as real estate, cotton brokering, auto mechanics or plumbing. *Boggs v. Eaton,* 379 So. 2d 520 (1980); *Early-Gary, Inc. v. Walters,* 294 So. 2d 181 (Miss. 1974 ); *Ludlow Corp. v. Arkwright-Boston Mfrs. Mut. Ins. Co.,* 317 So. 2d 4 7 (Miss. 1975). Rule 702 is the standard for the admission of expert testimony from such other fields as well as for scientific testimony. *See Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137 (1999).

By the 2003 amendment of Rule 702, the Supreme Court clearly recognizes the gate keeping responsibility of the trial court to determine whether the expert testimony is relevant and reliable. This follows the 2000 adoption of a like amendment to Fed. R. Evid., 702 adopted in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993). It is important to note that Rule 702 does not relax the traditional standards for determining that the witness is indeed qualified to speak an opinion on a matter within a purported field of knowledge, and that the factors mentioned in *Daubert* do not constitute an exclusive list of those to be considered in making the determination; *Daubert's* "list of factors was meant to be helpful, not definitive." *Kumho,* 526 U.S. at 151. *See also Pepitone v. Biomatrix, Inc.* 288 F. 3d 239 (5th Cir. 2002). (Amended effective May 29, 2003; "Advisory Committee Note" substituted for

"Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

In general.
Accident reconstruction.
Calculation of damages.
Chiropractic expert.
Computer information.
Credibility.
Custody.
Daubert hearing not requested.
Dental expert.
Economist expert.
DNA expert.
False confession expert.
Fingerprint expert.
Firearms expert.
Forensic pathologist.
Harmless error.
Human factors psychologist.
Industry standards.
Lack of foundational witness.
Legal expert.
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Mental health expert.
Necessity for expert testimony.
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Police testimony.
Qualification of expert.
Real estate.
Relationship to § 11-1-61.
Sobriety tests.
Soil mechanics expert.
Vocational expert.
Illustrative cases.

**In general.**

Circuit judge did not abuse his discretion by allowing the agent to testify about the results of the field test because defendant did not object to the State's failure to formally tender him as an expert. Cowan v. Miss. Bureau of Narcotics, 2 So. 3d 759, 2009 Miss. App. LEXIS 61 (Miss. Ct. App. 2009).

Without its expert's opinion, in which there was no evidence that it was based on sound scientific principles, Miss. R. Evid. 702, the school district was unable to prove that the copper tubing which allegedly caused the fire was the same tubing installed by the company; the school district could not prove that the company was negligent in its installation. Smith v. Clement, 983 So. 2d 285, 2008 Miss. LEXIS 172 (Miss. 2008).

It was improper to allow testimony lumping the corporation, based on its size, into a hypothetical with other large companies that may have a history of intimidating and deceiving regulatory agencies; from the expert's line of testimony, the jury easily could have been misled into believing that the corporation was guilty of covering up alleged regulatory violations, and under a Miss. R. Evid. 403 balancing test, the expert's testimony was more prejudicial to the corporation than probative; there existed a real danger that the testimony would unfairly prejudice the corporation and mislead the jury with the accusations of hypothetical regulatory violations by the corporation. E.I. DuPont de Nemours & Co. v. Strong, 968 So. 2d 410, 2007 Miss. LEXIS 574 (Miss. 2007).

In a suit brought by parents of children burned in a school bus fire, the trial court improperly struck the expert's affidavit in the school district's subsequent indemnity action against a gas company that converted buses owned by the district from gasoline to propane use, because the parents and the district did not have an opportunity to be heard regarding the district's expert testimony on causation as contemplated by Miss. R. Evid. 702 and Daubert. Smith v. Clement, 2007 Miss. LEXIS 548 (Miss. Oct. 4, 2007), op. withdrawn, sub. op., 983 So. 2d 285, 2008 Miss. LEXIS 172 (Miss. 2008).

Trial court erred in not granting a trial continuance to defendant company in a personal injury suit because the untimely designation of plaintiff's expert's 59 (versus 60) days prior to trial, the addition of a third theory of liability as to the company one week before trial, and the last-minute deposition of the expert, had the effect of working a severe prejudice on the company which could have been avoided had the trial court allowed a reasonable continuation of the trial. Int'l Paper Co. v. Townsend, 961 So. 2d 741, 2007 Miss. App. LEXIS 192 (Miss. Ct. App.), cert. denied, 962 So. 2d 38, 2007 Miss. LEXIS 424 (Miss. 2007).

Defendant claimed that the testimony of the accident reconstructionist and the forensic toxicologist should have been excluded because the defense was not allowed to voir dire those witnesses about the principles and methods used in arriving at their opinions. However, the defense extensively cross-examined the witnesses at issue regarding the methods used to arrive at their opinions on speed determination and the qualifications to calibrate the machine used to determine the blood alcohol level of defendant; the trial court did not err in its handling of those matters and discovery was not improperly restricted as to Miss. Unif. Cir. & County Ct. Prac. R. 9.04(A), where the defense claimed that the reports from the various expert witnesses of the State were insufficient, but where said cross-examination of experts and voir dire of other experts was allowed. Lawrence v. State, 931 So. 2d 600, 2005 Miss. App. LEXIS 552 (Miss. Ct. App. 2005), cert. denied, 933 So. 2d 303, 2006 Miss. LEXIS 345 (Miss. 2006).

In a condemnation proceeding, the trial court erred by failing to strike the testimony of the city's expert because his entire appraisal of the value of the private water utility was based on data from Public Service Commission (PSC) used to determine rates that did not include the value of property contributed by land developers. The testimony of the city's expert was not based on sufficient facts and data and was therefore unreliable and inadmissible under Miss. R. Evid. 702. Dedeaux Util. Co. v. City of Gulfport, 938 So. 2d 838, 2006 Miss. LEXIS 529 (Miss. 2006).

For expert testimony to be admissible, it must be both relevant and reliable; the party offering the testimony must show that the expert based his/her opinion not on opinions or speculation, but rather on scientific methods and procedures, and the trial judge assumes the critical role as a gatekeeper in assessing the value of the testimony. Webb v. Braswell, 930 So. 2d 387, 2006 Miss. LEXIS 284 (Miss. 2006).

Because the doctor, as the administratrix's expert, was not competent to offer opinions as to the standard of care of dialysis clinics, the appropriate monitoring of the dialysis process or the appropriate procedures in inserting and maintaining dialysis grafts, pursuant to Miss. R. Evid. 702, the circuit court properly granted summary judgment to the medical group. Lawrence v. State, 931 So. 2d 600, 2005 Miss. App. LEXIS 552 (Miss. Ct. App. 2005), cert. denied, 933 So. 2d 303, 2006 Miss. LEXIS 345 (Miss. 2006).

By languishing in her production of an expert witness, the patient did not have the evidence to establish the elements of proximate cause and damages; the first step in the process was a determination of known risks, and once the known risks were enumerated, they could be evaluated as to which were material; where a plaintiff charged that a doctor performed a procedure without first obtaining informed consent, the plaintiff's first task was to establish what were the known risks of the procedure, which required an expert opinion, and in order to establish that continuing pain was a known risk of the procedure, expert testimony was required. Jamison v. Kilgore, 903 So. 2d 45, 2005 Miss. LEXIS 484 (Miss. 2005).

Trial court did not err in allowing an expert witness to testify under Miss. R. Evid. 702, that CPR caused a tear in the anastomosis, even though the theory had not been subjected to peer review as it was scientific knowledge that would assist the trier of fact, and plaintiffs could challenge the opinion through cross-examination. Poole v. Avara, 908 So. 2d 716, 2005 Miss. LEXIS 486 (Miss. 2005).

Under Miss. R. Evid. 103(a), defendant was procedurally barred from raising an issue on appeal because he did not contest a social worker's expert testimony at trial. However, defendant's claim was without merit because the social worker was properly allowed to testify in the child-fondling case regarding the social worker's forensic interview because she qualified as an expert under Miss. R. Evid. 702, and she did not opine as to the victim's truthfulness in the interview; rather she opined that the child's behavior and story were consistent with those of child sex abuse victims. Elkins v. State, 918 So. 2d 828, 2005 Miss. App. LEXIS 483 (Miss. Ct. App. 2005), cert. denied, 921 So. 2d 1279, 2006 Miss. LEXIS 26 (Miss. 2006), cert. denied, 547 U.S. 1194, 126 S. Ct. 2865, 165 L. Ed. 2d 898, 2006 U.S. LEXIS 4564 (U.S. 2006).

Trial court erred in allowing auto manufacturer's expert to provide lay testimony about air bag inflation technology court because the manufacturer failed to designate him as an expert before the deadline, and his "lay testimony" strayed into the realm of scientific, technical and specialized knowledge that could only be admitted as expert testimony after assessment pursuant to Miss. R. Evid. 702. Also the injured driver's family members were prejudiced by the expert's testimony as it rebutted their expert's testimony regarding their claim of defective design under the Mississippi Product Liability Act, Miss. Code Ann. § 11-1-63. Palmer v. Volkswagen of Am., Inc., 2005 Miss. LEXIS 21 (Miss. Jan. 13, 2005), op. withdrawn, sub. op., 904 So. 2d 1077, 2005 Miss. LEXIS 247 (Miss. 2005).

Frye test is abandoned and the modified Daubert test is adopted; Miss. R. Evid. 702, as amended, is to be applied to assess there liability and admissibility of expert testimony. Miss. Transp. Comm'n v. McLemore, 863 So. 2d 31, 2003 Miss. LEXIS 532 (Miss. 2003).

State's expert was recognized as an expert witness pursuant to Miss. R. Evid. 702 in the field of forensic science specializing in substance identification; the trial court properly indicated that pursuant to Miss. R. Evid. 703, experts were allowed to base their opinion on things reasonably used by them to form these opinions, such that the testimony based on the machine's reading and the notes of the analyst was admissible. Lenoir v. State, 853 So. 2d 845, 2003 Miss. App. LEXIS 720 (Miss. Ct. App. 2003).

It is reversible error to allow expert testimony from a witness never qualified or tendered as an expert. Cotton v. State, 675 So. 2d 308, 1996 Miss. LEXIS 198 (Miss. 1996).

**Accident reconstruction.**

Trial judge did not abuse their discretion by excluding an accident-reconstruction expert as an expert witness because, although the witness was qualified through training, certification, and experience, and the testimony was relevant, the judge did not find the testimony of the witness sufficiently reliable in that without laws governing private gas-station parking lots and without the parties' estimated speeds in a parking lot at the time of an accident the witness could not connect the dots between any factual basis and a finding of fault. Thompson v. Holliman, 283 So. 3d 718, 2019 Miss. LEXIS 389 (Miss. 2019).

Trial court did not abuse its discretion in allowing the State's expert to testify regarding the area of impact, as the State's expert was qualified in accident reconstruction and had extensive experience. Koch v. State, 222 So. 3d 1088, 2017 Miss. App. LEXIS 15 (Miss. Ct. App.), cert. denied, 222 So. 3d 312, 2017 Miss. LEXIS 295 (Miss. 2017).

During defendant's trial for DUI, the court did not abuse its discretion in accepting an accident reconstructionist as an expert witness; while the reconstructionist did not possess all of the skills of an accident reconstructionist on the date of the accident, the reconstructionist utilized skills acquired up to the date of the accident to make initial findings and finished the report only after acquiring skills from the final course. Harness v. State, 58 So. 3d 12, 2009 Miss. App. LEXIS 262 (Miss. Ct. App. 2009), rev'd, 2010 Miss. LEXIS 270 (Miss. May 27, 2010), aff'd, 58 So. 3d 1, 2011 Miss. LEXIS 59 (Miss. 2011).

Accident reconstructionist testified that given the slow speed at which the tractor trailer was turning, if the injured person ( who skidded into the rear of the trailer), had been keeping a proper lookout and operating his vehicle under control at a safe speed, the accident would not have happened. Even though the testimony embraced an ultimate issue on the subject of negligence, such an invasion of the province of the jury was not absolutely barred, and it was not inadmissible as the testimony was helpful to the determination of the case. McKenzie v. Supervalu, Inc., 883 So. 2d 1188, 2004 Miss. App. LEXIS 955 (Miss. Ct. App. 2004).

A law enforcement officer may, with proper training and experience, qualify as an expert accident reconstructionist. Ware v. State, 790 So. 2d 201, 2001 Miss. App. LEXIS 87 (Miss. Ct. App. 2001).

In an action arising from an accident involving a mini-pickup truck that was towing an automobile that weighed more than the truck, the court did not abuse its discretion in excluding the testimony of an accident reconstruction expert since (1) by the time the expert arrived at the scene of the accident, the scene was washed away and the evidence was gone, and (2) he lacked specialized knowledge to render an opinion with regard to other matters to which he might have testified. Watkins v. U-Haul Int'l, Inc., 770 So. 2d 970, 2000 Miss. App. LEXIS 182 (Miss. Ct. App. 2000), cert. denied, 2000 Miss. LEXIS 276 (Miss. Oct. 19, 2000).

A witness was qualified as an accident reconstruction expert where (1) he received specialized training and education at the University of Texas at Austin, the Society of Automatic Engineers for accident reconstruction, and the Institute of Police Technology and Management in Jacksonville, Florida, (2) he had previously been qualified to testify as to accident reconstruction in 47 states including Mississippi, and (3) he was a professional race car driver. Fielder v. Magnolia Bev. Co., 757 So. 2d 925, 1999 Miss. LEXIS 165 (Miss. 1999).

In a products liability action arising from an automobile accident allegedly caused by a defective ball joint on a pickup truck, the plaintiff's expert was fully qualified to testify as an expert in auto mechanics and his testimony did not require him to be qualified as an accident reconstruction expert where he had extensive experience as a professional mechanic and testified, inter alia, as to whether a ball stud was loose before the accident. GMC v. Pegues, 738 So. 2d 746, 1998 Miss. App. LEXIS 1024 (Miss. Ct. App. 1998).

**Calculation of damages.**

Trial court did not abuse its discretion in excluding plaintiff's structural engineer's expert testimony regarding cost damages due to defects in the design and construction of the condominiums, after first continuing the trial and granting additional time for supplementation, where the engineer disclosed that a five-year-old RS Means manual was the general basis for his conclusory estimates on 22 of 23 items of alleged structural damages amounting to several million dollars. The engineer's production of only one itemized opinion out of 23 was not in compliance with the degree of specificity reasonably ordered by the trial court. Inn by the Sea Homeowner's Ass'n v. Seainn, LLC, 170 So. 3d 496, 2015 Miss. LEXIS 379 (Miss. 2015).

Expert's testimony about appellant's alleged lost profits was properly excluded, as the trial court found that appellant's expert discovery disclosures for lost net profits under Miss. R. Civ. P. 26(b)(4)(A)(i) were not presented in a meaningful way since it appeared the expert was only calculating lost gross profits and not the required lost net profits. Coastal Hardware & Rental Co., LLC v. Certain Underwriters at Lloyds, London, 120 So. 3d 1017, 2013 Miss. App. LEXIS 136 (Miss. Ct. App. 2013).

Where an insured sought lost profits allegedly caused by its insurer's improper denial of coverage, the trial court properly excluded the testimony of the insured's expert, as it appeared he calculated lost gross profits, not lost net profits, and the court found that his testimony was confusing and would not help the jury. Coastal Hardware & Rental Co., LLC v. Certain Underwriters at Lloyds, London, 120 So. 3d 1017, 2013 Miss. App. LEXIS 136 (Miss. Ct. App. 2013).

Adoption of the Daubert standard was not a basis for amending previous caselaw because the idea that the calculation of income for children should be based on the average income for a person in the community in which they lived was unfair and prejudicial, and would result in potentially disparate recoveries for children from affluent communities as opposed to children from less affluent areas. Spotlite Skating Rink, Inc. v. Barnes, 988 So. 2d 364, 2008 Miss. LEXIS 322 (Miss. 2008).

**Chiropractic expert.**

In a chiropractic malpractice action, testimony by the defendant chiropractor that he did not deviate from the standard of care necessarily required expertise in the field of chiropractics and, therefore, constituted expert testimony. McCaffrey v. Puckett, 784 So. 2d 197, 2001 Miss. LEXIS 119 (Miss. 2001).

**Computer information.**

Trial court did not abuse its discretion in excluding a forensic specialist's testimony, which was to establish that the victim used the family computer and to impeach her statements that she had never seen pornography before, because the testimony could not reliably establish that the victim accessed her user profile on the family computer to visit pornographic websites; the forensic specialist admitted that there was no reliable way of determining if it was the victim or someone else. Dandass v. State, 233 So. 3d 856, 2017 Miss. App. LEXIS 247 (Miss. Ct. App. 2017), cert. denied, 2017 Miss. LEXIS 517 (Miss. Dec. 7, 2017).

Where defendant claimed he accidentally shot his wife, his murder conviction was reversed because a crime scene analyst's computer-generated depiction of the shooting was improperly admitted, as it was based on mere speculation and possibilities. Parvin v. State, 113 So. 3d 1243, 2013 Miss. LEXIS 145 (Miss. 2013).

Expert's use of a computer-aided design program to create a simulation of the expert's alternative design of a beam connecting the roof of a car to its body was sufficiently reliable for purposes of Miss. R. Evid. 702; the expert was not required to physically build a model of the alternative design in order to demonstrate its efficacy. Hyundai Motor Am. v. Applewhite, 53 So. 3d 749, 2011 Miss. LEXIS 87 (Miss. 2011).

The rule did not apply to testimony by a police officer that he had checked a computer for a document that the defendant claimed was on the hard drive, but did not find any such document; such testimony did not involve information difficult to comprehend or require additional focused training in computer use. Boone v. State, 811 So. 2d 402, 2001 Miss. App. LEXIS 78 (Miss. Ct. App. 2001).

**Credibility.**

In a case in which a circuit court judge ruled appellee was intellectually disabled and thus ineligible for the death penalty under the Eighth Amendment, the circuit court's judge's finding that appellee's experts were more credible than the State's expert was entitled to deference. State v. Scott, 233 So. 3d 253, 2017 Miss. LEXIS 222 (Miss. 2017).

Expert's testimony was both relevant and reliable as a qualified third-party's evaluation of the situation was useful to the fact-finder and custody evaluation experts were often called to testify in modification matters, and the mother hired her own expert for the same purpose; the expert's credentials showed he had the skill, experience, and education to assist the trier of fact in the determination. The interviews were an appropriate, reliable method of gathering the information, and the chancellor was aware of the expert's limited time with the mother, which was in part due to her transience. Minter v. Minter, 29 So. 3d 840, 2009 Miss. App. LEXIS 695 (Miss. Ct. App. 2009), cert. denied, 29 So. 3d 774, 2010 Miss. LEXIS 134 (Miss. 2010).

Neither Miss. R. Evid. 702 nor its comment mentions any requirement that statements relied upon by an expert using proper, reliable, methodology also be found credible. Treasure Bay Corp. v. Ricard, 967 So. 2d 1235, 2007 Miss. LEXIS 617 (Miss. 2007).

**Custody.**

Chancellor found that he observed the doctor as an expert witness for several years and found him always to have the best interest of the child in mind, and he was never biased toward a specific parent; further, the mother did not file a motion in limine to exclude the expert's testimony before trial–the first time she raised the issue was at the hearing. Accordingly, the chancellor did not abuse his discretion in admitting the expert's testimony regarding the son's custody. Minter v. Minter, 29 So. 3d 840, 2009 Miss. App. LEXIS 695 (Miss. Ct. App. 2009), cert. denied, 29 So. 3d 774, 2010 Miss. LEXIS 134 (Miss. 2010).

**Daubert hearing not requested.**

There was nothing showing that defendant asked the trial court to conduct a

Daubert hearing and the court could not rule on whether the trial court abused its discretion in failing to conduct a Daubert hearing when defendant failed to request one. Wilson v. State, 990 So. 2d 798, 2008 Miss. App. LEXIS 572 (Miss. Ct. App. 2008).

**Dental expert.**

In a capital murder case, a doctor was properly allowed to testify that defendant's dentition matched the bite marks on the victim's neck, breast, and arm because he possessed the knowledge, skill, experience, and training necessary to qualify as an expert in forensic odontology. Howard v. State, 853 So. 2d 781, 2003 Miss. LEXIS 343 (Miss. 2003), cert. denied, 540 U.S. 1197, 124 S. Ct. 1455, 158 L. Ed. 2d 113, 2004 U.S. LEXIS 1327 (U.S. 2004).

**Economist expert.**

Trial court did not abuse its discretion by excluding the economist's testimony because the economist's opinions rested on the erroneous assumption that the employee was permanently disabled and relied on the vocational expert's faulty report. Young v. Ill. Cent. R.R. Co., 284 So. 3d 839, 2019 Miss. App. LEXIS 544 (Miss. Ct. App. 2019).

In a prosecution for felonious child abuse, it was not error for a dentist to testify that the victim's injuries were "serious", as legal conclusions are not per se prohibited. McBeath v. State, 739 So. 2d 451, 1999 Miss. App. LEXIS 218 (Miss. Ct. App. 1999).

A dentist was properly allowed to testify as an expert in wound pattern analysis where, in addition to his regular dental education, he had received extensive training in dental forensics from the United States Air Force, had conducted hundreds of death investigations over 19 years, had published and lectured extensively in the field, and had been accepted as an expert on wound pattern analysis in six or seven states. Puckett v. State, 737 So. 2d 322, 1999 Miss. LEXIS 122 (Miss. 1999).

Court at trial for driving under the influence did not err in refusing to allow defendant's expert dental witness to give his opinion regarding impact of defendant's bridge on his intoxilyzer test; question was not whether expert was qualified in making of dental appliances, but whether he had specialized knowledge regarding whether a partial bridge such as defendant's could affect results of an intoxilyzer test, and before a qualified expert's opinion could be received, it was required to rise above mere speculation. Goforth v. Ridgeland, 603 So. 2d 323, 1992 Miss. LEXIS 348 (Miss. 1992).

**DNA expert.**

Trial court's refusal to exclude a DNA expert's testimony, as presented, was not an abuse of discretion because the expert did not opine that defendant was the donor of the DNA sample from the sexual assault victim's pants, only that defendant could not be excluded as the donor. The expert did not express this opinion in terms of mere possibilities or speculation, but in terms of reasonable scientific certainty. Roberts v. State, 234 So. 3d 1251, 2017 Miss. LEXIS 383 (Miss. 2017).

**False confession expert.**

In the murder trial of a thirteen-year-old defendant, the trial court did not abuse its discretion by not allowing an expert to testify regarding false confessions because in reviewing the Daubert factors, the proposed testimony did not satisfy Miss. R. Evid. 702 in that while the expert was qualified in her field, there was no empirical test available to determine whether a confession was truthful or not; the proponents of the theories were few; and there was no way to discern a rate of error. Edmonds v. State, 2006 Miss. App. LEXIS 88 (Miss. Ct. App. Jan. 31, 2006), op. withdrawn, sub. op., modified, 955 So. 2d 864, 2006 Miss. App. LEXIS 311 (Miss. Ct. App. 2006).

**Fingerprint expert.**

Defendant's conviction for murder was proper where the introduction of fingerprint evidence had long been allowed to establish the identity of a party. Wright v. State, 915 So. 2d 527, 2005 Miss. App. LEXIS 976 (Miss. Ct. App. 2005).

Fingerprint expert's testimony concerning his comparison of background materials lifted with latent print was properly admitted; fingerprint examination was a field of knowledge which had gained general acceptance, and comparison of background materials was necessarily involved in the practice of fingerprint examination. Wilson v. State, 574 So. 2d 1324, 1990 Miss. LEXIS 845 (Miss. 1990).

This rule did not apply to support admissibility of police officer's testimony as to freshness of fingerprint, because officer was never tendered as an expert. Roberson v. State, 569 So. 2d 691, 1990 Miss. LEXIS 666 (Miss. 1990).

**Firearms expert.**

Defense witness was not allowed to testify as an expert witness, but was allowed to testify as a lay witness, as the witness's testimony was not based on sufficient facts and data because it concerned firearm shooting and not the actual mechanics of the firearm; the witness admitted that he had never written any articles or periodicals on shooting firearms, and could not provide the court with any reliable principles and methods on which his testimony was based; and the witness's testimony was largely contingent upon his own personal observations of the handgun's functionality, in light of defendant's theory of defense. Jones v. State, 269 So. 3d 378, 2018 Miss. App. LEXIS 218 (Miss. Ct. App. 2018).

Expert testimony as to the type of bullet that killed a victim was permissible in defendant's murder trial because the trial court accepted that the expert was qualified in the area of forensic pathology, terminal ballistics was a subfield of forensic pathology, and defendant was procedurally barred from challenging the expert's qualifications because he failed to object to them at trial. Keys v. State, 33 So. 3d 1143, 2009 Miss. App. LEXIS 697 (Miss. Ct. App. 2009), cert. denied, 34 So. 3d 1176, 2010 Miss. LEXIS 228 (Miss. 2010).

Defendant's conviction for capital murder was appropriate because the trial court did not err in not qualifying defendant's proffered firearms expert. Although it was clear that the expert had vast experience with military and police training, there simply was not enough information available about the particular shotgun used by defendant to provide the necessary relevancy and reliability for the expert's testimony. Nelson v. State, 995 So. 2d 799, 2008 Miss. App. LEXIS 319 (Miss. Ct. App.), cert. denied, 999 So. 2d 374, 2008 Miss. LEXIS 660 (Miss. 2008).

**Forensic pathologist.**

Where defendant claimed he accidentally shot his wife, his murder conviction was reversed because a forensic pathologist's measurements and a crime scene analyst's testimony about the shooting were inadmissible under Miss. R. Evid. 702, as the pathologist did not cite any scientific principle to explain how he calculated his distance and trajectory measurements, and the analyst testified that his theory was his "best approximation" of a "hypothesis" of how "maybe the incident happened." Parvin v. State, 113 So. 3d 1243, 2013 Miss. LEXIS 145 (Miss. 2013).

Defendant's manslaughter conviction was proper because the trial court did not err in admitting a forensic pathologist's testimony since he met the standard for admission of expert testimony. The expert testified that he obtained a medical degree, that he had pathology training, and that he had more than 30-years experience within the field of forensic pathology; there was no suggestion in the record that the testimony was based on unreliable principles and methods or that the expert misapplied the principles and methods to the facts of the case. Showers v. State, 70 So. 3d 241, 2011 Miss. App. LEXIS 46 (Miss. Ct. App.), cert. denied, 69 So. 3d 767, 2011 Miss. LEXIS 444 (Miss. 2011).

In a capital murder trial, a forensic pathologist was qualified to give opinion evidence concerning the position of the gun that fired the fatal shot in relation to the bullet path; such evidence was well within his expertise as a physician trained in forensic pathology and was therefore properly admitted. Maye v. State, 49 So. 3d 1140, 2009 Miss. App. LEXIS 807 (Miss. Ct. App. 2009), vacated, 49 So. 3d 1124, 2010 Miss. LEXIS 622 (Miss. 2010).

Expert testimony as to the cause and manner of the victim's death was permissible in defendant's murder trial because the trial court accepted, without objection from defendant, that the expert was qualified in the area of forensic pathology, and the expert did not testify that he was the State Medical Examiner, and, therefore, the expert was not required to be board certified by the American Board of Pathology. Keys v. State, 33 So. 3d 1143, 2009 Miss. App. LEXIS 697 (Miss. Ct. App. 2009), cert. denied, 34 So. 3d 1176, 2010 Miss. LEXIS 228 (Miss. 2010).

It was not error under Miss. R. Evid. 702 to allow an expert in forensic pathology to testify about the position of the victim when he was shot, nor to describe the type pain, trauma, and suffering the victim could have experienced after being shot. Brown v. State, 33 So. 3d 1134, 2009 Miss. App. LEXIS 674 (Miss. Ct. App. 2009), cert. denied, 34 So. 3d 1176, 2010 Miss. LEXIS 225 (Miss. 2010).

There was no abuse of discretion in the admission of a forensic toxicologists's opinion that a defendant, who was charged with aggravated DUI, "possibly" was in the elimination phase at the time of the accident. Lepine v. State, 10 So. 3d 927, 2009 Miss. App. LEXIS 91 (Miss. Ct. App. 2009).

In a capital murder trial, the trial court did not err in admitting the expert testimony of a forensic pathologist because his opinion testimony was based upon his observations of the victim's body, facts made known to him, and his observations of anatomical drawings and photographs at trial and the pathologist testified that he had reviewed the victim's medical records and was able to reach an opinion with a reasonable degree of medical certainty as to the cause and manner of the victim's death. Dixon v. State, 17 So. 3d 1099, 2009 Miss. App. LEXIS 88 (Miss. Ct. App.), cert. denied, 17 So. 3d 99, 2009 Miss. LEXIS 451 (Miss. 2009).

In a murder trial, the court's admission of a forensic pathologist's expert testimony on blood spatter evidence was harmless. Even if such testimony had been excluded, the jury heard defendant admit to stabbing the victim multiple times and there was sufficient evidence from which the jury could conclude that defendant did not act in self-defense in killing the victim. Flaggs v. State, 999 So. 2d 393, 2008 Miss. App. LEXIS 333 (Miss. Ct. App. 2008), cert. dismissed, dismissed without prejudice, cert. denied, 2009 Miss. LEXIS 37 (Miss. Jan. 22, 2009), cert. denied, 999 So. 2d 852, 2009 Miss. LEXIS 53 (Miss. 2009).

In a case where defendant was charged with capital murder after he slammed his car into a patrol car that was blocking his path during a chase, a trial court did not err by allowing a forensic pathologist to testify about an officer's location when he was killed because, under Miss. R. Evid. 702, the pathologist was allowed to testify as an expert that the wounds indicated that the officer was not inside the vehicle. White v. State, 964 So. 2d 1181, 2007 Miss. App. LEXIS 576 (Miss. Ct. App. 2007).

Where defendant confessed to participating in the wife's plan to murder her husband, the circuit court erred by allowing an expert qualified in forensic pathology to give testimony concerning the two-shooter theory; there was no showing that the expert's testimony was based, not on opinions or speculation, but rather on scientific methods and procedures. Edmonds v. State, 2007 Miss. LEXIS 7 (Miss. Jan. 4, 2007), op. withdrawn, sub. op., 955 So. 2d 787, 2007 Miss. LEXIS 349 (Miss. 2007).

Trial court did not err in admitting the forensic pathologist's testimony concerning the autopsy, bruises on the victim's body consistent with defensive posturing, the trajectory of the bullet, and the cause and manner of the victim's death, where a foundation was laid showing the expert was well qualified; further, the issue of the quality of the autopsy photos went to their weight, not their admissibility. Ross v. State, 883 So. 2d 1181, 2004 Miss. App. LEXIS 557 (Miss. Ct. App.), cert. denied, 883 So. 2d 1180, 2004 Miss. LEXIS 1274 (Miss. 2004).

In a capital murder case, the trial court did not abuse its discretion when it admitted the alleged murder weapon into evidence and permitted a forensic expert to testify that the victim was shot with the same type of weapon. Dycus v. State, 875 So. 2d 140, 2004 Miss. LEXIS 366 (Miss. 2004), vacated, 544 U.S. 901, 125 S. Ct. 1589, 161 L. Ed. 2d 271, 2005 U.S. LEXIS 2212 (U.S. 2005).

In defendant's capital murder case, a court did not err in allowing an expert to testify that a weapon matched the injury on the victim where defense counsel was given the opportunity to interview the expert about what his testimony would be, the expert said that he would testify that the mallet in the photograph was consistent with the injuries to the victim's head, but it would be impossible to say the mallet was the murder weapon, and defense counsel offered a general objection but did not ask for a continuance and did not specify a discovery violation. McGowen v. State, 859 So. 2d 320, 2003 Miss. LEXIS 413 (Miss. 2003).

An employee of the Mississippi Crime Laboratory was qualified to testify as an expert, notwithstanding that she had only reached the Forensic Scientist 1 level and that her work required supervision, where (1) she had been employed previously as an organic chemist and toxologist, (2) she had reviewed numerous articles and books on forensic science, drug chemistry, and drug analysis, and completed a 40 hour course with the Drug Enforcement Agency, and (3) she had also previously testified and been accepted as an expert throughout courts in the state of Mississippi. Grass v. State, 739 So. 2d 428, 1999 Miss. App. LEXIS 191 (Miss. Ct. App. 1999).

The trial court properly accepted a physician as an expert in the field of forensic odontology where (1) the defendant and the state stipulated that there is a body of scientific knowledge which allows for the identification of individuals based upon bite mark examination on soft tissue, (2) there was sufficient evidence of the expert's qualifications, and (3) a defense expert begrudgingly admitted that there was nothing wrong with the technique he used in comparing the defendant's dental impressions to the bite marks on the victim. Brewer v. State, 725 So. 2d 106, 1998 Miss. LEXIS 345 (Miss. 1998), cert. denied, 526 U.S. 1027, 119 S. Ct. 1270, 143 L. Ed. 2d 365, 1999 U.S. LEXIS 2032 (U.S. 1999).

It is not the case that only board certified forensic pathologists are qualified to render expert opinions in matters relating to deaths arising out of traumatic injuries. Johnson v. State, 1998 Miss. App. LEXIS 998 (Miss. Ct. App. Dec. 18, 1998), rev'd, 754 So. 2d 1178, 2000 Miss. LEXIS 50 (Miss. 2000).

In a prosecution for murder, a forensic pathologist was properly permitted to testify that the murder victim was holding his hands in front of his face at the time that one of his gunshot wounds was sustained. Bell v. State, 725 So. 2d 836, 1998 Miss. LEXIS 305 (Miss. 1998), cert. denied, 526 U.S. 1122, 119 S. Ct. 1777, 143 L. Ed. 2d 805, 1999 U.S. LEXIS 3380 (U.S. 1999).

Given a pathologist's extensive forensic experience, it was possible for him to state that the projectile removed from a murder victim's body was consistent with a .22 caliber bullet; the pathologist admitted that he could not and did not make a conclusive determination of the caliber of the bullet, and, therefore, the court did not err in allowing him to testify that the caliber of the projectiles was consistent with a .22 caliber projectile. Dudley v. State, 719 So. 2d 180, 1998 Miss. LEXIS 388 (Miss. 1998).

Trial court did not err in permitting forensic pathologist to testify as to cause of victim's death, and to give opinions as to blood splatters on her clothing and debris in her throat; these matters were clearly within his field of expertise, and he gave a detailed basis for every conclusion he reached. Whittington v. State, 523 So. 2d 966, 1988 Miss. LEXIS 75 (Miss.), cert. denied, 488 U.S. 923, 109 S. Ct. 304, 102 L. Ed. 2d 323, 1988 U.S. LEXIS 4871 (U.S. 1988).

**Harmless error.**

State's failure to tender a gang investigator as an expert was harmless error because the portions of the investigator's testimony based on his specialized knowledge, training, and experience paralleled the testimony of the victim and codefendant; the victim testified that defendant was a member of a gang, and the codefendant testified that the shooting was the result of gang rivalry. Croft v. State, 283 So. 3d 1, 2019 Miss. LEXIS 201 (Miss. 2019).

In a capital murder and arson case, even if the trial court erred in permitting a deputy marshal's testimony that the fires were intentionally set, the error was harmless as defendant was seen by numerous persons driving the victim's car and told his sister that he intended to burn it; he also told her that he intended to burn the victims's house minutes before the fire was discovered. Young v. State, 981 So. 2d 308, 2007 Miss. App. LEXIS 749 (Miss. Ct. App. 2007), cert. denied, 979 So. 2d 691, 2008 Miss. LEXIS 206 (Miss. 2008).

**Human factors psychologist.**

Trial court committed a clear error of judgment in excluding the expert testimony of a human factor's psychologist relating to the sufficiency of a car manufacturer's warning as to the danger of its auto air bag, on the ground that the witness was not an expert in auto air bag technology; further, the error was not harmless as the expert was the plaintiffs' sole warnings expert, and the substance of his testimony did not come in through any other route. Therefore, the plaintiffs were substantially prejudiced by the error. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564, 2003 Miss. App. LEXIS 752 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 2005 Miss. LEXIS 21 (Miss. Jan. 13, 2005), aff'd in part and rev'd in part, 904 So. 2d 1077, 2005 Miss. LEXIS 247 (Miss. 2005).

**Industry standards.**

Directed verdict in favor of the medical providers in the patient's medical malpractice action was inappropriate because the patient's proffered expert was a neurologist who had never performed middle ear surgery, which was the type of surgery performed on the patient; thus, that proffered expert was unable to offer an opinion on the appropriate standard of care that was owed to the patient. Troupe v. McAuley, 955 So. 2d 848, 2007 Miss. LEXIS 348 (Miss. 2007).

Witness's opinion as to trucking industry standards and customs was derived from specialized knowledge and was therefore subject to disclosure in response to plaintiffs' expert witness interrogatory, and therefore trial court erred in allowing him to provide expert testimony. Langston v. Kidder, 670 So. 2d 1, 1995 Miss. LEXIS 392 (Miss. 1995).

**Lack of foundational witness.**

Trial court erred when it allowed appraisals to be admitted in a probate case because the appraiser failed to appear as a foundational witness under Miss. R. Evid. 901; the appraiser's evaluations were relevant, thus meeting the first prong of the modified Daubert standard, but the decedent's son offered no proof of the appraiser's methods or procedures for appraising either property, and none of applicable reliability factors were considered prior to admitting the appraisals. Additionally, the widow never had the ability to cross-examine the appraiser on his methods or procedures. Hodges v. Hodges (In re Estate of Hodges), 109 So. 3d 150, 2013 Miss. App. LEXIS 106 (Miss. Ct. App. 2013).

**Legal expert.**

Testimony of attorney called as expert in action brought by client against its lawyer was properly admitted, where it assisted jury in understanding extensive testimony of both client and lawyer, particularly as to construction law and the relationship between owner, contractor and surety in a construction project. Terrain Enters. v. Mockbee, 654 So. 2d 1122, 1995 Miss. LEXIS 220 (Miss. 1995).

Circuit court in legal malpractice action should have allowed expert testimony regarding reasonableness of the attorney's actions in filing suit. Stevens v. Lake, 615 So. 2d 1177, 1993 Miss. LEXIS 73 (Miss. 1993).

**Medical expert.**

Defendant's expert had ample time to form reliable opinions by basing his review of the victim's medical records on his experience, training, and expertise as a family medicine medical doctor. Rather than exclude the testimony in its entirety, the circuit court should have permitted the State to cross-examine the expert and allow the jury to weigh other testimony against his contradicting testimony. Turner v. State, 292 So. 3d 1006, 2020 Miss. App. LEXIS 84 (Miss. Ct. App. 2020).

While a nurse who testified as an expert for the State was qualified to testify in the area of domestic violence based on her years of experience and training as a Sexual Assault Nurse Examiner, portions of her testimony regarding the correlation between the victim's injuries and strangulation were speculative and unreliable and should not have been admitted into evidence. Turner v. State, 292 So. 3d 1006, 2020 Miss. App. LEXIS 84 (Miss. Ct. App. 2020).

In a domestic aggravated assault case where a nurse and a physician gave extensive testimony about their training and experience as emergency-room medical providers, there was no objection to their scientific knowledge, skill, experience, training, or education, and there was no question that they were qualified to offer their testimony about the victim's initial presentation and treatment in the emergency room, the trial court did not err in admitting their testimony because the prosecution's failure to tender them as experts before eliciting their respective opinion-testimonies, although a procedural failure, did not constitute reversible error. Chase v. State, — So. 3d —, 2020 Miss. App. LEXIS 47 (Miss. Ct. App. Feb. 18, 2020), cert. denied, — So. 3d —, 2020 Miss. LEXIS 432 (Miss. 2020).

Circuit court was within its discretion to exclude an expert's testimony because none of the studies he cited wholly supported his conclusion, and most of the studies either contradicted his causal conclusion in their results or concluded that further investigation and research were required on the subject matter; the fact that none of the studies fully supported the expert's contention resulted in an analytical gap that could easily mislead the jury. Childers v. Ill. Cent. R.R. Co., 281 So. 3d 1175, 2019 Miss. App. LEXIS 264 (Miss. Ct. App. 2019).

Effective rate of timely administered tissue plasminogen activator (tPA), a drug used to restore blood flow to a stroke victim's brain, was between eight and twelve percent, and thus plaintiffs failed to prove that the decedent would have experienced a greater than 50 percent chance of a substantially better outcome had defendant timely administered tPA; because plaintiffs' expert testimony was not based on reliable data and it failed to satisfy the loss-of-chance causation standard, no genuine issues of material fact existed. Norman v. Anderson Reg'l Med. Ctr., 262 So. 3d 520, 2019 Miss. LEXIS 40 (Miss. 2019).

Trial court did not abuse its discretion in excluding the testimony of defendant's expert witness because his opinions were not offered to a reasonable degree of medical certainty; even if the testimony of the expert witness had been deemed admissible, the jury still would have had the authority to convict defendant. Thomas v. State, 249 So. 3d 331, 2018 Miss. LEXIS 272 (Miss. 2018).

Trial court did not abuse its discretion in allowing a doctor to testify as an expert, as he was a licensed physician who had ample experience with open wounds and the infections that can occur when a foreign body was left in a wound, as occurred in this action. Greenwood Leflore Hosp. v. Bennett, 276 So. 3d 1174, 2018 Miss. App. LEXIS 262 (Miss. Ct. App.), cert. denied, 258 So. 3d 287, 2018 Miss. LEXIS 526 (Miss. 2018).

Trial court did not abuse its discretion in finding that a patient's expert was not qualified to offer his expert opinion in a medical malpractice action because although the expert had some familiarity with the procedure performed upon the patient, the expert did not indicate sufficient familiarity with the standard of care to which a gastroenterologist was held but simply opined as to what he would have done as a general surgeon in a similar situation. Fipps v. Greenwood Leflore Hosp., 237 So. 3d 194, 2018 Miss. App. LEXIS 53 (Miss. Ct. App. 2018).

Trial judge did not abuse the judge's discretion in striking a doctor as an expert witness in a wrongful death action based on medical malpractice because the judge found that the doctor was not qualified to render an opinion, as the doctor lacked both knowledge and familiarity with the hospital which provided care to the decedent, and that the doctor failed to sufficiently articulate the applicable medical standard of care or a breach of the applicable medical standard of care by the hospital. Hodges v. Univ. of Miss. Med. Ctr., 226 So. 3d 602, 2017 Miss. App. LEXIS 534 (Miss. Ct. App. 2017).

Trial court was well within its discretion in allowing a doctor's expert testimony in a medical malpractice action because the court found that the doctor's testimony was both relevant and reliable, that the doctor was a board-certified OBGYN surgeon and medical professor, that the doctor had substantial medical experience, and that the doctor personally reviewed the patient's medical records and formulated an opinion as to the cause of the patient's post-surgical injury based on those records. Thomas v. Purdy, 231 So. 3d 190, 2017 Miss. App. LEXIS 190 (Miss. Ct. App.), cert. denied, 229 So. 3d 712, 2017 Miss. LEXIS 477 (Miss. 2017).

Admission of the medical records of doctors who treated a patient after the patient's surgery was appropriate, in a medical malpractice action, as testimony by treating physicians. Furthermore, no redactions of certain words from the records were required because the words did not speak to the causation of the patient's injury, or to any standard of care that a doctor may have owed to the patient, post-surgery. Thomas v. Purdy, 231 So. 3d 190, 2017 Miss. App. LEXIS 190 (Miss. Ct. App.), cert. denied, 229 So. 3d 712, 2017 Miss. LEXIS 477 (Miss. 2017).

Trial court abused its discretion in relying upon the speculative testimony of an expert witness to find a hospital liable for the decedent's death because, although the witness claimed admitting the decedent to the ICU would have saved the decedent's life, the witness offered no specifics on the treatment that the decedent would have received, and how monitoring would have saved the decedent's life. Moreover, the witness did not offer sufficient evidence to show a substantially better result would have occurred had the decedent been admitted. Univ. of Miss. Med. Ctr. v. Leontyne Littleton, 213 So. 3d 525, 2016 Miss. App. LEXIS 640 (Miss. Ct. App. 2016).

Trial court did not abuse its discretion by admitting the prosecution's expert witnesses' testimony because it was not required to conduct an actual Daubert hearing, it addressed defendant's Daubert claims outside the jury's presence at the time the prosecution called each of its experts, and the absence of peer review articles did not render the experts' opinions concerning the time that a 13-month-old child could survive after sustaining fatal internal injuries inadmissible. Gray v. State, 202 So. 3d 243, 2015 Miss. App. LEXIS 560 (Miss. Ct. App. 2015).

In a case in which strangulation was an element of the crime charged in the indictment, the trial court did not commit plain error by permitting a law enforcement officer to testify to medical causation that the victim's injuries appeared to be a result of strangulation because defendant failed to object to the testimony at trial and, in fact, emphasized at on cross examination. Kirk v. State, 160 So. 3d 685, 2015 Miss. LEXIS 68 (Miss. 2015).

Defendant was entitled to a new trial because the trial court erred in allowing a doctor to testify as to the position of the victim's body at the time of a shooting where the doctor offered no facts or evidence to support his contention that the victim's singular gunshot wound was consistent with being in a guarded position and the doctor noted that there were other possibilities as well. Newell v. State, 176 So. 3d 78, 2014 Miss. App. LEXIS 515 (Miss. Ct. App. 2014), aff'd, 175 So. 3d 1260, 2015 Miss. LEXIS 505 (Miss. 2015).

Circuit court judge did not abuse the judge's discretion in a medical malpractice action by granting a doctor's motion in limine to strike the testimony of the patient's expert witness because the opinion testimony of the witness lacked support by any peer-reviewed literature. Furthermore, the testimony failed to establish that the doctor failed to disclose a material known risk, or to create a dispute of material fact as to proximate causation. Bolton v. Weiner, 158 So. 3d 332, 2014 Miss. App. LEXIS 346 (Miss. Ct. App. 2014), cert. denied, 157 So. 3d 835, 2015 Miss. LEXIS 90 (Miss. 2015).

Where a theory has been studied in the medical literature and an expert's opinion is challenged for being contrary to the medical literature, there must be some support in the medical literature for a medical expert's opinion or some basis for believing that the medical literature is wrong. Reliance on a doctor's personal experience alone is insufficient. King v. Singing River Health Sys., 158 So. 3d 318, 2014 Miss. App. LEXIS 299 (Miss. Ct. App. 2014), cert. denied, 157 So. 3d 835, 2015 Miss. LEXIS 97 (Miss. 2015).

In a medical malpractice action, the trial court was correct in finding plaintiff's expert's opinion that the patient stood a

70 percent better chance of a better outcome if a tissue plasminogen activator had been administered was not based upon reliable principles and methods. As a consequence, the trial court was correct in excluding the expert's opinion. King v. Singing River Health Sys., 158 So. 3d 318, 2014 Miss. App. LEXIS 299 (Miss. Ct. App. 2014), cert. denied, 157 So. 3d 835, 2015 Miss. LEXIS 97 (Miss. 2015).

In a malpractice case, as the trial testimony of plaintiff's medical expert differed vastly from the opinion stated in his affidavit and disclosed in plaintiff's interrogatory responses, defendant surgeon was entitled to a new trial due to the unfair surprise caused by plaintiff's failure to supplement her discovery responses as required by Miss. R. Civ. P. 26(f)(1)(B). Cleveland v. Hamil, 155 So. 3d 829, 2013 Miss. App. LEXIS 112 (Miss. Ct. App.), aff'd in part and rev'd in part, 119 So. 3d 1020, 2013 Miss. LEXIS 404 (Miss. 2013).

In a medical malpractice case, although the trial court properly found that plaintiff's expert was qualified as an expert in thoracic and cardiovascular surgery, as he was not qualified to testify as an expert in gastroenterology–defendant's sub-specialty–he was improperly allowed to opine as to the standard of care applicable to that sub-specialty. Cleveland v. Hamil, 155 So. 3d 829, 2013 Miss. App. LEXIS 112 (Miss. Ct. App.), aff'd in part and rev'd in part, 119 So. 3d 1020, 2013 Miss. LEXIS 404 (Miss. 2013).

While a surgeon was properly qualified as an expert in surgery under Miss. R. Evid. 702, a doctor was entitled to a new trial in a medical malpractice matter as a decedent's wife failed to supplement her discovery responses regarding the substance of the expert's testimony as required by Miss. R. Civ. P. 26(f)(1)(B) and 26(f)(2)(A) to disclose the substance of the expert's evolving-second-ulcer theory and to provide meaningful information about the decedent's hemoglobin and hematocrit levels as to enable the doctor's counsel to meet the expert's testimony at trial; the doctor's unexercised right to depose the expert did not excuse the wife's unfulfilled duty to supplement and amend her expert's opinion. Cleveland v. Hamil, 2012 Miss. App. LEXIS 593 (Miss. Ct. App. Sept. 25, 2012), op. withdrawn, 2013 Miss. App. LEXIS 94 (Miss. Ct. App. Mar. 12, 2013), sub. op., 155 So. 3d 829, 2013 Miss. App. LEXIS 112 (Miss. Ct. App. 2013).

Wife's expert was not qualified as an expert in gastroenterology under Miss. R. Evid. 702 where the expert: (1) was not a gastroenterologist; (2) had not really had any gastroenterology training; (3) had not participated in any continuing medical education about gastroenterology; (4) had never performed any gastroenterologist-specific medical procedures; and (5) had never been consulted as a gastroenterologist. The expert's experience as a surgeon with upper GI bleeds did not show he was familiar with gastroenterology and the standard of care required of a gastroenterologist treating an upper GI bleed. Cleveland v. Hamil, 2012 Miss. App. LEXIS 593 (Miss. Ct. App. Sept. 25, 2012), op. withdrawn, 2013 Miss. App. LEXIS 94 (Miss. Ct. App. Mar. 12, 2013), sub. op., 155 So. 3d 829, 2013 Miss. App. LEXIS 112 (Miss. Ct. App. 2013).

Summary judgment in favor of a doctor and a clinic was appropriate in a medical malpractice and wrongful death action because the obstetrician-gynecologist whom the parents had offered as an expert was unable to provide reliable testimony regarding the cause of their baby's death and, thus, the testimony was inadmissible under Miss. R. Evid. 702. The expert was not a pathologist and did not present any scientific evidence that supported his opinion as to cause of death. In fact, the parents offered as an additional expert witness, a pathologist who gave an opinion different from the obstetrician-gynecologist's conclusion. Further, the expert did not study the placental tissues of the baby under a microscope. Finally, the autopsy report did not establish placental insufficiency as the cause of death. Worthy v. McNair, 37 So. 3d 609, 2010 Miss. LEXIS 297 (Miss. 2010).

In a personal injury action, a trial court's granting of a motion to strike the expert testimony of a doctor was arbitrary and clearly erroneous, and constituted an abuse of discretion, where the opinion of the doctor, a qualified obstetrician and gynecologist, was based on an interpretation of the medical records in light of the

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doctor's experience, training, and expertise. The doctor's opinion did not amount to mere speculation. It constituted a scientifically grounded theory of causation, not junk science. Hubbard v. McDonald's Corp., 41 So. 3d 670, 2010 Miss. LEXIS 316 (Miss. 2010).

Expert's affidavit was inadmissible under Miss. R. Evid. 702 to establish a prima facie medical-negligence claim that defendant doctor failed to exercise reasonable care and skill in the surgical removal of spinal-cord stimulator from plaintiff patient because the affidavit contained no information regarding the field in which the expert was expected to testify, lacked any articulation of the applicable standard of care, and did not contain underlying facts explaining how the doctor allegedly deviated from the standard of care. Sanders v. Wiseman, 29 So. 3d 138, 2010 Miss. App. LEXIS 129 (Miss. Ct. App. 2010).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the trial court did not err in allowing a toxicologist to testify to the effects of the use of methamphetamine on the decedent's body. The widow did not object to the expert's use of the words "could have" as being an improper legal standard pursuant to Miss. R. Evid. 702 and 703 and she was provided notice of the contents of the expert's opinion, which included the issue of fatigue. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450, 2010 Miss. LEXIS 200 (Miss. 2010).

Trial court did not abuse its discretion by excluding the witness's testimony regarding the efficacy of interventions to prolong plaintiff's pregnancy where the witness could produce no support for his opinion, other than his own personal experience. Hill v. Mills, 26 So. 3d 322, 2010 Miss. LEXIS 42 (Miss. 2010).

In a medical malpractice action brought by patient's personal representative alleging patient's death to have been due to complications arising out of a femoral angiogram, the trial court did not err in striking the testimony of plaintiff's expert witness, a surgeon, who had sufficient knowledge, skill, training, education, and experience to qualify him to testify as an expert in general surgery, but failed to establish that he had any special training or knowledge in the field of cardiology sufficient to qualify him as an expert in that field. McDaniel v. Pidikiti, 39 So. 3d 952, 2009 Miss. App. LEXIS 851 (Miss. Ct. App. 2009).

Pursuant to Miss. R. Evid. 702, nursing experts are not qualified to opine as to medical causation and are unable to establish the necessary element of proximate cause. Vaughn v. Miss. Baptist Med. Ctr., 20 So. 3d 645, 2009 Miss. LEXIS 531 (Miss. 2009).

Plaintiff patient's expert witness–a nurse–possessed the requisite knowledge, skill, experience, training, and education to be qualified as an expert in the field of nursing and was qualified to testify, pursuant to Miss. R. Evid. 702, concerning the standard of care and any deviations on the part of the hospital nursing staff from that standard of care. However, she could not testify as to medical causation. Vaughn v. Miss. Baptist Med. Ctr., 20 So. 3d 645, 2009 Miss. LEXIS 531 (Miss. 2009).

Pursuant to Miss. R. Evid. 702, the trial court properly excluded a doctor's expert testimony because the doctor was not familiar with the standard of care to which a thoracic surgeon performing the surgery at issue was held, and there was no basis in the record to show that the doctor was familiar with the requirements of a surgical team–he was an expert in internal medicine, not surgery. Paige v. Miss. Baptist Med. Ctr., 31 So. 3d 637, 2009 Miss. App. LEXIS 667 (Miss. Ct. App. 2009).

Medical experts' testimony was properly admitted under Miss. R. Evid. 702 because their qualifications were not legitimately questioned, and their testimony was sufficiently relevant and reliable regarding the causal connection between the neurotoxin in the adhesive to the illnesses the employees suffered while working on the glue line. Franklin Corp. v. Tedford, 18 So. 3d 215, 2009 Miss. LEXIS 426 (Miss. 2009).

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Trial court properly admitted a physician's testimony in defendant's trial for capital murder when the physician's background, training, and experience qualified the physician as an expert. Lima v. State, 7 So. 3d 903, 2009 Miss. LEXIS 190 (Miss. 2009).

Trial court properly granted a physician's and a center's motions to strike because neither of the widow's experts could testify as to the appropriate standard of care in the widow's medical malpractice/wrongful death action. Naomi Ruth McDonald v. Mem'l Hosp., 8 So. 3d 175, 2009 Miss. LEXIS 187 (Miss. 2009).

Circuit court did not abuse its discretion in allowing expert witnesses to testify regarding scientific evidence on neurological impact of 1-BP on humans, which was a relatively new field of study with limited reliable methodology, because the experts' qualifications were not legitimately questioned, and their testimony was sufficiently relevant and reliable. Franklin Corp. v. Tedford, 2009 Miss. LEXIS 169 (Miss. Apr. 16, 2009), op. withdrawn, sub. op., 18 So. 3d 215, 2009 Miss. LEXIS 426 (Miss. 2009).

Although a medical license was not the sine qua non for a patient's medical expert to qualify in a medical negligence action, it had to be shown that the proposed expert had to know a great deal regarding the subject of his testimony. Not only could it not be said that the proposed expert was a specialist in neurosurgery as the State of Mississippi prohibited him from practicing neurosurgery, but the court could not find that the proposed expert was qualified based on his specialized knowledge, skill, experience, training, or education because the very reason he was not allowed to practice neurosurgery was that he was found to have deficiencies in his medical knowledge, specifically in the areas of spinal and intra cranial topics. Caldwell v. Warren, 2 So. 3d 751, 2009 Miss. App. LEXIS 63 (Miss. Ct. App. 2009).

Where an expert's testimony as to the driver's disability resulting from injuries received in a motor vehicle accident was not based on a comprehensive exam, the trial court erred in awarding the driver damages for disability. City of Jackson v. Spann, 4 So. 3d 1029, 2009 Miss. LEXIS 5 (Miss. 2009).

Expert's testimony met the requirements of Miss. R. Evid. 702, where it was based on sufficient facts of data in the form of the decedent's medical reports and medical publications; it was the produce of reliable principles and methods gleaned from the records, publications, and the expert's medical experience; and the trial judge found the expert would reliably apply the principles and methods to the facts of the case. Univ. Med. Ctr. v. Martin, 994 So. 2d 740, 2008 Miss. LEXIS 618 (Miss. 2008).

In a medical malpractice and wrongful death case, the trial court did not err in permitting four expert witnesses who specialized in forensic pathology, forensic toxicology, pharmacology and toxicology, and gastroenterology and internal medicine to testify as to the condition of the deceased patient and the standard of care required of defendant doctor, who was an internist with a specialty in infectious diseases, because the expert witnesses sufficient established their familiarity with the standards of the doctor's specialty. Causey v. Sanders, 998 So. 2d 393, 2008 Miss. LEXIS 520 (Miss. 2008).

Defendant's conviction for sexual battery of child under the age of 14 was appropriate because the admission of the testimony of a forensic interviewer and a doctor who was an expert in forensic interviewing and child abuse was not erroneous. The record did not show that those witnesses failed to reliably apply the principles of their expertise to the case. Carter v. State, 996 So. 2d 112, 2008 Miss. App. LEXIS 445 (Miss. Ct. App. 2008), cert. denied, 999 So. 2d 374, 2009 Miss. LEXIS 43 (Miss. 2009).

Trial court did not err by admitting the testimony of the State's expert under Miss. R. Evid. 702 who did not physically evaluate the victim but merely reviewed his medical records because peer review by publication was only one factor on a non-exhaustive list of factors for admissibility, defendant had the opportunity to discredit the expert's theories by cross-examination, and the court found no merit to defendant's argument that since there was not yet board certification for child abuse and neglect that the expert could not qualify as an expert in child abuse. Middleton v. State, 980 So. 2d 351, 2008 Miss. App. LEXIS 254 (Miss. Ct. App. 2008).

Trial court did not err by admitting the testimony of the State's expert under Miss. R. Evid. 702 because he was well qualified to present testimony as an expert in the field of pediatrics, he had over 30 publications regarding his specialty, he had given many lectures regarding pediatrics and pediatric trauma, he had lectured on shaken baby syndrome, and he testified that shaken baby syndrome was a widely accepted theory but admitted that there were a few well-respected physicians who disagreed. Middleton v. State, 980 So. 2d 351, 2008 Miss. App. LEXIS 254 (Miss. Ct. App. 2008).

Trial court did not err by admitting the testimony of the State's expert under Miss. R. Evid. 702 because he was properly certified as an expert witness in pediatric radiology and the expert, as the victim's treating pediatric radiologist, was properly allowed to testify to his impressions regarding the causes of the victim's injuries, which he observed on the MRIs and CT scans of the victim. His initial reports were entered as exhibits and he testified about those findings at trial. Middleton v. State, 980 So. 2d 351, 2008 Miss. App. LEXIS 254 (Miss. Ct. App. 2008).

There was no error in allowing the expert opinion of a victim's treating physician under Miss. R. Evid. 702 in a rape case because the physician did not render an opinion that the victim had been raped, but he merely recounted his perceptions about her physical condition upon arrival and noted that the vagina was not lacerated during consensual sex. McGriggs v. State, 987 So. 2d 455, 2008 Miss. App. LEXIS 191 (Miss. Ct. App.), cert. dismissed, 998 So. 2d 1010, 2008 Miss. LEXIS 641 (Miss. 2008).

In an aggravated assault case, an orthopedic surgeon should have been qualified as an expert witness under Miss. R. Evid. 702 and not been allowed to give a lay opinion under Miss. R. Evid. 701 because he was acting in his professional capacity when he testified that a broken bone was caused by high-energy force. However, the error was harmless because it did not deny a substantial right or render the trial fundamentally unfair; photographs of the injuries suffered by defendant's girlfriend were shown, and the girlfriend testified that defendant forced her out of the car, threw her down, kicked her, and stomped on her back. O'Neal v. State, 977 So. 2d 1252, 2008 Miss. App. LEXIS 177 (Miss. Ct. App. 2008).

In a case filed under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 et seq., a trial court did not err by allowing expert testimony under Miss. R. Evid. 702 because a witness did not have to be a pulmonologist in order to opine on matters concerning aspiration pneumonia; the witness had received specialized training and knowledge in medical school and by treating other patients. Univ. of Miss. Med. Ctr. v. Pounders, 970 So. 2d 141, 2007 Miss. LEXIS 691 (Miss. 2007).

Where a patient sustained a chemical burn from an intravenous chemotherapy treatment, an expert nurse was properly allowed to testify in the medical negligence action because the expert was a licensed nurse, familiar with the current standards of chemotherapy administration, and called to testify whether the administration of the drugs was done properly, she testified as to areas within her expertise. Sacks v. Necaise, 991 So. 2d 615, 2007 Miss. App. LEXIS 817 (Miss. Ct. App. 2007), cert. dismissed, 2008 Miss. LEXIS 460 (Miss. Sept. 25, 2008).

In a wrongful death action, there was no error in partially excluding an expert's testimony; the parties conducted an extensive voir dire of the expert's qualifications to testify to the treatment that should have been provided to a decedent in light of his extreme weight loss, and the trial judge ruled that the expert was not familiar enough with those treatment options to offer an expert opinion. Mariner Health Care, Inc. v. Estate of Edwards, 964 So. 2d 1138, 2007 Miss. LEXIS 520 (Miss. 2007).

Expert's only testimony regarding traits of sexually abused children did not address similarities the victim shared with other sexually abused children, but noted that she differed from 98% of the other sexually abused children, and the expert's testimony also focused on the results of her physical examination of the victim, rather than child sexual abuse profiles; thus, the expert did not make improper generalizations about child abuse victims and the trial court did not abuse its discretion in allowing the expert's testimony pursuant to Miss. R. Evid. 702. Poynor v. State, 962 So. 2d 68, 2007 Miss. App. LEXIS 292 (Miss. Ct. App.), cert. denied, 962 So. 2d 38, 2007 Miss. LEXIS 416 (Miss. 2007).

Grant of summary judgment in favor of the doctor in a medical malpractice action was appropriate because the trial court properly found that the patient's witness-doctor was not qualified to testify as to the standard of care of an internist; additionally, the alleged negligence of the doctor did not fall under the layman's exception. Hubbard v. Wansley, 954 So. 2d 951, 2007 Miss. LEXIS 233 (Miss. 2007).

State's expert witness's only testimony regarding traits of sexually abused children did not address similarities defendant's first victim shared with other sexually abused children, but noted that the first victim differed from 98 percent of the other sexually abused children; thus, the expert did not make improper generalizations about child abuse victims, and therefore the trial court did not abuse its discretion in allowing the expert's testimony pursuant to Miss. R. Evid. 702. Poynor v. State, 2006 Miss. App. LEXIS 857 (Miss. Ct. App. Nov. 21, 2006), op. withdrawn, sub. op., 962 So. 2d 68, 2007 Miss. App. LEXIS 292 (Miss. Ct. App. 2007).

Trial court did not commit plain error by admitting the son's expert's testimony under Miss. R. Evid. 702 because, inter alia: (1) the expert's failure to consider lack of cardiac impairment did not render his testimony unreliable; and (2) the medical center did not question the expert about his experience with abdominal compartment syndrome. Univ. of Miss. Med. Ctr. v. Peacock, 972 So. 2d 619, 2006 Miss. App. LEXIS 825 (Miss. Ct. App. 2006), cert. denied, 973 So. 2d 244, 2008 Miss. LEXIS 5 (Miss. 2008).

Physician that served as a general medical officer in the air force, a flight surgeon for the national guard, and performed or assisted in numerous orthopedic surgeries was qualified as an expert to testify regarding injuries suffered to a mental patient's leg during an attempted escape. Miss. Dep't of Mental Health v. Hall, 936 So. 2d 917, 2006 Miss. LEXIS 462 (Miss. 2006).

Defendant's manslaughter conviction was proper pursuant to Miss. R. Evid. 702 where the doctor was not asked to testify outside of his area of expertise in discussing the pattern of shot wounds on the victim's torso, describing the marks that would have been present had the victim been holding some item, such as a gun, between himself and defendant at the time of the shooting. Moore v. State, 932 So. 2d 833, 2005 Miss. App. LEXIS 800 (Miss. Ct. App. 2005), cert. dismissed, 921 So. 2d 1279, 2005 Miss. LEXIS 780 (Miss. 2005), cert. denied, 933 So. 2d 303, 2006 Miss. LEXIS 520 (Miss. 2006).

Under Miss. R. Evid. 702, a pediatrician was allowed to assist the jury in understanding the evidence by presenting his opinion of the child's injuries because he was qualified as an expert by knowledge, skill, experience, training, or education. Under the guidance of Rule 702, the doctor could explain the nature of the injury to the child and the instrument which may have caused the bruising. McClain v. State, 929 So. 2d 946, 2005 Miss. App. LEXIS 602 (Miss. Ct. App. 2005), cert. denied, 929 So. 2d 923, 2006 Miss. LEXIS 294 (Miss. 2006).

Grant of summary judgment in favor of the medical center in the executor's action for medical malpractice and wrongful death was improper because, the expert in question's training, experience, and corresponding knowledge, indicated that he was qualified as to the general standard of care. Partin v. N. Miss. Med. Ctr., Inc., 929 So. 2d 924, 2005 Miss. App. LEXIS 468 (Miss. Ct. App. 2005), cert. denied, 929 So. 2d 923, 2006 Miss. LEXIS 290 (Miss. 2006), cert. denied, 929 So. 2d 923, 2006 Miss. LEXIS 298 (Miss. 2006), cert. denied, 929 So. 2d 923, 2006 Miss. LEXIS 299 (Miss. 2006).

Based on a physician's experience and treatment of an abuse victim, there was a sufficient foundation for the physician to opine under Miss. R. Evid. 702 as to whether head injuries suffered by a minor child were accidental or not in a felony child abuse case. Wells v. State, 913 So. 2d 1053, 2005 Miss. App. LEXIS 434 (Miss. Ct. App. 2005).

Because the unchallenged expert testimony at trial established that the decedent's stroke was not a foreseeable consequence of the alleged negligence which led to the decedent's fall, the estate was not permitted to recover damages related to the stroke, whether or not it was caused by the fall at issue in the personal injury action. City of Jackson v. Estate of Stewart, 908 So. 2d 703, 2005 Miss. LEXIS 298 (Miss. 2005).

In a products liability case arising from use of a prescription drug, a court erred by failing to grant the drug company's motion for a new trial because the medical testimony provided by plaintiffs failed to address and account for the innumerable preexisting conditions and other causative factors which were much more likely than the drug in question to have caused plaintiffs' symptoms. Janssen Pharmaceutica, Inc. v. Bailey, 878 So. 2d 31, 2004 Miss. LEXIS 494 (Miss. 2004), modified, 2004 Miss. LEXIS 1002 (Miss. Aug. 5, 2004).

In a wrongful death case, a court did not abuse its discretion in excluding defendant's expert's testimony where the testimony of the expert would have been cumulative to defendant's other expert testimony. Eckman v. Moore, 2003 Miss. LEXIS 552 (Miss. Oct. 23, 2003), op. withdrawn, 2004 Miss. LEXIS 310 (Miss. Mar. 25, 2004), sub. op., 876 So. 2d 975, 2004 Miss. LEXIS 287 (Miss. 2004).

In a case where defendant was convicted of murder for the shooting death of his wife, the circuit judge did not abuse his discretion in allowing a doctor to testify as to the victim's brain injuries, as the doctor had personally observed the victim's motor function and brain activity. Jones v. State, 857 So. 2d 740, 2003 Miss. LEXIS 554 (Miss. 2003).

Doctor's testimony, in a medical malpractice suit where he was the defendant but not designated as an expert witness, was permissible where it was explanatory of the doctor's treatment of the patient and of his records and nursing records about the patient's care; however, some of the doctor's testimony as to the symptoms that the patient would have developed had the doctor negligently perforated the patient's bowel in a surgical procedure was clearly impermissible expert testimony. Therefore, the trial court erred in permitting the expert testimony; however, the error did not warrant reversal as the doctor's expert testimony was largely cumulative to that of his expert witnesses and the doctor presented no new information. Griffin v. McKenney, 877 So. 2d 425, 2003 Miss. App. LEXIS 942 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 867 (Miss. 2004).

Even if the State's experts, two doctors, had never published any articles on child abuse, they were properly allowed to give opinions based on their prior experience with children in the emergency room. Kolberg v. State, 829 So. 2d 29, 2002 Miss. LEXIS 268 (Miss. 2002), cert. denied, 538 U.S. 981, 123 S. Ct. 1787, 155 L. Ed. 2d 672, 2003 U.S. LEXIS 3010 (U.S. 2003), overruled in part, Harrell v. State, 134 So. 3d 266, 2014 Miss. LEXIS 52 (Miss. 2014), overruled in part, Rowsey v. State, 188 So. 3d 486, 2015 Miss. LEXIS 573 (Miss. 2015).

An emergency room physician with 25 years experience in family practice and emergency medicine was qualified to give expert testimony in a rape prosecution regarding the gynecological aspects of his treatment and examination of the 11 and 13 year old victims. Simmons v. State, 722 So. 2d 666, 1998 Miss. LEXIS 538 (Miss. 1998).

Trial court did not err in admitting testimony of State's expert pathologist who wrote two autopsy reports which differed in some respects; pathologist was subject to rigorous cross-examination, and jury had both autopsy reports as well as pathologist's explanation for writing two reports. Taylor v. State, 672 So. 2d 1246, 1996 Miss. LEXIS 193 (Miss.), cert. denied, 519 U.S. 994, 117 S. Ct. 486, 136 L. Ed. 2d 379, 1996 U.S. LEXIS 7020 (U.S. 1996).

Trial court erred in allowing examining physician to testify that child had been sexually traumatized, where the physician was not qualified as a psychiatrist or psychologist, and gave no evidence of any specialized training in field of child sexual abuse. Goodson v. State, 566 So. 2d 1142, 1990 Miss. LEXIS 413 (Miss. 1990).

**Mental health expert.**

In a case in which a circuit court judge ruled appellee was intellectually disabled and thus ineligible for the death penalty under the Eighth Amendment, the Supreme Court found no reversible error in admitting an expert's opinion that appellee's multiple consistent IQ scores in the intellectually disabled range ruled out the possibility of malingering. State v. Scott, 233 So. 3d 253, 2017 Miss. LEXIS 222 (Miss. 2017).

Trial court abused its discretion when it refused to grant funds for the retention of a post-traumatic-stress-disorder (PTSD) expert to assist a juvenile defendant in preparing his imperfect self-defense theory. The juvenile established a need for the expert testimony to assist the jury in understanding how PTSD might have affected the juvenile's thought process at the time he shot and killed his father. Evans v. State, 109 So. 3d 1044, 2013 Miss. LEXIS 31 (Miss. 2013).

In a sexual battery and touching of a child for lustful purposes case, the expert testimony of the four-year-old victim's therapist was properly admitted as it satisfied Miss. R. Evid. 702 and the Daubert standard. The expert's testimony was reliable, based on her experience as a child therapist since for over 25 years, her treatment of hundreds of children who had been sexually abused, and her qualification as an expert on prior occasions. Bishop v. State, 982 So. 2d 371, 2008 Miss. LEXIS 137 (Miss. 2008).

Defendant's murder conviction was appropriate where a doctor did not impermissibly testify that the victim's brother, a child witness, was telling the truth during their interview in which he described his brother's death at the hands of defendant. Rather, the doctor testified about the indicators that she looked for during a forensic interview with a child victim/witness and then described the witness's demeanor and mannerisms during their interview. Osborne v. State, 942 So. 2d 193, 2006 Miss. App. LEXIS 134 (Miss. Ct. App.), cert. denied, 942 So. 2d 164, 2006 Miss. LEXIS 714 (Miss. 2006).

From the colloquies set forth in the record, the child psychologist did not offer a direct opinion that the child fondling victim was telling the truth. However, whether his testimony ran afoul of the prohibition against syndrome testimony was a closer question; while the psychologist did not specifically testify that the victim displayed the "so-called typical characteristics" of child-victims of sexual abuse, he came very close, but there was no reversible error because defendant never objected to the testimony on the basis that he urged on appeal. Barnes v. State, 906 So. 2d 16, 2004 Miss. App. LEXIS 971 (Miss. Ct. App. 2004), cert. denied, 904 So. 2d 184, 2005 Miss. LEXIS 430 (Miss. 2005).

In a student's suit against a school district and others based on her alleged sexual assault by male students, the trial court did not abuse its discretion in allowing the defendants' expert (a master's level psychometrist and licensed counselor, whose practice included counseling in sexual abuse cases) to testify as to her credibility, as he testified that he had "seen" over 2800 children who had been sexually abused, and had testified in an unspecified number of trials involving child sexual abuse. T.K. v. Simpson County Sch. Dist., 846 So. 2d 312, 2003 Miss. App. LEXIS 470 (Miss. Ct. App. 2003).

Since the state of mind or the mental health of accused is not an element of the offense of rape, doctor's testimony regarding defendant's mental health status would not have been helpful to jury in determining any fact in issue, and it was thus properly excluded. Ellis v. State, 667 So. 2d 599, 1995 Miss. LEXIS 596 (Miss. 1995).

Expert testimony was appropriate, and would be helpful to trier of fact, in proceeding to terminate parental rights based on mental illness of both natural parents. Lauderdale County Dep't of Human Servs. by Barnett v. T.H.G., 614 So.

2d 377, 1992 Miss. LEXIS 843 (Miss. 1992).

There was no error in allowing a forensic psychologist to testify for State in rebuttal to testimony of clinical psychologist called by defense, as the forensic psychologist's specialized knowledge was likely to assist jury in understanding evidence as it related to murder defendant's psychological makeup. Turner v. State, 573 So. 2d 657, 1990 Miss. LEXIS 792 (Miss. 1990), cert. denied, 500 U.S. 910, 111 S. Ct. 1695, 114 L. Ed. 2d 89, 1991 U.S. LEXIS 2522 (U.S. 1991).

**Necessity for expert testimony.**

Trial court erred in denying defendant's motion for a continuance to obtain an expert on the subject of cell phone technology because the State's witness – without being tendered or accepted as an expert – was allowed to provide expert testimony beyond the information contained in defendant's cell phone records to establish his presence at the location of an alleged murder, which exceeded the information contained in defendant's phone records, and the State's disclosure of records themselves, when provided in response to defendant's discovery request, did not put him on notice of the testimony the State would present at trial. Fleming v. State, 179 So. 3d 1115, 2015 Miss. LEXIS 611 (Miss. 2015).

In an asbestos case alleging failure to warn, it was unnecessary to consider the admissibility of expert testimony on the adequacy of a manufacturer's warning because such testimony was not required to establish that the warning was inadequate. Union Carbide Corp. v. Nix, 142 So. 3d 374, 2014 Miss. LEXIS 271 (Miss. 2014).

Issue of whether a landscape light, that burned hot enough to cause severe burning to a child who fell on the light, was a dangerous condition did not require expert testimony. Chandler v. Mary Mahoney's, Inc., 126 So. 3d 972, 2013 Miss. App. LEXIS 794 (Miss. Ct. App. 2013).

Denial of a driver and passenger's motion for a new trial in their negligence action after the jury found in favor of the other driver was improper because the driver and passenger were denied their right to a fair trial. In part, the jury was given no expert testimony to use to draw a conclusion as to the negligence of the parties and without such testimony, the jury did not have sufficient information from which to reach a verdict. Denham v. Holmes, 60 So. 3d 803, 2010 Miss. App. LEXIS 148 (Miss. Ct. App. 2010), aff'd on other grounds, 60 So. 3d 773, 2011 Miss. LEXIS 192 (Miss. 2011).

Defendant's argument that an investigator's testimony as to the path of the bullets was an area requiring expert testimony was without merit. The investigator's testimony was nothing more than his opinion based on his personal observations and the testimony was not intended to prove any ballistic evidence since defendant admitted to shooting the officers. Mayers v. State, 42 So. 3d 33, 2010 Miss. App. LEXIS 88 (Miss. Ct. App.), cert. denied, 42 So. 3d 24, 2010 Miss. LEXIS 437 (Miss. 2010).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the trial court did not err excluding two of the widow's experts from testifying on the issue of the taillight visibility and in allowing two of the trucking company's lay witnesses to render opinions on taillight visibility; dirt on the taillights was not of a nature that required an expert opinion because the jury had enough knowledge to discern whether the photographs depicted dirt on the taillights. Further, neither of the widow's experts were at the scene of the accident; the trucking company's lay witnesses were at the scene moments after the collision; and the lay witnesses testified about their personal knowledge and observations. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450, 2010 Miss. LEXIS 200 (Miss. 2010).

Record failed to reflect that the guardian ad litem possessed the qualifications to investigate child abuse, to determine substantiation, to interview children regarding allegations of sexual abuse, or to make any expert conclusions as to whether the allegations were substantiated or not; the determination as to whether sexual abuse occurred was a factual determination to be made by the chancellor. The chancellor was not provided any factual information regarding any inquiry as to the sexual abuse of the children and no qualified opinion of any facts derived therefrom. thus no accurate conclusion could properly be drawn. Jones v. Jones, 43 So. 3d 465, 2009 Miss. App. LEXIS 946 (Miss. Ct. App. 2009), cert. denied, 49 So. 3d 106, 2010 Miss. LEXIS 463 (Miss. 2010).

In a statutory rape case, a trial court did not abuse its discretion by refusing to appoint an expert where defendant did not show that it would have aided his defense that semen had been planted in the victim's vagina; defendant did not want an expert to testify at trial, but only requested assistance with cross-examination. Since he was able to conduct such without the aid of an expert, there was no due process violation. Ladd v. State, 969 So. 2d 141, 2007 Miss. App. LEXIS 762 (Miss. Ct. App. 2007).

Summary judgment was properly granted to a doctor and a hospital in a medical malpractice action because the expert testimony offered by a patient's wife was insufficient since it did not articulate an objective standard; expert testimony was required to establish causation for a death that occurred several days after an overdose in a hospital, and it was also required to show why a doctor should have conducted a particular test in response to the overdose. Maxwell v. Baptist Mem'l Hospital-DeSoto, Inc., 958 So. 2d 284, 2007 Miss. App. LEXIS 394 (Miss. Ct. App. 2007).

In a death penalty case, counsel was not ineffective for failing to obtain expert testimony to show that the victim's body position was "staged" because it was doubtful that expert testimony regarding the positioning of the body would have likely resulted in a different verdict; the victim was found nude from the waist down with her shorts and underwear bunched at one ankle, as well as with five gunshot wounds to her head. Powers v. State, 945 So. 2d 386, 2006 Miss. LEXIS 585 (Miss. 2006), cert. denied, 551 U.S. 1149, 127 S. Ct. 3006, 168 L. Ed. 2d 733, 2007 U.S. LEXIS 8389 (U.S. 2007).

In a medical malpractice action, no expert was needed to explain to a jury the issue of whether a a nurse breached the standard of care when she told a minor patient's mother that a surgical procedure was going well when, in fact, the doctor had first begun the procedure on the patient's wrong eye. Smith v. Gilmore Mem. Hosp., Inc., 952 So. 2d 245, 2006 Miss. App. LEXIS 402 (Miss. Ct. App. 2006), rev'd, 952 So. 2d 177, 2007 Miss. LEXIS 179 (Miss. 2007).

Summary judgment was properly granted for the doctor on a patient's informed consent and malpractice claims because the patient failed to present expert medical testimony which was required to establish what type of warning the doctor should have given her about the risks of facial laser resurfacing and the treatment proximally causing her injury. McMichael v. Howell, 919 So. 2d 18, 2005 Miss. LEXIS 367 (Miss. 2005).

Expert did not have to testify that the particular desk owned by the victim was worth more than $250 where it was not necessary to establish a precise value on the stolen desk but merely to establish that the desk had a value that was greater than $250; it was common knowledge and not exclusively within the knowledge of an expert that antique furniture tended to appreciate, rather than depreciate, in value, and there was no need to rely on a complex economic model to establish the market value of an item that could be comparably priced. Thompson v. State, 910 So. 2d 60, 2005 Miss. App. LEXIS 31 (Miss. Ct. App. 2005).

In a case involving the destruction of trees, a trial court did not err in denying a motion for a new trial based on a failure to allow expert testimony because such testimony was not admissible to determine whether punitive damages were appropriate. Smith v. Parkerson Lumber, Inc., 888 So. 2d 1197, 2004 Miss. App. LEXIS 1149 (Miss. Ct. App. 2004).

Expert testimony is required in order to prove professional negligence by an attorney. Hence, summary judgment was properly awarded to an attorney in a client's legal malpractice/negligence action because the client failed to designate, offer, or list any expert on her list of witnesses who could support her allegations of legal malpractice. Montgomery v. Woolbright, 904 So. 2d 1027, 2004 Miss. LEXIS 1452 (Miss. 2004) (Miss. – 2004).

In an action arising from an accident involving a mini-pickup truck that was towing an automobile that weighed more than the truck, the court did not abuse its discretion in excluding the testimony of an professor of mechanical engineering as the matters to which he would have testified either were resolved by stipulations or were matters of common knowledge. Watkins v. U-Haul Int'l, Inc., 770 So. 2d 970, 2000 Miss. App. LEXIS 182 (Miss. Ct. App. 2000), cert. denied, 2000 Miss. LEXIS 276 (Miss. Oct. 19, 2000).

At trial for embezzlement, store owner's knowledgeable testimony regarding retail business and standard operating procedures of cash registers was a contribution of something different requiring qualification as expert testimony and opinion under M.R.E. 702. Wells v. State, 604 So. 2d 271, 1992 Miss. LEXIS 379 (Miss. 1992).

**Opinions.**

Trial court did not abuse its discretion in finding a biomechanics expert's testimony admissible under Miss. R. Evid. 702 where the record evidence was insufficient to find that the expert's sources lacked a scientific basis, the expert had reliably applied the principles and methods to the facts of the case, and nothing in the record indicated that a simulation of the incident was necessary. Brown v. Prof'l Bldg. Servs., 252 So. 3d 23, 2018 Miss. LEXIS 372 (Miss. 2018).

Admission of the deputy medical examiner's lay opinions as to manner and cause of death of the victim, based on her own observations of the body at the scene and during the autopsy, did not violate this rule. Parks v. State, 235 So. 3d 111, 2017 Miss. App. LEXIS 205 (Miss. Ct. App. 2017), cert. denied, 236 So. 3d 817, 2018 Miss. LEXIS 102 (Miss. 2018).

Trial court did not abuse its discretion in permitting a former wife's expert to testify about the value of a family business that was awarded to the former husband, as it found that the expert used sound methodology and reasonably relied on the evidence available to reach his valuation. Jones v. Jones, 155 So. 3d 856, 2013 Miss. App. LEXIS 218 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 57 (Miss. 2014).

Witness's opinion did not constitute an impermissible legal opinion as his opinion reflected only the railroad industry's knowledge of injuries caused by projectiles coming through open cab windows and the feasibility of installing air conditioning, and he never gave an opinion on whether the railroad's actions violated the Locomotive Inspection Act (LIA) or the Federal Employers Liability Act (FELA), questions that were reserved for the trier of fact, nor did he try to explain to jury duties imposed by the LIA or the FELA; because the majority of the witness's testimony was factual in nature, and because his only opinion was on a question of fact, the trial court properly denied the railroad's motion to exclude the witness's testimony. Ill. Cent. R.R. Co. v. Brent, 133 So. 3d 760, 2013 Miss. LEXIS 595 (Miss. 2013).

Trial court abused its discretion in finding the expert opinion unsupported by a factual basis or otherwise incompetent on the issue of causation. Nothing in the record suggested that the expert's methodology was flawed or that the expert was not qualified to render such an opinion. Rhaly v. Waste Mgmt. of Miss., Inc., 43 So. 3d 509, 2010 Miss. App. LEXIS 228 (Miss. Ct. App. 2010).

Officer's opinion testimony was properly admitted into evidence in defendant's trial for vehicular manslaughter while driving under the influence because the officer was a certified accident reconstructionist, and the officer was qualified as an expert in both state and federal courts. Hudspeth v. State, 28 So. 3d 600, 2009 Miss. App. LEXIS 244 (Miss. Ct. App. 2009), cert. denied, 27 So. 3d 404, 2010 Miss. LEXIS 89 (Miss. 2010).

Trial judge did not abuse his discretion in excluding certain testimony from defendant's expert witness as it was irrelevant, but he allowed the expert to testify regarding his other conclusions. Grant v. State, 8 So. 3d 213, 2008 Miss. App. LEXIS 495 (Miss. Ct. App. 2008), cert. denied, 12 So. 3d 531, 2009 Miss. LEXIS 207 (Miss. 2009).

Expert's testimony was unreliable and therefore inadmissible under the Daubert standard because none of the studies upon which he relied supported his opinion that benzene exposure caused small-cell lymphocytic lymphoma. Watts v. Radiator Specialty Co., 990 So. 2d 143, 2008 Miss. LEXIS 306 (Miss. 2008).

No evidence supported a finding that a clinical social worker's opinion (offered by husband) on child custody was either based upon sufficient facts or data or the product of reliable principles and methods as required by Miss. R. Evid. 702; to the contrary, the social worker's testimony was that her opinions were derived from unrecorded sessions with the child, without independent verification of the truthfulness vel non of the allegations, and based upon her five-week training and instincts. Giannaris v. Giannaris, 960 So. 2d 462, 2007 Miss. LEXIS 399 (Miss. 2007).

Admission of expert testimony in a capital murder case under Miss. R. Evid. 702 regarding a "two-shooter" theory to the exclusion of a single-shooter theory was prejudicial error because the testimony was based on opinion or speculation rather than scientific methods and procedures and was the only evidence other than defendant's contested confession to support the state's theory of defendant's guilt. Edmonds v. State, 955 So. 2d 787, 2007 Miss. LEXIS 349 (Miss.), cert. denied, 552 U.S. 1064, 128 S. Ct. 708, 169 L. Ed. 2d 557, 2007 U.S. LEXIS 12868 (U.S. 2007).

In defendant's trial for capital murder as a result of felonious abuse of a child, testimony as to the possible causes of the deceased child's injuries was not outside the scope of the state's expert witness because the testimony was relevant, and the testimony was helpful for the jury. Berry v. State, 980 So. 2d 936, 2007 Miss. App. LEXIS 393 (Miss. Ct. App. 2007), cert. denied, 979 So. 2d 691, 2008 Miss. LEXIS 204 (Miss. 2008).

Defendant's conviction for the sale of marijuana within a correctional facility was appropriate because a witness's testimony did not exceed the scope of Miss. R. Evid. 702 since that witness did not opine as to whether the passed item at issue was marijuana; the witnesses never attempted to explain defendant's or his client's actions on the videotape. Jackson v. State, 962 So. 2d 649, 2007 Miss. App. LEXIS 104 (Miss. Ct. App.), cert. denied, 962 So. 2d 38, 2007 Miss. LEXIS 434 (Miss. 2007).

Trial court erred in not excluding a driver's expert's opinion, both as a sanction under Miss. R. Civ. P. 37 and Miss. R. Evid. 702, because the expert's opinion was not based on sufficient facts; the expert based his opinion on the driver's misstatements. Gilbert v. Ireland, 949 So. 2d 784, 2006 Miss. App. LEXIS 637 (Miss. Ct. App. 2006), cert. denied, 949 So. 2d 37, 2007 Miss. LEXIS 153 (Miss. 2007).

Testimony of a highly-skilled, specially educated engineer presented by auto manufacturers was that of an expert witness because he was asked to make and explain highly technical calculations, apply his results to industry standards, and explain why the testing and calculations he approved were necessary. Because he had been permitted to testify as a "lay witness" only, the trial court abused its discretion in permitting the expanded scope of his testimony. Palmer v. Volkswagen of Am., Inc., 904 So. 2d 1077, 2005 Miss. LEXIS 247 (Miss. 2005).

In the wife's civil action against the tobacoo company and retailers, claiming that the cigarettes sold to her husband were defective and unreasonably dangerous, because Miss. R. Evid. 703 allowed an expert to form an opinion on facts or data that was inadmissible and because forensic psychiatry had been recognized as a proper field of expertise, pursuant to Miss. R. Evid. 702, no error was committed by the trial court in allowing the tobacco company's expert to form an opinion on and to testify regarding whether the decedent could have stopped smoking at any time. Nunnally v. R.J. Reynolds Tobacco Co., 869 So. 2d 373, 2004 Miss. LEXIS 283 (Miss. 2004).

Trial court abused its discretion by allowing a designated lay witness's testimony to stray into the realm of scientific, technical, and specialized knowledge that only could be admitted as expert testimony after assessment pursuant to Miss. R. Evid. 702. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564, 2003 Miss. App. LEXIS 752 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 2005 Miss. LEXIS

21 (Miss. Jan. 13, 2005), aff'd in part and rev'd in part, 904 So. 2d 1077, 2005 Miss. LEXIS 247 (Miss. 2005).

A police officer did not give an opinion as contemplated by the rule; instead, he merely answered questions based upon his experience as a narcotics officer when he explained his determinations that certain evidence was relevant to the charges against the defendants and should be recovered during a search. Jones v. State, 754 So. 2d 476, 1999 Miss. App. LEXIS 460 (Miss. Ct. App. 1999).

**Police testimony.**

While a police officer's testimony that simply described the information in a cell phone record and the location of cell phone towers may properly have been admitted as lay testimony when it was based upon the personal observations of the witness, the officer should have been qualified as an expert prior to giving opinion testimony regarding the pinpointing of the general locations of defendant's and the victim's cell phones based on historical cellular data. Collins v. State, 172 So. 3d 724, 2015 Miss. LEXIS 435 (Miss. 2015).

Because a detective's testimony in a murder case failed to constitute expert testimony, the trial court did not abuse its discretion when it admitted into evidence the detective's testimony or the map he created with a computer software program during the course of his investigation. Collins v. State, 172 So. 3d 813, 2014 Miss. App. LEXIS 563 (Miss. Ct. App. 2014), rev'd, 172 So. 3d 724, 2015 Miss. LEXIS 435 (Miss. 2015).

Because the sergeant's testimony regarding his personal observations of the scene as to where the bullets appeared to have impacted the ground and where he recovered the shell casings was not based on scientific, technical, or other specialized knowledge, but was helpful to the clear understanding of the testimony or the determination of a fact in issue, the sergeant's testimony required no expert certification, and was admissible non-expert testimony. Barber v. State, 143 So. 3d 586, 2013 Miss. App. LEXIS 701 (Miss. Ct. App. 2013), cert. denied, 139 So. 3d 74, 2014 Miss. LEXIS 350 (Miss. 2014).

In a criminal case, an officer is allowed to describe first-hand observations of injuries, but the officer cannot give expert testimony without first being qualified under Miss. R. Evid. 702. Hicks v. State, 6 So. 3d 1099, 2008 Miss. App. LEXIS 481 (Miss. Ct. App. 2008), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 161 (Miss. 2009).

In an aggravated domestic assault case, for purposes of expert testimony, to the extent that the officer blurred the line between fact and opinion testimony with regard to his testimony that he would have expected defendant to have more severe injuries if he had been defending himself against a knife attack, any error was harmless in light of the overwhelming weight of the evidence of his guilt, including (1) the photographs of the victim's injuries; (2) the photographs of the ironing board he used to beat the victim; (3) the photographs of defendant's injuries; and (4) the testimony of the victim and her neighbor. Hicks v. State, 6 So. 3d 1099, 2008 Miss. App. LEXIS 481 (Miss. Ct. App. 2008), cert. denied, 11 So. 3d 1250, 2009 Miss. LEXIS 161 (Miss. 2009).

In a criminal prosecution for murder and attempted arson, defendant argued that her written confession given to law enforcement was rendered involuntary because she suffered from post-traumatic stress disorder and borderline personality disorder; the circuit court did not err by admitting lay opinion testimony of defendant's mental status under Miss. R. Evid. 701. The investigating officer was permitted to testify that defendant did not appear to be suffering from any mental disease or illness; because the officer's testimony was based on his personal observation, it was not an expert opinion under Miss. R. Evid. 702. Brown v. State, 981 So. 2d 1007, 2007 Miss. App. LEXIS 806 (Miss. Ct. App. 2007), cert. denied, 981 So. 2d 298, 2008 Miss. LEXIS 222 (Miss. 2008).

Court erred in determining that cash found during a police search of appellant's bedroom was forfeitable on the ground that it was found in close proximity to drug paraphernalia because no evidence supported the finding that a brass container attached to a Brillo pad, a piece of foil with holes in it, and plastic bags qualified as drug paraphernalia. The testimony of a police officer who had attended drug schools could not have been considered expert testimony because the city did not qualify him as an expert witness at trial. Evans v. City of Aberdeen, 925 So. 2d 850, 2005 Miss. App. LEXIS 290 (Miss. Ct. App. 2005), aff'd, 926 So. 2d 181, 2006 Miss. LEXIS 120 (Miss. 2006).

While the detective should not have been permitted to testify as to the result of a DNA study because he was not an expert, it was harmless because an expert also testified as to the results. Bailey v. State, 2006 Miss. App. LEXIS 508 (Miss. Ct. App. June 27, 2006), op. withdrawn, sub. op., modified, 956 So. 2d 1016, 2007 Miss. App. LEXIS 112 (Miss. Ct. App. 2007).

In a case involving possession of cocaine with intent to distribute, there was no specific objection relating to expert testimony on the value and packaging of the cocaine by police; the objection made was based on relevance, so the issue of expertise was not preserved for appellate review. Dixon v. State, 953 So. 2d 1117, 2006 Miss. App. LEXIS 434 (Miss. Ct. App. 2006), aff'd, 953 So. 2d 1108, 2007 Miss. LEXIS 210 (Miss. 2007).

At defendant's trial for armed robbery, where a police officer testified about yellow marks on currency found on defendant as coming from markers used to check for counterfeits and further that the officer had learned after the arrest that such marks eventually disappear, such testimony was improperly admitted because it required specialized knowledge and the officer had not been qualified as an expert; however, on appeal the court held that the error was harmless in light of the store clerk's identification of defendant, a regular customer, as the robber and other evidence of defendant's guilt. Rash v. State, 840 So. 2d 774, 2003 Miss. App. LEXIS 191 (Miss. Ct. App. 2003).

The trial court did not err by admitting a police officer's testimony about his opinion that the defendant had burglarized a store, notwithstanding the argument that the statement did not meet the requirements for lay opinions under Rule 701 and that the officer had not been determined to be an expert as required for expert opinions under Rule 702, since the statement was made in the context of the officer's thought process during the investigation to explain why he acted and proceeded in the manner that he did. Desalvo v. State, 776 So. 2d 704, 2000 Miss. App. LEXIS 339 (Miss. Ct. App. 2000).

Where police detective attempted to explain to jury mechanical features of brand of gun allegedly used, and gave his opinion that weapon would not fire unless a specific sequence of events was followed, he was required to reveal particular knowledge about the pistol, and his testimony constituted expert opinion for which he should have been qualified. Cotton v. State, 675 So. 2d 308, 1996 Miss. LEXIS 198 (Miss. 1996).

Testimony of FBI agent was of assistance to jury and was properly allowed, where he not only testified that pieces of cloth found at murder site and at defendant's home looked like exact matches, but he also demonstrated that tears and cuts on pieces of cloth matched exactly. Davis v. State, 660 So. 2d 1228, 1995 Miss. LEXIS 287 (Miss. 1995), cert. denied, 517 U.S. 1192, 116 S. Ct. 1684, 134 L. Ed. 2d 785, 1996 U.S. LEXIS 3101 (U.S. 1996).

Although police department investigator had vast experience in the reconstruction of traffic accidents, he had no expertise in either engineering or road construction, and it remained within trial court's discretion to allow only limited portions of his testimony. Couch v. City of D'Iberville, 656 So. 2d 146, 1995 Miss. LEXIS 258 (Miss. 1995).

If any specialized knowledge, however obtained, was needed for investigating officer to express an opinion as to whether defective tire was the only contributing factor in causing car accident, testimony was that of an expert. Roberts v. Grafe Auto Co., 701 So. 2d 1093, 1997 Miss. LEXIS 261 (Miss. 1997).

**Qualification of expert.**

In a case in which defendant was convicted of driving under the influence, the trial court did not err in excluding a doctor's expert testimony on concussions because the doctor was not qualified to testify as to concussions and how disorientation could mimic alcohol impairment as the doctor was not a medical doctor, could not prescribe medicine, and conceded that diagnosing concussions was beyond his purview. Burke v. State, 256 So. 3d 637, 2018 Miss. App. LEXIS 200 (Miss. Ct. App.), cert. denied, 256 So. 3d 594, 2018 Miss. LEXIS 451 (Miss. 2018).

In a capital murder case, the trial court properly allowed a defense expert to testify in mitigation, to the extent that the expert was qualified to do so, even though her testimony was not timely divulged. Hutto v. State, 227 So. 3d 963, 2017 Miss. LEXIS 180 (Miss. 2017), cert. denied, — U.S. —, 138 S. Ct. 983, 200 L. Ed. 2d 262, 2018 U.S. LEXIS 1361 (U.S. 2018).

Trial court did not abuse its discretion by finding that a former director of forensic chemistry at the forensic laboratory was qualified to render expert testimony based on his education, experience, and training in drug analysis, which included a court at the FBI Academy in forensic spectometry and a Drug Enforcement Agency drug chemist court. Warren v. State, 187 So. 3d 616, 2016 Miss. LEXIS 137 (Miss. 2016).

Trial court did not abuse its discretion when it held that the physician was qualified to testify as an expert in pediatric forensic medicine where he testified that he was an associate professor of pediatrics, chief of the division of forensic medicine, and the medical director of the Children's Justice Center, and he had testified in numerous cases as an expert in pediatric forensic medicine. Gray v. State, 202 So. 3d 243, 2015 Miss. App. LEXIS 560 (Miss. Ct. App. 2015).

Trial court did not err by finding that a structural engineer was unqualified to provide expert testimony regarding damages where he stated in his expert report that the range of between $1,660,000 and $4,020,000 was merely his general estimate and that establishing sufficiently specific estimates would require bringing in someone more qualified. Inn by the Sea Homeowner's Ass'n v. Seainn, LLC, 170 So. 3d 496, 2015 Miss. LEXIS 379 (Miss. 2015).

As soon as a patient's daughter injected her training and education in alternative medicine into her proposed testimony, she was no longer just a fact witness because she was attempting to testify as an expert; at the summary judgment hearing, the daughter told the trial judge she was a "medical expert," though she admitted she was unlicensed, and lack of a license aside, her purported expertise in alternative medicine did not qualify her to testify against the medical doctors. Jones v. MEA, Inc., 160 So. 3d 241, 2014 Miss. App. LEXIS 739 (Miss. Ct. App. 2014), op. withdrawn, sub. op., 2015 Miss. App. LEXIS 87 (Miss. Ct. App. Mar. 3, 2015).

Business owner laid a foundation and presented the expert as an expert in business valuation, the expert testified to his credentials and the executors had the opportunity to conduct voir dire, and the chancellor found that the expert was qualified to render an expert opinion and that his testimony was relevant and reliable, and there was no abuse of discretion in admitting the expert's testimony. Lane v. Lampkin, 176 So. 3d 62, 2014 Miss. App. LEXIS 497 (Miss. Ct. App. 2014), rev'd, 175 So. 3d 1222, 2015 Miss. LEXIS 503 (Miss. 2015).

Based on the witness's specialized knowledge and training in the area of railroad safety laws and regulations, and because his testimony was limited to that area, the trial court did not err in finding the witness to be qualified to testify with respect to federal railroad safety rules. Ill. Cent. R.R. Co. v. Brent, 133 So. 3d 760, 2013 Miss. LEXIS 595 (Miss. 2013).

Trial court did not abuse its discretion in allowing an expert to testify because she earned a bachelor of arts in biology, she had sixteen years' experience working with bodily fluids in the forensics field, and at the time of trial, she had ten years' experience working as a DNA analyst. She had testified in other courts as a forensic DNA analyst thirty times. Galloway v. State, 122 So. 3d 614, 2013 Miss. LEXIS 328 (Miss. 2013), cert. denied, 572 U.S. 1134, 134 S. Ct. 2661, 189 L. Ed. 2d 209, 2014 U.S. LEXIS 3685 (U.S. 2014).

Court properly allowed an expert's testimony regarding demonstrative evidence because the testimony was reliable based on his extensive professional experience in the field of forensic psychology, and it was clearly relevant to the issues. Bateman v. State, 125 So. 3d 616, 2013 Miss. LEXIS 416 (Miss. 2013).

Engineer may be qualified as an expert witness under Miss. R. Evid. 702 even if he or she is not licensed in Mississippi as an engineer pursuant to Miss. Code Ann. §§ 73-13-1 through 73-13-45. Tellus Operating Group, LLC v. Tex. Petroleum Inv. Co., 105 So. 3d 274, 2012 Miss. LEXIS 488 (Miss. 2012).

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Circuit court did not err in granting a hospital's motion for summary judgment in a negligence action brought by a contractor's employee, who fell when exiting a hospital elevator, because the physician proffered by the employee as an expert admitted that he had no basis for his conclusion that the employee's back complaints appeared to be result of a fall that occurred six years prior to his treatment, other than the history from the employee herself, and as such the physician lacked the requisite factual knowledge to testify as an expert witness. Buckley v. Singing River Hosp., 99 So. 3d 248, 2012 Miss. App. LEXIS 609 (Miss. Ct. App. 2012), op. withdrawn, sub. op., 146 So. 3d 365, 2013 Miss. App. LEXIS 691 (Miss. Ct. App. 2013).

In a slip and fall case, appellee's treating physician, an internal medicine and pulmonary medicine specialist, was qualified to opine regarding diagnosing his hip problem and referring him to an orthopedic surgeon, but was not qualified to give a causation opinion as to the need for a hip replacement because it was outside his discipline. Bailey Lumber & Supply Co. v. Robinson, 98 So. 3d 986, 2012 Miss. LEXIS 386 (Miss. 2012).

Grant of summary judgment in favor of a hospital in the patient's medical-malpractice claim was appropriate, in part because the mere fact that an expert was a gastroenterologist did not preclude him from testifying to the standards of ER care. Hans v. Mem'l Hosp., 40 So. 3d 1270, 2010 Miss. App. LEXIS 143 (Miss. Ct. App. 2010).

In a medical negligence case, the affidavit of plaintiff's expert was inadmissible under Miss. R. Evid. 702 because, in part, the affidavit did not explain how the expert, a general surgeon, was qualified to testify about the standard of care applicable to an anesthesiologist and pain-management specialist such as defendant doctor. Sanders v. Wiseman, 29 So. 3d 138, 2010 Miss. App. LEXIS 129 (Miss. Ct. App. 2010).

Trial court did not err in allowing a witness to testify as an expert in police pursuit because the witness had extensive experience, skill, and knowledge of police pursuit, which were derived from working for a police department, various police driving schools, and his experience in teaching police-pursuit programs. Giles v. Brown, 31 So. 3d 1232, 2009 Miss. App. LEXIS 548 (Miss. Ct. App. 2009), cert. denied, 31 So. 3d 1217, 2010 Miss. LEXIS 178 (Miss. 2010).

Investor service company and an estate alleged derivative and individual shareholder claims against a corporation. A trial court abused its discretion in excluding expert testimony under Miss. R. Evid. 702 because an expert was qualified to testify as to damages although the expert was not currently licensed as a Certified Public Accountant. Investor Res. Servs. v. Cato, 15 So. 3d 412, 2009 Miss. LEXIS 292 (Miss. 2009).

Worker's expert under Miss. R. Evid. 702 was not qualified to testify about the adequacy of warnings provided regarding the sander and dust collection system manufactured by the two separate manufacturers that allowed sawdust to build up in barrels, and combusted, exploded, and injured the worker when one of the barrels was opened after the sander was used on finished wood. Thus, despite the expert's work as a mechanical engineering professor, he lacked the expertise and training to testify about whether the warnings on the products were adequate. Tucker v. Rees-Memphis, Inc., 17 So. 3d 122, 2009 Miss. App. LEXIS 117 (Miss. Ct. App.), cert. denied, 17 So. 3d 99, 2009 Miss. LEXIS 437 (Miss. 2009).

In a wrongful death suit stemming from a collision at a railway crossing, the trial court erred in excluding the affidavit from plaintiff's engineering expert, who opined that a clear line of sight did not exist at the crossing, and in granting summary judgment in favor of the railway company because an accident reconstructionist was not the only professional qualified to make line-of-sight determinations; the engineer possessed sufficient professional qualifications, including a bachelor of science degree in engineering, to collect relevant line-of-sight data using appropriate engineering instruments and devices and input that data into a recognized line-of-sight equation and to determine from those calculations that the obstructions at the site prevented the decedent from seeing the approaching train until he was dangerously close to the railroad track. His affidavit should not have been excluded from consideration in response to the railway company's summary judgment motion, and his opinion was sufficient to establish the existence of a question of material fact that precluded summary judgment. Kilhullen v. Kan. City S. Ry., 8 So. 3d 168, 2009 Miss. LEXIS 87 (Miss. 2009).

Although a proposed defense expert was qualified to testify as a firearm expert, he was not qualified to testify as a shooting reconstruction expert under Miss. R. Evid. 702 because defendant failed to present sufficient qualifications regarding the proposed expert and failed to sufficiently explain the reasoning behind his theory that the shooting was accidental. Christian v. State, 998 So. 2d 1019, 2008 Miss. App. LEXIS 516 (Miss. Ct. App. 2008).

Defendant's convictions for manslaughter and rape were proper because the trial court did not abuse its discretion in allowing expert testimony regarding the characteristics of hair samples recovered from the crime scene. The testimony provided was based on the expert's expertise, skill, and experience in the field of forensic hair examination; the expert's testimony was helpful to the jury in formulating its verdict. Brown v. State, 999 So. 2d 853, 2008 Miss. App. LEXIS 320 (Miss. Ct. App. 2008), cert. denied, 999 So. 2d 852, 2009 Miss. LEXIS 44 (Miss. 2009).

In a rape case, a treating physician, who had worked in an emergency room for several years and had training as a family practitioner, was qualified to give an expert opinion that a rape victim's level of intoxication was mild and would not have affected her ability to recall. McGriggs v. State, 987 So. 2d 455, 2008 Miss. App. LEXIS 191 (Miss. Ct. App.), cert. dismissed, 998 So. 2d 1010, 2008 Miss. LEXIS 641 (Miss. 2008).

Grant of summary judgment in favor of a railway and an engineer in the decedent's wife's action alleging that they caused the wrongful death of her husband was appropriate because an expert witness had no training or experience regarding accident reconstruction, but his testimony amounted to such. Therefore, he was not qualified to render an expert opinion in that area. Kilhullen v. Kan. City S. Ry., 8 So. 3d 186, 2008 Miss. App. LEXIS 195 (Miss. Ct. App. 2008), rev'd, 8 So. 3d 168, 2009 Miss. LEXIS 87 (Miss. 2009).

Deputy state fire marshal's job was to investigate suspicious fires and to determine where the fires started and their causes; in qualifying as an expert witness, he testified that he had been doing that type of work for 24 years and that his training was updated annually. Without any objections by the defense, he was accepted by the trial court as an expert witness in arson investigation and crime scene diagrams, in accordance with Miss. R. Evid. 702; thus, the trial court did not err in accepting him as an expert witness in that area. Colburn v. State, 990 So. 2d 206, 2008 Miss. App. LEXIS 74 (Miss. Ct. App.), cert. denied, 994 So. 2d 186, 2008 Miss. LEXIS 472 (Miss. 2008).

Patient alleged that the trial court erred in not disqualifying a physician's expert in a medical malpractice suit, but the finding of expert testimony reliability was fact-intensive and dependent on a case-by-case review and determination; the record reflected that the expert sufficiently overcame an alleged conflict with medical literature, and based on the record the trial court did not err in qualifying the expert to render an expert opinion. Bass v. Bobo, 980 So. 2d 944, 2007 Miss. App. LEXIS 636 (Miss. Ct. App. 2007), cert. denied, 979 So. 2d 691, 2008 Miss. LEXIS 203 (Miss. 2008).

Forensic interviewer was properly accepted as an expert witness because she possessed specialized knowledge through her education, training, and her professional experience in the field of forensic interviewing and her knowledge in the form of her opinion could have been helpful to the jury in deciding whether the victim was sexually abused by defendant; the expert's opinion was based on sufficient facts, and her testimony was the product of reliable principles and methods such that she was suitably positioned to opine that characteristics of the victim's interview statements were consistent with sexually abused children. Williams v. State, 970 So. 2d 727, 2007 Miss. App. LEXIS 577 (Miss. Ct. App. 2007).

In a case involving a dispute over which son was a proper conservator over a father and his estate, a trial court did not err by failing to admit one son's testimony about the father's medical diagnosis and treatment because the son was not qualified as an expert; moreover, there was no prejudice since the evidence was largely cumulative. Cole v. Cole (In re Cole), 958 So. 2d 276, 2007 Miss. App. LEXIS 398 (Miss. Ct. App. 2007).

Because defendant failed to object to the qualifications of the expert witness, he was procedurally barred from raising that issue on appeal. Poynor v. State, 962 So. 2d 68, 2007 Miss. App. LEXIS 292 (Miss. Ct. App.), cert. denied, 962 So. 2d 38, 2007 Miss. LEXIS 416 (Miss. 2007).

Where an injured employee sued the railroad for injuries sustained while mounting a moving locomotive when a foot slipped, the trial judge did not abuse discretion in allowing testimony from an expert in the field of operating and safety rules; the expert had 13 years of experience in the railroad industry as a claim agent, he had worked with attorneys, insurance companies, state transportation departments, and private industries on the topic of railroad safety regulations. Canadian Nat'l/Ill. Cent. R.R. v. Hall, 953 So. 2d 1084, 2007 Miss. LEXIS 208 (Miss. 2007).

In a personal injury suit brought against a paper company, the trial court erred in allowing the logging truck driver's expert to testify as an expert witness because the trial judge did not allow voir dire of the expert that would have gone directly to the issue of his qualifications to testify in the field of expertise he claimed: wood yard loading and unloading, and wood yard safety; the trial court should have allowed the company to question whether the expert's testimony conflicted with the techniques and practices of his purported field and what those techniques and practices actually were. Int'l Paper Co. v. Townsend, 961 So. 2d 741, 2007 Miss. App. LEXIS 192 (Miss. Ct. App.), cert. denied, 962 So. 2d 38, 2007 Miss. LEXIS 424 (Miss. 2007).

In a personal injury suit brought against a paper company, the trial court erred in allowing the logging truck driver's expert to testify as an expert witness because trial testimony showed that the witness clearly was not qualified to testify in his purported field of knowledge because, although those questions were later answered on direct and cross-examination, the proper arena in which to have discussed those issues was voir dire. Int'l Paper Co. v. Townsend, 961 So. 2d 741, 2007 Miss. App. LEXIS 192 (Miss. Ct. App.), cert. denied, 962 So. 2d 38, 2007 Miss. LEXIS 424 (Miss. 2007).

In a personal injury suit brought against a paper company, the trial court erred in allowing the logging truck driver's expert to testify as an expert witness because the "foundational facts" on which the witness based his testimony were insufficient as a matter of law because his statement that the condition of the company's wood yard, of which he knew nothing about, could have caused shifting of the log's on a truck, was "mere guess or conjecture" because the expert had not been at the wood yard on the day in question and could not remember the last time he had been there. Int'l Paper Co. v. Townsend, 961 So. 2d 741, 2007 Miss. App. LEXIS 192 (Miss. Ct. App.), cert. denied, 962 So. 2d 38, 2007 Miss. LEXIS 424 (Miss. 2007).

In a personal injury suit brought against a paper company, the trial court erred in allowing the logging truck driver's expert to testify as an expert witness because he was unqualified to testify as to the duty of the company to provide an unbinding rack at its woodyard; although he testified emphatically that an unbinding rack would have caught the log that injured the driver, he was at a loss to explain exactly how an unbinding rack would have accomplished that feat, and terefore his opinion was purely unsupported speculation. Int'l Paper Co. v. Townsend, 961 So. 2d 741, 2007 Miss. App. LEXIS 192 (Miss. Ct. App.), cert. denied, 962 So. 2d 38, 2007 Miss. LEXIS 424 (Miss. 2007).

In a personal injury suit brought against a paper company, the trial court erred in failing to allow the company to cross-examine plaintiff driver's safety expert as to his misdemeanor convictions for lack of safety; the witness was proffered as an expert on the basis that he had been "driving trucks for a number of years," and therefore the jury should have been allowed to hear testimony elicited on cross-examination regarding his record of driving trucks during that period of time. Int'l Paper Co. v. Townsend, 961 So. 2d 741, 2007 Miss. App. LEXIS 192 (Miss. Ct. App.), cert. denied, 962 So. 2d 38, 2007 Miss. LEXIS 424 (Miss. 2007).

Finding against the company in the driver's action for damages was improper pursuant to Miss. R. Evid. 702 where the trial court erred in allowing the driver's expert to testify as an expert witness. The trial court's failure to allow more extensive voir dire of the expert as to his qualifications made it impossible to determine whether he was truly qualified in his purported field. Int'l Paper Co. v. Townsend, 2006 Miss. App. LEXIS 108 (Miss. Ct. App. Feb. 7, 2006), op. withdrawn, sub. op., 961 So. 2d 741, 2007 Miss. App. LEXIS 192 (Miss. Ct. App. 2007).

Defendant was not entitled to reversal of his conviction for fondling a child in violation of Miss. Code Ann. § 97-5-23 because, inter alia: (1) the evidence was sufficient to enable a reasonable juror to find defendant guilty beyond a reasonable doubt, (2) the trial court did not improperly limit cross-examination of the victim in violation of defendant's rights under USCS Const. Amend. 6 and Miss. Const. Art. III, § 26, because testimony concerning the victim's past sexual behavior was properly excluded under Miss. R. Evid. 412; (3) since defendant failed to object at trial to the qualification of an expert witness under Miss. R. Evid. 702, the issue was waived; and (4) under Miss. R. Evid. 615(3), the expert witness was properly allowed to remain in the court room so that she could base her opinion on facts learned at the trial pursuant to Miss. R. Evid. 703. Aguilar v. State, 955 So. 2d 386, 2006 Miss. App. LEXIS 903 (Miss. Ct. App. 2006).

Because defendant failed to object to an expert witness's qualification as an expert, defendant was procedurally barred from raising that issue on appeal. Poynor v. State, 2006 Miss. App. LEXIS 857 (Miss. Ct. App. Nov. 21, 2006), op. withdrawn, sub. op., 962 So. 2d 68, 2007 Miss. App. LEXIS 292 (Miss. Ct. App. 2007).

Post-conviction relief was denied based on the qualifications of an expert who took dental molds in a capital case because the issue was procedurally barred since it could have been raised at trial or on direct appeal; even if it was not, defendant did not contend that improper methods were used in creating the molds, that they were not an accurate replica, or that the expert was in fact unqualified. Howard v. State, 945 So. 2d 326, 2006 Miss. LEXIS 531 (Miss. 2006), cert. denied, 552 U.S. 829, 128 S. Ct. 49, 169 L. Ed. 2d 43, 2007 U.S. LEXIS 9278 (U.S. 2007).

Finding against the driver in her action for injuries resulting from a collision with a train at a railroad crossing was appropriate pursuant to Miss. R. Evid. 702 where the disqualification of the driver's "expert" witness was not in error because the witness did not possess any knowledge, skill, experience, or education in the interpretation of the data tables produced by the machinery in question. Bowman v. CSX Transp., Inc., 931 So. 2d 644, 2006 Miss. App. LEXIS 418 (Miss. Ct. App. 2006).

Directed verdict in favor of the sheriff and county in the family's action alleging reckless disregard by an auxiliary deputy sheriff concerning an accident involving the deputy and their son was appropriate where the trial court did not err by not allowing an accident reconstructionist to give his expert opinion regarding the use of proper police procedures in emergency situations because he was clearly not qualified; the accident reconstructionist, by his own admission, established that he did not have any more training or education regarding police procedures than any other law enforcement officer in Mississippi. Peebles v. Winston County, 929 So. 2d 385, 2006 Miss. App. LEXIS 373 (Miss. Ct. App. 2006).

Trial court did not err in allowing a forensic pathologist to give expert testimony on toxicology in defendant's trial for DUI manslaughter because although expert testimony was limited to matters within the witness's demonstrated area of expertise under Miss. R. Evid. 702, nothing in Mississippi law prohibited the witness from being qualified as an expert in more than one field. Cowart v. State, 910 So. 2d 726, 2005 Miss. App. LEXIS 218 (Miss. Ct. App. 2005) (Miss. Ct. App. – 2005).

Police officer was not testifying as an expert witness where the testimony presented by the officer, as to how the gun physically worked, required no particular skill or training and was not beyond the knowledge of a layman; additionally, the testimony was given during rebuttal and the State was not required to disclose rebuttal witnesses in discovery. Fairley v. State, 871 So. 2d 1282, 2003 Miss. LEXIS 690 (Miss. 2003).

Trial judge did not abuse his discretion in allowing the physician's witness to testify as an expert where the witness had been qualified and accepted as an expert and the witness testified that he had reviewed the records and based his opinion on knowledge beyond that of a lay person. Daughtry v. Kuiper, 852 So. 2d 675, 2003 Miss. App. LEXIS 372 (Miss. Ct. App. 2003).

In a wrongful death action, the trial court properly instructed the jury to disregard any questions or responses of a project manager with respect to the application or non-application of guidelines for shipboard elevators, with respect to compliance or non-compliance of the elevator system at issue, because the project manager was determined to not be an expert nor designated as an expert, and the questions posed were not fact questions. Crane Co. v. Kitzinger, 2003 Miss. LEXIS 52 (Miss. Jan. 30, 2003), op. withdrawn, sub. op., 860 So. 2d 1196, 2003 Miss. LEXIS 689 (Miss. 2003).

In a prosecution for an armed robbery that occurred in a casino parking lot, an employee in the surveillance department of the casino was properly qualified to testify as an expert where she had received three years of on-the-job-training on video surveillance and interpretation and her testimony revealed that she was trained on identifying specific objects and events from the casino surveillance cameras. Johnson v. State, 784 So. 2d 991, 2001 Miss. App. LEXIS 175 (Miss. Ct. App. 2001).

In an action arising from a collision between a train and a car, an expert was properly permitted to testify regarding loss of enjoyment of life, notwithstanding the existence of some honest dispute as to whether his testimony was generally accepted in his field. Kansas City S. Ry. Co. v. Johnson, 798 So. 2d 374, 2001 Miss. LEXIS 26 (Miss.), cert. denied, 534 U.S. 816, 122 S. Ct. 43, 151 L. Ed. 2d 15, 2001 U.S. LEXIS 5524 (U.S. 2001).

In an action arising from the operation of an automobile "chop shop," the trial court did not err in allowing an expert in the field of vehicle identification to testify regarding (1) damages and repairs to automobiles, (2) whether vehicles were repairable or were total losses, (3) whether particular rivets were factory originals or homemade, and (4) whether or not particular pieces of sheet metal had been repaired, given the expert's experience in the Highway Patrol and the International Association of Auto Theft Investigators and the fact that he had been accepted as an expert in the field of vehicle identification in numerous court throughout Mississippi and also in federal courts in four states. Logan v. State, 773 So. 2d 338, 2000 Miss. LEXIS 267 (Miss. 2000).

It was not an error or an abuse of discretion for the trial judge to accept a witness as an expert in the fields of molecular biology and DNA analysis where she had specialized knowledge of DNA analysis to assist the trier of fact, had testified as a DNA expert in over 100 cases, and had given the population statistics in 98 percent of those cases. Baldwin v. State, 757 So. 2d 227, 2000 Miss. LEXIS 71 (Miss. 2000).

Under the guidelines of the Rule 702, the trial judge serves as a "gatekeeper" in ruling on the admissibility of expert testimony. Watkins v. U-Haul Int'l, Inc., 770 So. 2d 970, 2000 Miss. App. LEXIS 182 (Miss. Ct. App. 2000), cert. denied, 2000 Miss. LEXIS 276 (Miss. Oct. 19, 2000).

Decision as to whether an expert is qualified rests in the sound discretion of the trial court. T. K. Stanley, Inc. v. Cason, 614 So. 2d 942, 1992 Miss. LEXIS 844 (Miss. 1992).

Where neither party thoroughly examined expert regarding basis of his testimony, this did not render his testimony inadmissible, since predicate facts supporting expert testimony were only required to be available in some colorable form, and expert's testimony that common knowledge supported his findings was sufficient to meet this standard. Materials Transp. Co. v. Newman, 656 So. 2d 1199, 1995 Miss. LEXIS 286 (Miss. 1995).

In considering admissibility of expert's testimony, court asks whether field of expertise is one in which it has been scientifically established that due investigation and study in conformity with techniques and practices generally accepted within the field will produce a valid opinion. Wilson v. State, 574 So. 2d 1324, 1990 Miss. LEXIS 845 (Miss. 1990).

Circuit court did not abuse its discretion in disqualifying plaintiffs' expert witnesses, and absent expert testimony, record was devoid of significant, probative evidence from which a genuine issue of material fact could derive, and summary judgment for defendant was therefore proper. Palmer v. Biloxi Regional Medical Ctr., 564 So. 2d 1346, 1990 Miss. LEXIS 239 (Miss. 1990).

Test of whether or not an expert witness is qualified to testify is whether witness possesses peculiar knowledge or information regarding subject matter which is not likely to be possessed by a layman. May v. State, 524 So. 2d 957, 1988 Miss. LEXIS 191 (Miss. 1988).

**Real estate.**

It was not an abuse of discretion for a chancellor to strike parts of a forensic accounting report after the close of evidence on grounds the report was the chancellor's basis for finding corporate funds were misappropriated because (1) the report was not the only basis for the finding, and (2) the chancellor did not exclude the entire report but only noted limitations on the report as a final statement of the value of corporate assets. Scafidi v. Hille, 180 So. 3d 634, 2015 Miss. LEXIS 603 (Miss. 2015).

Circuit court did not abuse its discretion by not allowing a real estate appraiser to testify as an expert witness concerning the value of an owner's house or in not allowing the appraiser's report to be admitted into evidence because the appraisal was based upon pictures of the house that were taken for the owner approximately two years prior to the appraisal and before the house had been largely destroyed in a tornado. Zeigler v. Nolan, 147 So. 3d 387, 2014 Miss. App. LEXIS 506 (Miss. Ct. App. 2014).

Landowner's expert appraiser's opinion as to the diminution in value of the remainder of the landowner's property occasioned by the taking of an easement for a pipeline should have been excluded under Miss. R. Evid. 702 because he failed to offer admissible market-data or comparable-sales evidence. Gulf S. Pipeline Co., LP v. Pitre, 35 So. 3d 494, 2010 Miss. LEXIS 199 (Miss. 2010).

In a case in which a pipeline company sought to acquire by eminent domain a right-of-way and easement through a land owner's property, the trial court did not err in allowing the jury to consider the testimony of the owner's expert witness regarding the value of the owner's property; expert's testimony was competent and relevant, and it was for the jury to pass upon the testimony's credibility and weight. Gulf South Pipeline Co., LP v. Pitre, 35 So. 3d 519, 2009 Miss. App. LEXIS 127 (Miss. Ct. App. 2009), rev'd, 35 So. 3d 494, 2010 Miss. LEXIS 199 (Miss. 2010).

Trial court was presented with affirmative proof that a partition by sale under Miss. Code Ann. § 11-21-11 was in the best interests of the parties and thus the trial court did not err by ordering the property to be sold and dividing the proceeds equally between appellants and appellee as co-tenants; an expert on real estate appraisals testified that it was his opinion that the properties were to be sold rather than being partitioned in kind, the court found no error in the appraisal of the properties and believed that the trial court did not abuse its discretion in relying on the report, and the trial court did not rely solely on the appraisal, but also considered the parties' recommendations and did not abuse its discretion in assigning more weight to the expert's opinion. Georgian v. Harrington, 990 So. 2d 813, 2008 Miss. App. LEXIS 561 (Miss. Ct. App. 2008).

Owners' expert's testimony in a condemnation case, that land within 750 feet of a proposed interstate would be more adversely affected by the highway construction than the rest of the owners' property, was entirely speculative since it failed to comport with the Daubert and Kumho Tire factors, and the trial court reversibly erred in admitting it. Miss. Transp. Comm'n v. McLemore, 863 So. 2d 31, 2003 Miss. LEXIS 532 (Miss. 2003).

Real estate professional was qualified as an expert under this rule and trial court did not err in allowing his appraisal testimony, despite his retirement and question regarding lack of license, where he had been a real estate broker for 30 years and had done some 11,000 appraisals during that time. Watts v. Lawrence, 703 So. 2d 236, 1997 Miss. LEXIS 88 (Miss. 1997).

**Relationship to § 11-1-61.**

Miss. Code Ann. § 11-1-61 does not conflict with the Mississippi Rules of Evidence, which govern evidentiary matters, including the qualification of expert witnesses, Miss. R. Evid. 702. Blake v. Clein, 903 So. 2d 710, 2005 Miss. LEXIS 235 (Miss. 2005).

**Sobriety tests.**

Trial court did not err in admitting the officer's testimony of the results of defendant's field sobriety tests because the walk and turn and the one-legged stand tests relied upon the officer's observation and did not require qualification as an expert. Pulido v. City of Oxford, 991 So. 2d 1223, 2008 Miss. App. LEXIS 51 (Miss. Ct. App.), cert. denied, 997 So. 2d 924, 2008 Miss. LEXIS 511 (Miss. 2008).

Where plaintiff sued a casino and a bar for wrongful death pursuant to Mississippi's Dram Shop Act, Miss. Code Ann. § 67-3-73, plaintiff's expert testified that the driver who killed decedent was visibly intoxicated when he was served alcohol at the bar based on Intoxilyzer results taken an hour after the accident indicating a BAC of 0.088%. Under Miss. R. Evid. 702, the expert's testimony was sufficiently reliable to create a genuine issue of material fact concerning whether the driver was served alcohol at the bar while he was visibly intoxicated. Treasure Bay Corp. v. Ricard, 967 So. 2d 1235, 2007 Miss. LEXIS 617 (Miss. 2007).

A police officer need not be rendered an expert to give opinion testimony regarding the administration of field sobriety tests, including the horizontal gaze nystagmus test. Graves v. State, 761 So. 2d 950, 2000 Miss. App. LEXIS 289 (Miss. Ct. App. 2000).

**Soil mechanics expert.**

Pursuant to Miss. R. Evid. 702, in connection with a wrongful death action, an expert in soil mechanics was permitted to testify about the soil conditions where an industrial accident had taken place; this was proper because the expert's testimony assisted the trier of fact in understanding the evidence or determining whether the company was negligent in failing to conduct soil tests or any further site preparation. Coho Res., Inc. v. McCarthy, 829 So. 2d 1, 2002 Miss. LEXIS 208 (Miss. 2002).

**Vocational expert.**

Trial court did not abuse its discretion by excluding the vocational expert's testimony because there was no medical foundation to support his proposed testimony as to future lost wages as the employee's treating orthopedic physician's testified that the employee was not permanently disabled and he could work. Young v. Ill. Cent. R.R. Co., 284 So. 3d 839, 2019 Miss. App. LEXIS 544 (Miss. Ct. App. 2019).

**Illustrative cases.**

Court properly admitted expert testimony because the court considered not only the expert's qualifications but also the relevance and reliability of her expert testimony concerning shaken baby syndrome; the record clearly showed that the trial judge had the issues regarding the actual testimony squarely before it when it determined that the expert was qualified to testify. Clark v. State, 315 So. 3d 987, 2021 Miss. LEXIS 19 (Miss.), cert. denied, — U.S. —, 142 S. Ct. 466, 211 L. Ed. 2d 283, 2021 U.S. LEXIS 5600 (U.S. 2021).

In a sexual battery of a seven-year-old girl case, the trial court did not abuse its discretion in excluding defendant's expert witness because the expert's ultimate opinion that defendant did not have the characteristics of a pedophile improperly relied on defendant's general characteristics, which were not relevant to whether he actually committed the crime of sexual battery. McCammon v. State, 299 So. 3d 873, 2020 Miss. App. LEXIS 28 (Miss. Ct. App.), cert. denied, 299 So. 3d 794, 2020 Miss. LEXIS 297 (Miss. 2020).

In a sexual battery of a seven-year-old girl case, the trial court did not abuse its discretion in excluding defendant's expert witness because, although it was the expert's opinion that the victim was at risk for making a false report, he could not opine that her statements or demeanor during her forensic interview were inconsistent with a child who had in fact been abused. McCammon v. State, 299 So. 3d 873, 2020 Miss. App. LEXIS 28 (Miss. Ct. App.), cert. denied, 299 So. 3d 794, 2020 Miss. LEXIS 297 (Miss. 2020).

Defendant's pre-testimony objection to an expert was properly overruled by the trial court because she described the child victim's demeanor when they met and stated that her interview findings were consistent with the allegations of sexual abuse. Lawson v. State, 292 So. 3d 266, 2019 Miss. App. LEXIS 501 (Miss. Ct. App. 2019).

Simply because a gang investigator's testimony relied on personal knowledge did not automatically place his testimony outside the scope of the rule because the portions of the testimony concerning the victim's gang membership and the investigator's opinion about a gang rivalry were based on his specialized knowledge, experience, and training; therefore, the State was required to tender the investigator as an expert for those portions of his testimony. Croft v. State, 283 So. 3d 1, 2019 Miss. LEXIS 201 (Miss. 2019).

Gang investigator testified as a fact witness because portions of his testimony were grounded in facts learned during his investigation of the shooting and based on his personal knowledge; however, the investigator's testimony also included expert opinions because an average, randomly selected adult likely would not be able to identify a gang or testify about the difference between a gang member and a "hang-around," and he provided expert opinions about what he believed precipitated a shooting. Croft v. State, 283 So. 3d 1, 2019 Miss. LEXIS 201 (Miss. 2019).

Trial court did not erroneously the testimony of the violence shelter's executive director as an expert in domestic violence and it properly limited her testimony to whether victims later recant their stories because defendant's argument that her expert opinion should not be accepted because she did not meet with the victim or defendant was incorrect. Taylor v. State, — So. 3d —, 2019 Miss. App. LEXIS 34 (Miss. Ct. App. Jan. 22, 2019).

Trial court did not err in qualifying the State's witness as an expert in the area of firearms and toolmark identification and allowing his testimony because it was evident that the expert determined that the casing and gun matched to a reasonable degree of scientific certainty and his failure to cite any margin of error did not warrant reversible error. Willie v. State, 274 So. 3d 934, 2018 Miss. App. LEXIS 557 (Miss. Ct. App. 2018).

Despite the expert's determination that the stairs were not in compliance with the applicable building codes, he had not identified any facts allowing him to connect the noncompliant stairway to how the homeowner actually fell; thus, any opinion the expert reached beyond the physical condition of the stairway was only through speculation and conjecture, and the circuit court did not abuse its discretion in striking his testimony. Burns v. Gray, 270 So. 3d 1084, 2018 Miss. App. LEXIS 500 (Miss. Ct. App. 2018).

There was no plain error in a trial judge allowing a general surgeon, who operated on the shooting victim when the victim was brought to an emergency room, to testify as to the surgeon's own observations from treating the victim of the victim's gunshot wounds and to state the surgeon's disagreement with one of the findings of the autopsy report based upon the surgeon's treatment of the victim. Lott v. State, 270 So. 3d 49, 2018 Miss. App. LEXIS 346 (Miss. Ct. App. 2018).

Trial court did not abuse its discretion, in defendant's trial for depraved-hear murder, by allowing the prosecution to present expert testimony from physicians as to the decedent's death being caused by silicone injections which the decedent received from defendant because the physicians were knowledgeable of the subject by their education, experience, and training. Furthermore, the physicians' testimony helped the jury resolve a factual dispute, whether the silicone injections were the cause of the decedent's death. Garner v. State, 247 So. 3d 345, 2018 Miss. App. LEXIS 241 (Miss. Ct. App. 2018).

In a capital murder case, the trial court did not commit an abuse of discretion in not allowing a defense expert's testimony relating to police investigatory techniques, where the expert did not provide support for his statement that the practices he referenced were, in fact, generally accepted. Flowers v. State, 240 So. 3d 1082, 2017 Miss. LEXIS 431 (Miss. 2017), rev'd, — U.S. —, 139 S. Ct. 2228, 204 L. Ed. 2d 638, 2019 U.S. LEXIS 4196 (U.S. 2019).

Trial judge did not abuse the judge's discretion by allowing a witness to testify as an expert in biomechanics because the testimony of the witness was relevant to issues in the case, and the witness demonstrated scientific knowledge that assisted the trier of fact. In addition, the trial judge did not clearly err or abuse the judge's discretion by finding that the witness was qualified to testify by virtue of the training and experience of the witness in engineering and medicine. Brown v. Prof'l Bldg. Servs., 284 So. 3d 754, 2017 Miss. App. LEXIS 605 (Miss. Ct. App. 2017), aff'd, 252 So. 3d 23, 2018 Miss. LEXIS 372 (Miss. 2018).

Trial court did not err by excluding the opinions and testimony of a homeowner's expert witness, a metallurgical engineer, regarding the standard of care of pipeline operators and the alleged breach of that standard by a pipeline operator because the witness lacked familiarity with or understanding of the applicable federal regulations and standards. Furthermore, the testimony of the witness regarding alleged violations of American Petroleum Institute standards was irrelevant and would not have assisted the trier of fact. Elmore v. Dixie Pipeline Co., 245 So. 3d 500, 2017 Miss. App. LEXIS 580 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 884, 2018 Miss. LEXIS 286 (Miss. 2018).

Trial court did not abuse its discretion in admitting the expert testimony of a licensed social worker. The record showed that the social worker testified – in detail – as to how she conducted her interview with the sexual battery victim, and the social worker testified in detail as to what the victim told her. Powell v. State, 240 So. 3d 449, 2017 Miss. App. LEXIS 500 (Miss. Ct. App. 2017), cert. denied, 245 So. 3d 395, 2018 Miss. LEXIS 169 (Miss. 2018).

In a case in which the 19-year-old defendant was convicted of sexual battery of the victim, his nine- or 10-year-old cousin, the trial court did not err in allowing the testimony of the State's expert witness because she had a master's degree in social work; she trained for the ChildFirst forensic interviewing protocol through the National Child Protection Training Center; she had interviewed more than 900 children regarding alleged sexual abuse, alleged physical abuse, and witnesses to violent crime; she relied on her training in gathering as much information as possible from the victim; and she found that the victim's characteristics were consistent with children who had been abused. Daniels v. State, 242 So. 3d 878, 2017 Miss. App. LEXIS 461 (Miss. Ct. App. 2017), cert. denied, 237 So. 3d 1271, 2018 Miss. LEXIS 141 (Miss. 2018).

Trial court did not abuse its discretion in excluding an expert witness's causation opinion because it thoroughly considered the opinion on causation and found the opinion to be unreliable; the trial court carefully considered the peer review reports, the testimony in the Daubert hearing, the deposition testimony and expert report of the witness, and all of the Daubert-related motions in its decision to exclude the witness's expert testimony on causation. T.L. Wallace Constr., Inc. v. McArthur, Thames, Slay, and Dews, PLLC, 234 So. 3d 312, 2017 Miss. LEXIS 271 (Miss. 2017).

Trial judge did not err when he struck the opinion testimony of an accident victim's expert witness regarding a neutral wire theory as irrelevant because it was undisputed that the injury to the victim while attempting to attach a metal conduit to an electrical pole was not caused by the presence of an unrelated, neutral wire. Griffith v. Entergy Miss., Inc., 203 So. 3d 579, 2016 Miss. LEXIS 372 (Miss. 2016).

Trial court did not err in granting a store owner's motion to strike the opinions of a customer's safety and security expert because the expert affidavit failed to meet the requirements of Daubert and the rule, thus making it unreliable; the expert failed to articulate what the national or Mississippi standards for property security were, where they came from, or who had established them, and he offered no indication that any theory upon which he based his opinions could or had been tested. Wright v. R.M. Smith Invs., L.P., 210 So. 3d 555, 2016 Miss. App. LEXIS 566 (Miss. Ct. App. 2016).

Trial court did not abuse its discretion by refusing to allow defendant's expert to testify that methamphetamine causes violent behavior, because the expert's proposed testimony was speculative at best given that it was not based on sufficient facts or data due to the lack of specific evidence presented concerning the quantification of the substance in the male victim's system. Freeman v. State, 203 So. 3d 770, 2016 Miss. App. LEXIS 181 (Miss. Ct. App.), cert. denied, 204 So. 3d 291, 2016 Miss. LEXIS 465 (Miss. 2016).

In a candidate qualification challenge case, the circuit court did not err in excluding the expert testimony of a "utility analyst" at the evidentiary hearing. Even if the utility analyst used reliable information in formulating his opinion, this was insufficient to render his methodology reliable, admissible, or sound. Hale v. State Democratic Exec. Comm., 168 So. 3d 946, 2015 Miss. LEXIS 376 (Miss. 2015).

Trial court did not abuse its discretion by excluding the testimony of an expert concerning the reliability of eyewitness identification evidence because he failed to provide information about the rate of error or the principles and methods used, his testimony that the photo identification was flawed could have confused the jury as evidence of the identification was admitted, and the eyewitness's identification was far from the only evidence of guilt. Flowers v. State, 158 So. 3d 1009, 2014 Miss. LEXIS 569 (Miss. 2014), vacated, 579 U.S. 913, 136 S. Ct. 2157, 195 L. Ed. 2d 817, 2016 U.S. LEXIS 3930 (U.S. 2016).

Trial court did not abuse its discretion by excluding the testimony of an expert in criminal investigation procedures under this rule because he did not articulate a standard for his opinion relating to the investigation's early focus on defendant as a suspect, he did not provide support for his statement that the practices he referenced were generally accepted, and his testimony was cumulative of other testimony. Flowers v. State, 158 So. 3d 1009, 2014 Miss. LEXIS 569 (Miss. 2014), vacated, 579 U.S. 913, 136 S. Ct. 2157, 195 L. Ed. 2d 817, 2016 U.S. LEXIS 3930 (U.S. 2016).

Trial court did not abuse its discretion in excluding an expert's testimony because the expert did not apply his principles and methodologies reliably to the facts of the case, and his testimony was unreliable; the expert could not reliably apply the science to the facts of the case, and his testimony was inconclusive and speculative because he testified only that a lineup identification "could" be unreliable and that in-court identifications "probably" were suggestive. Corrothers v. State, 148 So. 3d 278, 2014 Miss. LEXIS 311 (Miss. 2014), cert. denied, 576 U.S. 1023, 135 S. Ct. 2835, 192 L. Ed. 2d 877, 2015 U.S. LEXIS 3926 (U.S. 2015).

To extent the witness's testimony explained the railroad industry standards and customs regarding proper ventilation, such testimony was admissible and helpful in assisting the trier of fact; although the railroad was correct that any testimony from the witness regarding the adequacy of ventilation system in the employee's locomotive would have been of questionable reliability, as the witness admitted he was not qualified to inspect locomotives and had never even seen the locomotive in question, the witness never offered such testimony. Ill. Cent. R.R. Co. v. Brent, 133 So. 3d 760, 2013 Miss. LEXIS 595 (Miss. 2013).

Trial judge properly allowed the insureds' expert to testify because he was qualified to give his opinion on the effects that winds would have had on the roof structure and used an accepted method for estimating the cost to repair the structure. Hoover v. United Servs. Auto. Ass'n, 125 So. 3d 636, 2013 Miss. LEXIS 578 (Miss. 2013).

Trial court did not err in allowing a construction company owner to testify as an expert witness as his forty years of experience as a residential contractor qualified him to provide expert testimony in that field and his testimony was not outside his area of expertise. Gilmer v. Morris Goodman Builders, Inc., 131 So. 3d 1203, 2013 Miss. App. LEXIS 397 (Miss. Ct. App. 2013), cert. denied, 132 So. 3d 579, 2014 Miss. LEXIS 105 (Miss. 2014).

Expert's opinion did not support appellants' claim that a train crew's view of a crossing was obstructed by vegetation in violation of Miss. Code Ann. § 77-9-254, because his opinion regarding sight-distance deficiencies was based on calculations of a train traveling at 79 mph, while the evidence established that it had been traveling at approximately 49 mph as it approached the crossing. Estate of Bloodworth v. Ill. Cent. R.R. Co., 129 So. 3d 888, 2013 Miss. LEXIS 588 (Miss. 2013).

In a sexual-battery case, the trial court did not abuse its discretion by accepting the licensed clinical social worker as an expert witness and allowing her to testify that she diagnosed the victim with post-traumatic stress disorder based on information gathered from the victim though an interview because the Daubert factor of being able to test an expert witness's opinion for reliability did not apply. Pickett v. State, 143 So. 3d 596, 2013 Miss. App. LEXIS 761 (Miss. Ct. App. 2013), cert. denied, 141 So. 3d 947, 2014 Miss. LEXIS 374 (Miss. 2014).

Summary judgment was properly granted on the basis that plaintiff had no basis to establish causation for her negligence claim. The witness designated as plaintiff's expert witness lacked the requisite factual knowledge to testify as an expert as he merely made a conclusory statement, which was not based on anything other than plaintiff's history, that plaintiff's back complaints appeared to be the result of a fall. Buckley v. Singing River Hosp., 146 So. 3d 365, 2013 Miss. App. LEXIS 691 (Miss. Ct. App. 2013).

Trial court did not err in excluding the opinion of plaintiff's expert witness based on the National Electric Code (NEC) as neither of the expert's reports offered information that showed the NEC's relevance to determining whether the presence of an extension cord across a sidewalk constituted a tripping hazard nor its relevance to determining the applicable standard of care in the case. Howell v. Holiday, 155 So. 3d 839, 2013 Miss. App. LEXIS 134 (Miss. Ct. App. 2013).

Exclusion of the wife's expert in business valuation was proper because, though the expert might have performed calculations under other methods that did not include goodwill, he declined to utilize those methods as the proper basis for forming his opinions. The expert relied on a valuation method that neither excluded goodwill nor separately assigned a value to it; the chancellor considered the applicable precedent and excluded the testimony in part because the expert considered goodwill. Rhodes v. Rhodes, 52 So. 3d 430, 2011 Miss. App. LEXIS 19 (Miss. Ct. App. 2011).

In a slip and fall case, plaintiff's treating physician was improperly allowed to give a causation opinion as to the need for plaintiff's hip replacement as there was no evidence he consulted any literature, applied a particular theory, performed any procedures, or relied on any principles, methodologies, or scientific methods in concluding that the need for the hip replacement was caused by the fall; therefore, his opinion was not reliable under Daubert. Bailey Lumber & Supply Co. v. Robinson, 98 So. 3d 986, 2012 Miss. LEXIS 386 (Miss. 2012).

In a sexual battery case, an expert's testimony was admissible under Miss. R. Evid. 702 because he had a degree in psychology and a Ph.D. in clinical psychology, he had been a psychologist for forty years, and he testified that the victim demonstrated behavior consistent with a victim of sexual abuse, not that she was a victim of sexual abuse. Collins v. State, 70 So. 3d 1144, 2011 Miss. App. LEXIS 299 (Miss. Ct. App. 2011).

Grant of summary judgment in favor of a window manufacturer and seller in the homeowners' action against them concerning leaking windows was appropriate because the circuit court did not abuse its discretion in excluding the homeowners' expert from providing expert testimony since he utilized no methodology, much less a scientifically recognized one. Therefore, even assuming that the circuit court abused its discretion on the qualification issue, which it did not, the application of relevance and reliability principles also called for the exclusion of the testimony. McKee v. Bowers Window & Door Co., 64 So. 3d 926, 2011 Miss. LEXIS 218 (Miss. 2011).

Grant of summary judgment in favor of two lawyers in the clients' action claiming the lawyers had breached their fiduciary duty was improper because the trial court erred in applying a negligence standard to the clients' claims of breach of fiduciary duty. Because a lawyer's discretionary disbursement of the settlement funds to his clients did not implicate the kind of specialized knowledge implicated by Miss. R. Evid. 702, to the extent his testimony constituted opinion, it was admissible under Miss. R. Evid. 701; therefore, the trial court erred in excluding the testimony regarding how he devised the settlement matrix and how he disbursed the settlement funds to his clients. Crist v. Loyacono, 65 So. 3d 837, 2011 Miss. LEXIS 217 (Miss. 2011).

Exclusion of expert testimony in a negligence action was improper, in part, because the jury should have been able to weigh the credibility of the expert's distance and timing estimates, which largely were based on facts in the record and would have aided the jury. Denham v. Holmes, 60 So. 3d 773, 2011 Miss. LEXIS 192 (Miss. 2011).

Exclusion of expert testimony in a negligence action was proper, in part, because the expert failed to connect the dots between the skid marks and the existing physical evidence and thus, his conclusion regarding causation was unreliable. Moreover, the expert's conclusion regarding whether the driver had created an immediate hazard was not based on specialized, technical, or scientific knowledge. Denham v. Holmes, 60 So. 3d 773, 2011 Miss. LEXIS 192 (Miss. 2011).

Grant of summary judgment in favor of the other driver in the passenger's negligence action for injuries that she received in a car accident was inappropriate because an oral surgeon's testimony was admissible; he testified that his opinion was based on his knowledge, skill, experience, training, and education as an orthopedic surgeon and his testimony was sufficient to establish the element of proximate cause and was admissible for the jury to consider in the apportionment of damages. The other driver, as the driver of the second car to hit the vehicle in which the passenger was riding, was responsible only for the amount of the passenger's damages that were based on his fault allocated by the jury in accord with Miss. Code Ann. § 85-5-7. Lopez v. McClellan, 2010 Miss. App. LEXIS 214 (Miss. Ct. App. Apr. 27, 2010).

Defendant's convictions for capital murder during the commission of a robbery were proper because it was not an abuse of discretion for the trial court to find that a DNA Section Chief at the Mississippi Crime Laboratory's testimony was based on sufficient data and was the product of reliable methods. Cross-examination and presentation of contrary evidence were the appropriate means of attacking any aspects of the expert's testimony; however, the defense chose neither to cross-examine him nor to object to his testimony at trial. Gillett v. State, 56 So. 3d 469, 2010 Miss. LEXIS 337 (Miss. 2010), cert. denied, 565 U.S. 1095, 132 S. Ct. 844, 181 L. Ed. 2d 552, 2011 U.S. LEXIS 8944 (U.S. 2011).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the widow's argument that the trial court erred by denying her motion in limine pertaining to evidence by the trucking company's expert that the decedent had methamphetamine in his blood at the time of the collision was without merit. The expert had been qualified as an expert; the widow did not object to him being qualified as an expert; and the expert's opinions were credibility issues for the jury to resolve. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450, 2010 Miss. LEXIS 200 (Miss. 2010).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because issue of visibility, or lack thereof, of the trailer was presented to the jury for consideration. The testimony on visibility was not expressed in terms of the decedent's actual ability to see the truck on the night of the accident; however, without the decedent's testimony, which unfortunately was not possible in the case, any testimony concerning that issue was properly excluded. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450, 2010 Miss. LEXIS 200 (Miss. 2010).

Defendant's murder conviction was appropriate because his expert witness was not erroneously excluded. An expert in criminal investigations was prepared to testify that the officers were deficient in their investigation into the victim's murder; however, the trial court did not abuse its discretion when it found that the proffered testimony had been adequately covered by the cross-examination of the officers and that the expert had failed to establish the reliability of his testimony under Daubert. Ross v. State, 22 So. 3d 400, 2009 Miss. App. LEXIS 861 (Miss. Ct. App. 2009).

Circuit court did not abuse its discretion in allowing expert witnesses to testify regarding scientific evidence on neurological impact of 1-BP on humans, which was a relatively new field of study with limited reliable methodology, because the experts' qualifications were not legitimately questioned, and their testimony was sufficiently relevant and reliable. Franklin Corp. v. Tedford, 2009 Miss. LEXIS 169 (Miss. Apr. 16, 2009), op. withdrawn, sub. op., 18 So. 3d 215, 2009 Miss. LEXIS 426 (Miss. 2009).

In defendant's trial on a charge of sexual battery, a nurse did not give improper opinion testimony regarding the dried secretions obtained during the administration of the victim's rape kit because the State questioned the nurse regarding hospital protocol in administering a rape kit, which was within her personal knowledge as a nurse who assisted doctors in performing the rape kit and because the nurse did not give any opinions beyond what she was qualified to render; the nurse's testimony helped the jury understand the process by which evidence was gathered and analyzed. The nurse did not state that the dried secretions were seminal fluid but only stated that a foreign substance was found by a process that was used to detect seminal fluid; this was not an opinion but was information gained through her personal observations and experiences. Bolden v. State, 23 So. 3d 491, 2009 Miss. App. LEXIS 193 (Miss. Ct. App.), cert. denied, 22 So. 3d 1193, 2009 Miss. LEXIS 614 (Miss. 2009).

In plaintiff's suit against the manufacturer of a forklift, the trial court did not abuse its discretion in excluding the testimony of plaintiff's expert witness under Miss. R. Evid. 702; the expert did not conduct any personal interviews, nor did he prepare his own fact sheet regarding the incident. The methods employed by the expert were "result-oriented tests," and he could not point to any literature where "real-life testing" methodology was employed; the Court of Appeals of Mississippi held that the expert's findings were speculative and that his methodology failed to meet the Daubert standard. Townsend v. Doosan Infracore Am. Corp., 3 So. 3d 150, 2009 Miss. App. LEXIS 92 (Miss. Ct. App. 2009).

In defendant's vehicular homicide case, the trial court did not err by allowing the State's expert witness to testify regarding defendant's level of impairment because the trial court found that the expert used an established methodology for testing the presence of hydrocodone and used acceptable protocol to form his expert opinion, and the expert's method of determining the level of hydrocodone in defendant's system prior to the administration of her blood test could be tested. Teston v. State, 44 So. 3d 977, 2008 Miss. App. LEXIS 681 (Miss. Ct. App. 2008), cert.

dismissed, 44 So. 3d 969, 2010 Miss. LEXIS 520 (Miss. 2010).

Defendant's conviction for fondling his seven-year-old daughter was appropriate even though it was erroneous for the trial court to permit the clinical director to testify as to the veracity of the child. However, even though the admission of the challenged testimony was error, it was not reversible, in part because the jury had the opportunity to evaluate the child since she testified before the jury; therefore, even if the bar was not in place, admitting the director's testimony was not erroneous. Golden v. State, 984 So. 2d 1026, 2008 Miss. App. LEXIS 91 (Miss. Ct. App. 2008).

Trial court properly determined that the deputy state fire marshal's expert testimony would assist the jury in understanding the evidence because (1) he testified about the origin and cause of the fire; (2) he properly utilized the methods of his training and expertise in arson to formulate an opinion based on the facts he encountered; (3) an investigation of the appliances and heaters in the house revealed that they were not the cause of the fire; (4) in his opinion, he determined the area of origin of the fire was the front living room and the adjoining den area; (5) he testified about pour patterns noted on the floor in that area, which indicated that a flammable liquid had been poured over the area; (6) he excluded all accidental causes of the fire; and (7) during cross-examination, he explained that the negative test results did not exclude the possibility that there were flammable liquids in the pour pattern; it just possibly meant that there was not enough flammable liquid remaining to create a positive test result. Colburn v. State, 990 So. 2d 206, 2008 Miss. App. LEXIS 74 (Miss. Ct. App.), cert. denied, 994 So. 2d 186, 2008 Miss. LEXIS 472 (Miss. 2008).

During defendant's murder trial, it was reasonable for defense counsel not to hire an expert witness to discover whether there was evidence of another shooter who might have killed the victim at close range where defendant confessed to shooting the victim three times, which was consistent with evidence presented in the autopsy report and witnesses' testimony. Davis v. State, 980 So. 2d 951, 2007 Miss. App. LEXIS 689 (Miss. Ct. App. 2007), cert. denied, 979 So. 2d 691, 2008 Miss. LEXIS 205 (Miss. 2008).

Trial court abused its discretion by allowing the parents' expert to testify under Miss. R. Evid. 702 hypothetically that a CT scan of the son would have shown a midline shift had it been performed on an earlier date because such testimony was not based on sufficient facts or data; therefore, the physicians were entitled to a new trial. Bullock v. Lott, 964 So. 2d 1119, 2007 Miss. LEXIS 521 (Miss. 2007).

Trial court's ruling that there was no factual basis for a police commander's conclusion that the cause of the decedent's death from a shooting was the apartment complex's failure to have any security guards or other security measures was correct because there was no factual basis for his conclusions; there was no evidence to support the commander's conclusion that security guards would have expelled the shooter from the apartment complex's premises as there was no indication that the shooter was not at the apartment complex by invitation, and there was no record evidence supporting the commander's conclusion that the apartment complex's lighting was inadequate and that that inadequacy contributed to the decedent's death. Davis v. Christian Bhd. Homes of Jackson, Miss., Inc., 957 So. 2d 390, 2007 Miss. App. LEXIS 310 (Miss. Ct. App. 2007).

In a personal injury case, a court properly admitted defendant's expert's testimony because the expert stated that he was basing his testimony and opinions on multiple pieces of evidence, including the layout of the accident scene, witness testimony, and the opinions and findings of the officer who investigated the scene; on the stand, the expert explained how each of those pieces of evidence supported his finding that plaintiff was following too closely to the driver at the time of the accident, and the expert also testified regarding his extensive training and experience in investigating accidents and their causes and explained how scientific principles supported his findings. Walker v. Gann, 955 So. 2d 920, 2007 Miss. App. LEXIS 290 (Miss. Ct. App. 2007).

In a capital murder trial, the trial court did not abuse its discretion in excluding a defense expert's testimony regarding his inability to destroy a wallet by burning it; the expert's testimony regarding statements made to him by the witness were inadmissible since the introduction of any such statements would have been mere commentary on the veracity of a witness, which was not appropriate expert testimony under Miss. R. Evid. 702, and while the expert was proffered to be an expert on police investigatory techniques, his proffer failed to establish the reliability of his testimony under Daubert and McLemore. Ross v. State, 954 So. 2d 968, 2007 Miss. LEXIS 235 (Miss. 2007).

Trial court did not err by certifying a fire inspector as an expert and allowing her testify because: (1) no prior expert qualification in a court of law was necessary under Miss. R. Evid. 702; (2) her Daubert testimony revealed extensive training in fire and arson investigation; and (3) nothing in her testimony suggested that she manipulated the facts to fit her opinion. Taylor v. State, 954 So. 2d 944, 2007 Miss. LEXIS 183 (Miss. 2007).

In defendant's drug case, the court did not err in allowing the state's expert witness to testify as to what ephedrine and pseudoephedrine were used for in the realm of drug manufacturing because, in light of the witness's direct testimony on his training of the "chemical properties of various controlled substances," it was not clearly erroneous for the trial court to allow an expert in the fields of drug analysis and identification to testify as to the chemical make up of methamphetamine. Cook v. State, 953 So. 2d 271, 2007 Miss. App. LEXIS 143 (Miss. Ct. App. 2007).

In a premises liability case, it was not error to exclude the price of two surgeries from a doctor's testimony under Miss. R. Evid. 702 because he did not state with medical certainty that the surgeries were necessary. Kidd v. McRae's Stores P'ship, 951 So. 2d 622, 2007 Miss. App. LEXIS 137 (Miss. Ct. App. 2007).

Defendant's murder conviction was proper because a witness testified as an expert witness and her opinion regarding DNA evidence was not prohibited as long as it was based upon sufficient facts or data; the testimony was the product of reliable principles and methods, the witness reliably applied the principles and methods, and there was no indication that the witness's testimony violated Miss. R. Evid. 702. Bailey v. State, 956 So. 2d 1016, 2007 Miss. App. LEXIS 112 (Miss. Ct. App.), cert. denied, 957 So. 2d 1004, 2007 Miss. LEXIS 301 (Miss. 2007).

Where defendant confessed to participating in the wife's plan to murder her husband, the circuit court did not err in excluding the testimony of an expert concerning involuntary confessions; during the Daubert hearing, the expert admitted her theories could not be empirically tested. Edmonds v. State, 2007 Miss. LEXIS 7 (Miss. Jan. 4, 2007), op. withdrawn, sub. op., 955 So. 2d 787, 2007 Miss. LEXIS 349 (Miss. 2007).

In a child custody case, a social worker was properly determined to be an expert witness under Miss. R. Evid. 702 based on her education and experience, and the social worker was allowed to testify regarding her therapy sessions with the child under Miss. R. Evid. 803(4). Giannaris v. Giannaris, 962 So. 2d 574, 2006 Miss. App. LEXIS 668 (Miss. Ct. App. 2006), rev'd, 960 So. 2d 462, 2007 Miss. LEXIS 399 (Miss. 2007).

Grant of summary judgment in favor of the company and subcontractors in the students' and teachers' action for the alleged fear of future disease due to asbestos exposure was appropriate because no genuine issue of material fact existed as to the evidence necessary to demonstrate a rational basis for the fear of future disease; additionally, a doctor's opinion was not based on sufficient facts; therefore, his testimony failed the reliability prong of the Daubert/McLemore test as well as the requirements of Miss. R. Evid. 702. Brooks v. Stone Architecture, P.A., 934 So. 2d 350, 2006 Miss. App. LEXIS 533 (Miss. Ct. App. 2006).

Summary judgment in favor of defendant casket company on a products liability claim was proper because no expert testimony was presented that demonstrated that the alternative glue would have allowed the wooden casket to last for an "indefinite" period of time. Moss v. Batesville Casket Co., 935 So. 2d 393, 2006 Miss. LEXIS 378 (Miss. 2006).

Defendant's capital murder convictions were proper where nothing in the record supported defendant's assertion that the State intentionally presented false testimony; the defense failed to demonstrate that the doctor's testimony was in fact false; and the doctor's credibility as a witness at trial rested with the jury. Rubenstein v. State, 2005 Miss. LEXIS 789 (Miss. Dec. 1, 2005), op. withdrawn, 2006 Miss. LEXIS 424 (Miss. Aug. 10, 2006), sub. op., 941 So. 2d 735, 2006 Miss. LEXIS 411 (Miss. 2006).

Trial court properly held that the first expert witness's testimony concerning a Luminol test had the tendency to show that defendant committed the murder; thus, pursuant to Miss. R. Evid. 401, the trial court did not err in allowing the evidence to be admitted. Jackson v. State, 924 So. 2d 531, 2005 Miss. App. LEXIS 451 (Miss. Ct. App. 2005), cert. denied, 927 So. 2d 750, 2006 Miss. LEXIS 175 (Miss. 2006).

Where defendant appealed his conviction of three counts of fondling child victims, asserting that the testimony of the State's expert forensic interviewer should not have been allowed because the forensic interviewer could not cite evidence that her methods had ever been independently tested, nor could she shed any light on the rate of error regarding her interviewing methods, and the expert's methods were unreliable, as there was no single accrediting or sanctioning body for the field of forensic interviewing, and the State properly countered that (1) the area of investigations of sexual abuse cases, especially through interviews, was a competent area of expertise, (2) the expert's testimony was based upon sufficient facts and data, as she testified in detail how she conducted her interview with the victim and what the victim told her; (3) the testimony was the product of reliable principles and methods, despite the general consensus within the field that there was no single "right way" to conduct an interview; and (4) the expert applied the principles and methods of her interviewing skills reliably to the facts of the case, the trial court did not abuse its discretion in admitting the expert testimony. Mooneyham v. State, 915 So. 2d 1102, 2005 Miss. App. LEXIS 989 (Miss. Ct. App. 2005).

Defendant, tried for embezzlement, was employed by the owner for approximately nine months and the owner testified that he had become familiar with defendant's handwriting during said period. By virtue of his familiarity with defendant's handwriting, the owner was fully qualified to offer his opinion as to whether or not the writing was in fact defendant's signature; such testimony was rationally based upon his perception, was helpful in making a determination of a fact in issue, was not based on scientific, technical, or other specialized knowledge within the scope of Miss. R. Evid. 702, and it therefore met the requirements for both Miss. R. Evid. 701 and 901(b)(2). Bell v. State, 910 So. 2d 640, 2005 Miss. App. LEXIS 159 (Miss. Ct. App. 2005).

Finding in favor of the patient in his medical malpractice action was improper where the trial court erred in allowing the testimony of an orthopaedic surgeon because that doctor was not qualified to testify as to the standard of care in August of 1995 since he was still in his residency in Austria and had not completed his own orthopedic training at that time. Blake v. Clein, 903 So. 2d 710, 2005 Miss. LEXIS 235 (Miss. 2005).

Trial court erred in excluding defense expert toxicologist's videotaped deposition testimony regarding the deceased truck driver's BAC and lack of narcolepsy medicine because it was central to main issue of how the fatal one-vehicle accident occurred and the auto manufacturer's defense. The Supreme Court of Mississippi has held that it constitutes reversible error to restrict an expert's testimony about the main issue in the case. GMC v. Myles, 905 So. 2d 535, 2005 Miss. LEXIS 3 (Miss. 2005).

In a family's wrongful death suit against the department of transportation and the decedents' insurer, the trial court did not abuse its discretion in allowing the family's expert to testify as an expert witness as he was qualified to testify as an expert in the field of forestry and his testimony was helpful to the jury on the issue of what caused the tree to fall and fatally injure the decedents. The trial judge limited expert's testimony to forestry issues within his knowledge and his personal observations of the tree, and he was not allowed to give testimony outside his expertise and education. Alfa Ins. Corp. v. Ryals, 918 So. 2d 676, 2004 Miss. App. LEXIS 560 (Miss. Ct. App. 2004), rev'd, 918 So. 2d 1260, 2005 Miss. LEXIS 442 (Miss. 2005).

Trial court did not abuse its discretion by sustaining an objection to testimony regarding the standards applicable to an elevator used on an oil rig because the witness was not qualified as an expert; moreover, a company's argument concerning the personal knowledge of the witness was without merit. Crane Co. v. Kitzinger, 860 So. 2d 1196, 2003 Miss. LEXIS 689 (Miss. 2003).

In a malpractice suit in which a patient claimed she was burned by a heating unit used during surgery, the trial court erred in not allowing the patient's expert to testify as to the standard of care for using the heating pad, but the error was harmless as the expert testified that the unit's instruction manual required defendant doctor to prescribe the use and to dictate the temperature setting, and that defendant failed to follow these procedures, and the patient was able to get her theory of the case as to the cause of her injuries before the jury. Winters v. Wright, 869 So. 2d 357, 2003 Miss. LEXIS 415 (Miss. 2003).

Trial court acted within its discretion in a medical malpractice case in excluding a nurse's testimony as to a statement made by a doctor based on the court's prior ruling; which excluded expert testimony by the doctor, and on the plaintiff's declination to opening the door to expert testimony by the doctor. Griffin v. McKenney, 877 So. 2d 425, 2003 Miss. App. LEXIS 942 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 867 (Miss. 2004).

Trial court properly allowed sufficiency of warning testimony from the defendant's expert witness, where its earlier ruling to deny the plaintiff's expert witness from testifying as to the same subject was incorrect, because both experts should have been allowed to relate their knowledge of warnings to the problem of air bags, because, as the plaintiff's expert testified, it was the generally accepted methodology for human factors experts to apply their knowledge of human behavior to different types of problems. Miss. R. Evid. 702. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564, 2003 Miss. App. LEXIS 752 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 2005 Miss. LEXIS 21 (Miss. Jan. 13, 2005), aff'd in part and rev'd in part, 904 So. 2d 1077, 2005 Miss. LEXIS 247 (Miss. 2005).

Trial court did not abuse its discretion in allowing DNA identification testimony, as the State's expert testified that the test was performed in accordance with FBI standards and was accredited by organizations consisting of scientists, law enforcement agents, and lawyers who wrote guidelines for DNA testing facilities across the country. Moody v. State, 841 So. 2d 1067, 2003 Miss. LEXIS 104 (Miss. 2003).

In a motorist's suit against a county, his expert, a traffic engineer, should have been allowed to testify as to whether a curve required signs, whether warnings complied with the Manual on Uniform Traffic Control Devices, and whether the county failed to provide adequate warnings. Donaldson v. Covington County, 846 So. 2d 219, 2003 Miss. LEXIS 133 (Miss. 2003).

Where a mother and father had divorced, resumed living together, had another child, and separated, a vocational rehabilitation expert was properly allowed to testify as to the economic value of the mother's contribution to the family under Miss. R. Evid. 702. Wooldridge v. Wooldridge, 856 So. 2d 446, 2003 Miss. App. LEXIS 279 (Miss. Ct. App. 2003), cert. denied, 864 So. 2d 282, 2004 Miss. LEXIS 52 (Miss. 2004).

Chancellor in a divorce case erred in precluding the husband's expert from opining as to the value of the husband's dental practice and office building, as the denial of this testimony was contrary to the intent of Miss. R. Evid. 702. Singley v. Singley, 846 So. 2d 1004, 2002 Miss. LEXIS 309 (Miss. 2002).

Trial court's decision not to disallow the testimony of a psychologist and a psychiatrist as expert witnesses for defendant which testimony embodying the view that defendant did not fit the profile of a sex offender was not arbitrary or clearly erroneous in light of their expressed opinion that no scientifically acceptable profile of a sex offender existed. Earnest v. State, 805 So. 2d 599, 2002 Miss. App. LEXIS 2 (Miss. Ct. App. 2002).

In the sentencing phase of a prosecution for capital murder and armed robbery, a psychologist was properly precluded from testifying concerning what life would be like for a minor in prison for life without the possibility of parole, where the proffer stated that he would testify only to generalities and he had never even examined the defendant or any of his records. Eskridge v. State, 765 So. 2d 508, 2000 Miss. LEXIS 165 (Miss. 2000), cert. denied, 531 U.S. 1155, 121 S. Ct. 1105, 148 L. Ed. 2d 976, 2001 U.S. LEXIS 1279 (U.S. 2001).

It was well within the judge's discretion to admit expert testimony describing a child's behavior as common with that of a sexually abused child, and there was no abuse of discretion where the expert testimony was offered as substantive evidence of abuse and was not describing a syndrome. Crawford v. State, 754 So. 2d 1211, 2000 Miss. LEXIS 8 (Miss. 2000).

In an action for breach of contract and fraud arising from the purchase by the defendant of insurance for the plaintiff's car after she allowed her own policy to lapse, it was reversible error for the court to allow the plaintiff's insurance experts to testify outside their stated areas of expertise where one witness had no expertise, and the other had never sold insurance in Mississippi. GMAC v. Baymon, 732 So. 2d 262, 1999 Miss. LEXIS 78 (Miss. 1999).

Expert testimony was not necessary to establish the standard of care that an insurance agent owes to his client; case did not involve underwriting or actuarial tables but was a negligence case based on discussion of client's application for insurance, a matter that a layman could understand based on common sense and practical experience. Lovett v. Bradford, 676 So. 2d 893, 1996 Miss. LEXIS 323 (Miss. 1996).

Trial court erred in admitting expert testimony on subject of tax preparations and calculations, and loss of use of income; chancellor did not need assistance understanding such evidence and testimony was instead offered to help chancellor determine amount of damages suffered, but this was not relevant since it was not a fact at issue, and therefore testimony should not have been admitted. Century 21 Deep South Properties, Ltd. v. Corson, 612 So. 2d 359, 1992 Miss. LEXIS 804 (Miss. 1992).

Where witness was allowed to express his opinions concerning value, normal street usage and customary packaging of marijuana based upon his training and experience as a narcotics officer, he was an expert and should have been tendered as such to have his qualifications tested through voir dire before being allowed to offer expert opinions. Sample v. State, 643 So. 2d 524, 1994 Miss. LEXIS 466 (Miss. 1994).

Trial court did not err in admitting the testimony of expert economist as to plaintiff's future economic losses, since issues concerning his opinion went to the weight or credibility of the evidence, not its admissibility. Flight Line, Inc. v. Tanksley, 608 So. 2d 1149, 1992 Miss. LEXIS 447 (Miss. 1992).

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**ALR.**

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Admissibility of expert or opinion evidence of battered-woman syndrome on issue of self-defense. 58 A.L.R.5th 749.

Admissibility of expert testimony as to susceptibility of defendant to inducement for purpose of establishing entrapment defense. 70 A.L.R.5th 491.

Admissibility of expert testimony regarding credibility of confession. 73 A.L.R.5th 581.

Admissibility of results of presumptive tests indicating presence of blood on object. 82 A.L.R.5th 67.

Admissibility of expert testimony regarding reliability of accused's confession where accused allegedly suffered from mental disorder or defect at time of confession. 82 A.L.R.5th 591.

Admissibility of Expert and Opinion Evidence as to Cause or Origin of Fire – Modern Civil Cases. 84 A.L.R.5th 69.

Admissibility of Expert and Opinion Evidence As to Cause or Origin of Fire in Criminal Prosecution for Arson or Related Offense – Modern Cases. 85 A.L.R.5th 187.

Admissibility of Expert Testimony on Child Sexual Abuse Accommodation Syndrome (CSAAS) in Criminal Case. 85 A.L.R.5th 595.

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Admissibility of Expert Testimony by Nurses. 24 A.L.R.6th 549.

Necessity and Admissibility of Expert Testimony to Establish Malpractice or Breach of Professional Standard of Care by Architect. 47 A.L.R.6th 303.

Admissibility and Propriety of Use of Abel Assessment for Sexual Interest Test. 84 A.L.R.6th 263.

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Qualification as Expert to Testify in Legal Malpractice Action. 82 A.L.R.6th 281.

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State Court Class Actions in Mississippi: Why Adopt Them Now?, 24 Miss. C. L. Rev. 437, Spring, 2005.

Taming an Elephant: A Closer Look at Mass Tort Screening and the Impact of Mississippi Tort Reforms, 26 Miss. C. L. Rev. 253, 2006/2007.

## Rule 703. Bases of an expert's opinion testimony.

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible.

**HISTORY: Restyled effective July 1, 2016.**

### ADVISORY COMMITTEE NOTE

The language of Rule 703 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

All reference to an "inference" has been deleted, on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

There are three possible sources which may produce an expert's facts or data. Practice in Mississippi already recognizes two of them: (1) where the expert bases his opinion on personal observation, and (2) where he bases it either on a hypothetical question presented to him at trial or on the trial testimony of others which the expert has heard while sitting in the courtroom. *See Collins v. State,* 361 So. 2d 333 (Miss. 1978). The new practice under Rule 703 brings a third source: the presentation of data to the expert outside of court and other than by his personal observation. The Advisory Committee Note to FRE 703 presents a persuasive rationale for the use of the third source. A physician, for example, bases his medical diagnosis of his patient on many sources. Most of his sources are admissible in evidence but only with the expenditure of substantial time in producing and examining various authenticating witnesses. Since these sources provide the doctor with information that he utilizes in making life-and-death decisions, his validation of them ought to be sufficient for trial, especially since he can be cross-examined. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

Admissibility.
DNA tests.
Exclusion.
Hearsay.
Instruments.
Medical expertise.
Observation.
Photographs of murder victim.
Reports.
Sequestration.
Specialized knowledge.

**Admissibility.**

Expert testimony of the technical and administrative reviewer of the primary analyst who tested defendant's blood and urine was permissible as the witness was qualified to testify as a surrogate witness in lieu of the primary analyst. The witness was actively involved in the production of the lab report, had intimate knowledge of the tests that were performed and the process that was used to confirm the findings, and reviewed the analyst's work, including the data, to ensure that the conclusions were correct and accurate. Roberts v. State, 229 So. 3d 1060, 2017 Miss. App. LEXIS 610 (Miss. Ct. App. 2017).

When hearing defendant's post-conviction claim that defendant was sentenced to death despite being mentally retarded, it was no error to admit an expert report or rely on statements therein because (1) the expert was cross-examined, (2) Miss. R. Evid. 703 let the expert rely on others' statements, (3) statements explaining the opinion's basis were not hearsay, and (4) nothing showed the court relied on a statement that was false or improperly admitted. Brown v. State, 168 So. 3d 884, 2015 Miss. LEXIS 149 (Miss. 2015).

In a capital murder trial, the trial court did not err in admitting the expert testimony of a forensic pathologist because his opinion testimony was based upon his observations of the victim's body, facts made known to him, and his observations of anatomical drawings and photographs at trial and the pathologist testified that he had reviewed the victim's medical records and was able to reach an opinion with a reasonable degree of medical certainty as to the cause and manner of the victim's death. Dixon v. State, 17 So. 3d 1099, 2009 Miss. App. LEXIS 88 (Miss. Ct.

App.), cert. denied, 17 So. 3d 99, 2009 Miss. LEXIS 451 (Miss. 2009).

Because an expert in an eminent domain action had little or no knowledge as to the valuation of a business sign based on the cost approach, his testimony based on a quote from a sign company should have been stricken since he was merely acting as a conduit for hearsay about another expert's opinion, in violation of Miss. R. Evid. 703; however, additur was not an appropriate remedy in this case because the jury verdict was based on inadmissible evidence. Martin v. Miss. Transp. Comm'n, 953 So. 2d 1163, 2007 Miss. App. LEXIS 225 (Miss. Ct. App. 2007).

Defendant's conviction for manslaughter was proper pursuant to Miss. R. Evid. 703 where the trial court did not err in admitting expert testimony. The doctor's validation of the paramedics' information was sufficient to serve as a basis for his expert medical opinion, the evidence was relevant, and the expert was subject to the crucible of cross-examination. Miller v. State, 919 So. 2d 1137, 2005 Miss. App. LEXIS 734 (Miss. Ct. App. 2005).

Trial court did not err in admitting the forensic pathologist's testimony concerning the autopsy, bruises on the victim's body consistent with defensive posturing, the trajectory of the bullet, and the cause and manner of the victim's of death, where a foundation was laid showing the expert was well qualified; further, the issue of the quality of the autopsy photos went to their weight, not their admissibility. Ross v. State, 883 So. 2d 1181, 2004 Miss. App. LEXIS 557 (Miss. Ct. App.), cert. denied, 883 So. 2d 1180, 2004 Miss. LEXIS 1274 (Miss. 2004).

In the wife's civil action against the tobacoo company and retailers, claiming that the cigarettes sold to her husband were defective and unreasonably dangerous, because Miss. R. Evid. 703 allowed an expert to form an opinion on facts or data that was inadmissible and because forensic psychiatry had been recognized as a proper field of expertise pursuant to Miss. R. Evid. 702, no error was committed by the trial court in allowing the tobacco company's expert to form an opinion on and to testify regarding whether the decedent could have stopped smoking at any time. Nunnally v. R.J. Reynolds Tobacco Co., 869 So. 2d 373, 2004 Miss. LEXIS 283 (Miss. 2004).

Trial court did not abuse its discretion in allowing the State's expert witness to testify where the trial court recognized the witness as an expert witness, who was an employee of the Mississippi Crime Lab at the time the test was performed; the expert's testimony would be based on the machine's reading and the notes of the analyst, and was therefore admissible pursuant to Miss. R. Evid. 703. Lenoir v. State, 853 So. 2d 845, 2003 Miss. App. LEXIS 720 (Miss. Ct. App. 2003).

Although the trial court based its denial of an expert witness's testimony, who had relied on an inadmissible accident report in forming his opinions, on an incorrect legal standard, which constituted an abuse of discretion, the party which presented the expert witness suffered no prejudice from the error because the expert witness was able to testify to the same conclusions based on other information. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564, 2003 Miss. App. LEXIS 752 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 2005 Miss. LEXIS 21 (Miss. Jan. 13, 2005), aff'd in part and rev'd in part, 904 So. 2d 1077, 2005 Miss. LEXIS 247 (Miss. 2005).

Under Miss. R. Evid. 703, the proper inquiry for determining whether to allow an expert to base an opinion on inadmissible evidence is whether the inadmissible evidence is of a type reasonably relied upon by experts in the field. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564, 2003 Miss. App. LEXIS 752 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 2005 Miss. LEXIS 21 (Miss. Jan. 13, 2005), aff'd in part and rev'd in part, 904 So. 2d 1077, 2005 Miss. LEXIS 247 (Miss. 2005).

Expert was qualified to testify regarding his forensic testing performed on the Fila Olympic shoes but he went a step further and testified, based on what was told to him by the Fila representative, that if he had performed an analysis on the Fila Grant Hill II MID shoes, those, too, would have been consistent with the impressions. This statement was only offered to prove the truth of the matter asserted and therefore, his testimony regarding the shoe impressions was based on hearsay and was erroneously admitted. Flowers v. State, 2003 Miss. LEXIS 67 (Miss. Feb. 20, 2003), op. withdrawn, sub. op., 842 So. 2d 531, 2003 Miss. LEXIS 149 (Miss. 2003).

State's mental health professional's testimony that petitoner's ability to appreciate the criminality of his conduct and his ability to conform his conduct at the time of the crime were not impaired was properly admitted, as the expert based his opinions on documents in the defense expert's file, audiotapes of that expert's interviews with petitioner, and petitioner's videotaped and written confessions; he had not been obliged under Miss. R. Evid. 703 to actually interview petitioner. Woodward v. State, 843 So. 2d 1, 2003 Miss. LEXIS 92 (Miss. 2003).

In a medical malpractice action, testimony by an expert was improperly excluded, even though he had not treated the plaintiff; this fact went to the weight of the expert's testimony, rather than its admissibility. McCaffrey v. Puckett, 2000 Miss. LEXIS 256 (Miss. Dec. 21, 2000), op. withdrawn, sub. op., 784 So. 2d 197, 2001 Miss. LEXIS 119 (Miss. 2001).

**DNA tests.**

There was no violation of the defendant's right to confront witnesses against him when a witness testified about DNA evidence, notwithstanding that the witness did not perform the actual tests on the various DNA samples collected from the defendant, where she did perform the scientific analysis of the data obtained. Byrd v. State, 741 So. 2d 1028, 1999 Miss. App. LEXIS 336 (Miss. Ct. App. 1999).

**Exclusion.**

Exclusion of portions of an expert's deposition testimony that referred to an excluded expert or his report was proper in light of the fact that the excluded expert had been excluded; thus, insertion of that excluded expert's opinions into the record through the expert's deposition testimony was impermissible. O'Keeffe v. Biloxi Casino Corp., 76 So. 3d 726, 2011 Miss. App. LEXIS 305 (Miss. Ct. App. 2011), cert. denied, 78 So. 3d 906, 2012 Miss. LEXIS 5 (Miss. 2012).

**Hearsay.**

Trial court did not err in admitting testimony that the images found on defendant's laptop were "known images" of child pornography because an investigator and an agent, as experts, were entitled to rely on information from other sources to form their opinions, even though they did not personally create that information; the investigator and agent were subjected to vigorous cross-examination, and defendant had a meaningful opportunity to confront the witnesses against him. Travelstead v. State, 232 So. 3d 752, 2017 Miss. App. LEXIS 323 (Miss. Ct. App. 2017).

In a capital murder case, testimony by a forensics expert regarding shoe impressions was based on hearsay and was erroneously admitted by the trial court, because the expert testified based on what was told to him by a representative of the shoe company. Flowers v. State, 842 So. 2d 531, 2003 Miss. LEXIS 149 (Miss. 2003).

In a prosecution for murder, a physician was properly permitted to testify that a forensic anthropologist was present at the autopsy of the victim, that the anthropologist's comments were "confirmatory" of his own findings, and that the anthropologist's comments were "something that is reasonably and customarily relied upon by forensic pathologists . . . in forming opinions." Jones v. State, 776 So. 2d 643, 2000 Miss. LEXIS 187 (Miss. 2000).

In an action against a natural gas company for negligence in the maintenance, operation, and repair of a gas pipeline and for fire damages caused to numerous residences, the trial court did not err by refusing to allow the gas company's expert to testify about a statement made by an unidentified man about children playing in an abandoned house before the fire because such testimony would not have gone to explain the basis of the expert's opinion but would have been used to prove the truth of the matter asserted. Mississippi Valley Gas Co. v. Estate of Walker, 725 So. 2d 139, 1998 Miss. LEXIS 367 (Miss. 1998).

**Instruments.**

Trial court did not abuse its discretion in allowing the State's expert witness to testify where the trial court recognized the witness as an expert witness, who was an employee of the Mississippi Crime Lab at the time the test was performed; the expert's testimony would be based on the machine's reading and the notes of the analyst, and was therefore admissible pursuant to Miss. R. Evid. 703. Lenoir v. State, 853 So. 2d 845, 2003 Miss. App. LEXIS 720 (Miss. Ct. App. 2003).

**Medical expertise.**

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the trial court did not err in allowing a toxicologist to testify to the effects of the use of methamphetamine on the decedent's body. The widow did not object to the expert's use of the words "could have" as being an improper legal standard pursuant to Miss. R. Evid. 702 and 703 and she was provided notice of the contents of the expert's opinion, which included the issue of fatigue. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450, 2010 Miss. LEXIS 200 (Miss. 2010).

Trial court did not err by admitting the testimony of the State's expert under Miss. R. Evid. 702 who did not physically evaluate the victim but merely reviewed his medical records because peer review by publication was only one factor on a non-exhaustive list of factors for admissibility, defendant had the opportunity to discredit the expert's theories by cross-examination, and the court found no merit to defendant's argument that since there was not yet board certification for child abuse and neglect that the expert could not qualify as an expert in child abuse. Middleton v. State, 980 So. 2d 351, 2008 Miss. App. LEXIS 254 (Miss. Ct. App. 2008).

There was no error in allowing the expert opinion of a victim's treating physician under Miss. R. Evid. 702 in a rape case because the physician did not render an opinion that the victim had been raped, but he merely recounted his perceptions about her physical condition upon arrival and noted that the vagina was not lacerated during consensual sex. McGriggs v. State, 987 So. 2d 455, 2008 Miss. App. LEXIS 191 (Miss. Ct. App.), cert. dismissed, 998 So. 2d 1010, 2008 Miss. LEXIS 641 (Miss. 2008).

In a case involving a dispute over which son was a proper conservator over a father and his estate, a trial court did not err by failing to admit one son's testimony about the father's medical diagnosis and treatment because the son was not qualified as an expert; moreover, there was no prejudice since the evidence was largely cumulative. Cole v. Cole (In re Cole), 958 So. 2d 276, 2007 Miss. App. LEXIS 398 (Miss. Ct. App. 2007).

Trial court acted within its discretion in finding that a doctor was not qualified to offer an opinion that he would not expect to see a fatality in a 20-mile an hour car crash; further, his testimony was already properly excluded because the plaintiff's Miss. R. Civ. P. 26(b)(4) response did not include the opinion or show that the doctor was qualified to express it. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564, 2003 Miss. App. LEXIS 752 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 2005 Miss. LEXIS 21 (Miss. Jan. 13, 2005), aff'd in part and rev'd in part, 904 So. 2d 1077, 2005 Miss. LEXIS 247 (Miss. 2005).

The fact that a chiropractor had not treated the plaintiff did not prevent his testimony as an expert witness, although it was relevant to the weight of his testimony. McCaffrey v. Puckett, 784 So. 2d 197, 2001 Miss. LEXIS 119 (Miss. 2001).

**Observation.**

Defendant was not entitled to reversal of his conviction for fondling a child in violation of Miss. Code Ann. § 97-5-23 because, inter alia: (1) the evidence was sufficient to enable a reasonable juror to find defendant guilty beyond a reasonable doubt, (2) the trial court did not improperly limit cross-examination of the victim in violation of defendant's rights under USCS Const. Amend. 6 and Miss. Const. Art. III, § 26, because testimony concerning the victim's past sexual behavior was properly excluded under Miss. R. Evid. 412; (3) since defendant failed to object at trial to the qualification of an expert witness under Miss. R. Evid. 702, the issue was waived; and (4) under Miss. R. Evid.

615(3), the expert witness was properly allowed to remain in the court room so that she could base her opinion on facts learned at the trial pursuant to Miss. R. Evid. 703. Aguilar v. State, 955 So. 2d 386, 2006 Miss. App. LEXIS 903 (Miss. Ct. App. 2006).

Where a psychiatrist's opinion was based on the observation of plaintiff at the hearing and on medical and psychiatric records of plaintiff's treating physicians, evidence was properly admitted and the only issue to be resolved was that of the weight to be given to testimony. Sibley v. Unifirst Bank for Sav. ex rel. Resolution Trust Corp., 699 So. 2d 1214, 1997 Miss. LEXIS 418 (Miss. 1997).

**Photographs of murder victim.**

The court did not err in admitting into evidence six specific photographs taken during the autopsy of a murder victim, notwithstanding the contentions that instruments protruding from the wounds could be compared to a knife stuck in the body and that the photographs created confusion about which wounds were inflicted by the knife wielded by the defendant and which wounds were the result of the surgeon's scalpel at the hospital during efforts to resuscitate the victim, since (1) the punctures from the knife already existed at the time of the autopsy and the instruments were used to assess the punctures, (2) the photographs contradicted the defendant's testimony that he could remember stabbing his wife only two times, (3) the location and nature of the wounds demonstrated the potentially brutal manner in which the defendant slashed his wife, and (4) the number of wounds may have indicated to the jury a degree of brutality in the defendant's attack on his wife which exceeded whatever force might otherwise have reasonably been required to repel her attack on him with her knife, about which the defendant also testified. Hamilton v. State, 742 So. 2d 1173, 1999 Miss. App. LEXIS 341 (Miss. Ct. App. 1999).

**Reports.**

Trial court was within its discretion in admitting an expert in human factors and warnings, with special expertise in the National Highway Traffic Safety Administration's (NHTSA) promulgation of a Federal Motor Vehicle Safety Standard by virtue of his peer review paper on the subject, to testify as to the NHTSA's though proscesses in making certain decisions. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564, 2003 Miss. App. LEXIS 752 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 2005 Miss. LEXIS 21 (Miss. Jan. 13, 2005), aff'd in part and rev'd in part, 904 So. 2d 1077, 2005 Miss. LEXIS 247 (Miss. 2005).

Testimony of an expert in human factors and warnings satisfied the trial court that the studies and surveys on which the expert based his opinion were of the type considered reliable for forming expert opinions. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564, 2003 Miss. App. LEXIS 752 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 2005 Miss. LEXIS 21 (Miss. Jan. 13, 2005), aff'd in part and rev'd in part, 904 So. 2d 1077, 2005 Miss. LEXIS 247 (Miss. 2005).

Trial court was within its discretion in allowing expert witnesses to testify about accident data from the National Accident Sampling System database as the reports on which the experts based their opinions were of the type reasonably relied upon by experts in their fields. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564, 2003 Miss. App. LEXIS 752 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 2005 Miss. LEXIS 21 (Miss. Jan. 13, 2005), aff'd in part and rev'd in part, 904 So. 2d 1077, 2005 Miss. LEXIS 247 (Miss. 2005).

Trial court abused its discretion by barring the cross-examination of an expert witness on the ground that the reports upon which the opposing party sought to rely upon in the cross-examination were not admitted into evidence. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564, 2003 Miss. App. LEXIS 752 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 2005 Miss. LEXIS 21 (Miss. Jan. 13, 2005), aff'd in part and rev'd in part, 904 So. 2d 1077, 2005 Miss. LEXIS 247 (Miss. 2005).

The trial court did not err in allowing an expert to testify in a murder prosecution using an autopsy report prepared by a third party where such autopsy report was used by the expert in forming his own opinion as to the victim's cause of death. Alexander v. State, 759 So. 2d 411, 2000 Miss. LEXIS 104 (Miss. 2000).

Government report, if reasonably relied on by experts in the field in forming opinions or inferences, was not required to be admissible in evidence, and since defendant was entitled to cross-examine plaintiff's expert to attack the relevancy of this information, its suppression was inappropriate. Magnolia Constr. Co. v. Mississippi Gulf South Engineers, Inc., 518 So. 2d 1194, 1988 Miss. LEXIS 14 (Miss. 1988).

**Sequestration.**

Although a murder defendant had invoked the rule of sequestration, the trial court did not err in allowing an expert witness for the State to remain in the courtroom during another witness's testimony in order to avoid the need to ask the expert hypothetical questions. Northup v. State, 793 So. 2d 618, 2001 Miss. LEXIS 224 (Miss. 2001).

**Specialized knowledge.**

Simply because a gang investigator's testimony relied on personal knowledge did not automatically place his testimony outside the scope of Miss. R. Evid. 702 because the portions of the testimony concerning the victim's gang membership and the investigator's opinion about a gang rivalry were based on his specialized knowledge, experience, and training; therefore, the State was required to tender the investigator as an expert for those portions of his testimony. Croft v. State, 283 So. 3d 1, 2019 Miss. LEXIS 201 (Miss. 2019).

### RESEARCH REFERENCES

**ALR.**

Post-Daubert standards for admissibility of scientific and other expert evidence in state courts. 90 A.L.R.5th 453.

Admissibility and effect of evidence of electromagnetic fields generated by power lines, or public perception thereof, in action to value land or to recover for personal injury or property damage. 104 A.L.R.5th 503.

Admissibility of ion scan evidence. 124 A.L.R.5th 691.

Admissibility and Propriety of Use of Abel Assessment for Sexual Interest Test. 84 A.L.R.6th 263.

Admissibility of handwriting expert's testimony in federal criminal case. 183 A.L.R. Fed. 333.

## Rule 704. Opinion on an ultimate issue.

An opinion is not objectionable just because it embraces an ultimate issue.

### ADVISORY COMMITTEE NOTE

The language of Rule 704 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

All reference to an "inference" has been deleted, on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Rule 704 abolishes the "ultimate issue rule" which existed in pre-rule Mississippi practice. The ultimate issue rule was often unnecessarily restrictive and generally difficult to apply. More often than not the invocation of the rule served to deprive the trier of fact of useful information. Rule 704 clarifies much of the confusion over the ultimate issue rule. An opinion is no longer objectionable solely on grounds that it "invades the province of the jury."

The abolition of the ultimate issue rule does not result in the admission of all opinions. It is an absolute requirement under Rules 701 and 702 that opinions must be helpful to a determination of the case before they are admissible. Furthermore, under Rule 403 evidence is excluded which wastes time. A question may not be asked which is based on inadequately explored legal criteria since the answer would not be helpful. As the FRE Advisory Committee Note to FRE 705 indicates, the question in a will contest, "Did the testator have the capacity to make a will" is still not permitted, whereas the question, "Did the testator have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution" would be. The former question is not helpful; the latter is. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

State of mind.
Illustrative cases.

**State of mind.**

Whether murder defendant, under the circumstances, had reasonable grounds to believe that victim was going to kill him was a matter to be decided by the fact-finder alone, and trial judge properly excluded psychologist's opinion as stating a legal conclusion. Hart v. State, 637 So. 2d 1329, 1994 Miss. LEXIS 115 (Miss. 1994).

Questions asked of defendant's psychologist, as to whether defendant was suffering effects of hypnosis, called for an opinion as to an ultimate issue, and his opinion was permissible under this rule since it did not tell the jury what result to reach or provide a legal conclusion. Alexander v. State, 610 So. 2d 320, 1992 Miss. LEXIS 580 (Miss. 1992).

**Illustrative cases.**

Trial court properly determined that the deputy state fire marshal's expert testimony would assist the jury in understanding the evidence because (1) he testified about the origin and cause of the fire; (2) he properly utilized the methods of his training and expertise in arson to formulate an opinion based on the facts he encountered; (3) an investigation of the appliances and heaters in the house revealed that they were not the cause of the fire; (4) in his opinion, he determined the area of origin of the fire was the front living room and the adjoining den area; (5) he testified about pour patterns noted on the floor in that area, which indicated that a flammable liquid had been poured over the area; (6) he excluded all accidental causes of the fire; and (7) during cross-examination, he explained that the negative test results did not exclude the possibility that there were flammable liquids in the pour pattern; it just possibly meant that there was not enough flammable liquid remaining to create a positive test result. Colburn v. State, 990 So. 2d 206, 2008 Miss. App. LEXIS 74 (Miss. Ct. App.), cert. denied, 994 So. 2d 186, 2008 Miss. LEXIS 472 (Miss. 2008).

In defendant's trial for capital murder as a result of felonious abuse of a child, testimony as to the possible causes of the deceased child's injuries was not outside the scope of the state's expert witness because the testimony was relevant, and the testimony was helpful for the jury. Berry v. State, 980 So. 2d 936, 2007 Miss. App. LEXIS 393 (Miss. Ct. App. 2007), cert. denied, 979 So. 2d 691, 2008 Miss. LEXIS 204 (Miss. 2008).

Trial court did not err in not allowing an eyewitness to express his opinion as to whether defendant was acting in self-defense because it was determined that the eyewitness was not in the best view to assess whether or not defendant began his attack based on self-defense. Shirley v. State, 942 So. 2d 322, 2006 Miss. App. LEXIS 855 (Miss. Ct. App. 2006).

There was sufficient evidence for a driving under the influence conviction, even though there was no scientific evidence of intoxication because an officer's testimony regarding defendant's conduct, as well as the reading on a breath test and his refusal to cooperate with an Intoxilyzer test, showed that he was intoxicated; the officer did not have to qualify as an expert to so testify. Ouzts v. State, 947 So. 2d 1005, 2006 Miss. App. LEXIS 698 (Miss. Ct. App. 2006).

Finding against the driver in her action for injuries resulting from a collision with a train at a railroad crossing was appropriate where a witness would not have qualified as an expert on the dynamics of accidents at the crossing; at best he was a lay witness whose opinions were rationally based on his perceptions. Bowman v. CSX Transp., Inc., 931 So. 2d 644, 2006 Miss. App. LEXIS 418 (Miss. Ct. App. 2006).

Circuit judge did not commit prejudicial error under Miss. R. Evid. 103(a) by allowing three circuit judges to testify and offer opinions about the competency of public defenders after instructing the county to "stay away from" expert testimony on ultimate questions of fact under Miss. R. Evid. 704 in the county's action against the state alleging that state statutes requiring counties to provide legal services for indigent criminal defendants were unconstitutional. The circuit judge relied on the judges' testimony to help her determine whether the public defenders' caseload was excessive, whether indigent defendants were entering into ill-advised plea agreements, and whether the public defenders take their obligations as such seriously, and further, the circuit judge did not treat their testimony as expert testimony. Quitman County v. State, 910 So. 2d 1032, 2005 Miss. LEXIS 438 (Miss. 2005).

Circuit judge did not commit prejudicial error under Miss. R. Evid. 103(a) in disallowing "ultimate issue" opinion testimony by an expert under Miss. R. Evid. 704 in a county's action against the state alleging that state statutes requiring counties to provide legal services for indigent criminal defendants were unconstitutional because the expert had already addressed his specific concerns about the indigent defense system in his extensive testimony, and allowing one final, sweeping opinion during re-direct examination was redundant and unnecessary under Miss. R. Evid. 401. Quitman County v. State, 910 So. 2d 1032, 2005 Miss. LEXIS 438 (Miss. 2005).

Accident reconstructionist testified that given the slow speed at which the tractor trailer was turning, if the injured person ( who skidded into the rear of the trailer), had been keeping a proper lookout and operating his vehicle under control at a safe speed, the accident would not have happened. Even though the testimony embraced an ultimate issue on the subject of negligence, such an invasion of the province of the jury was not absolutely barred, and it was not inadmissible as the testimony was helpful to the determination of the case. McKenzie v. Supervalu, Inc., 883 So. 2d 1188, 2004 Miss. App. LEXIS 955 (Miss. Ct. App. 2004).

In a landowner's action against a lumber company for trespass and wrongful cutting of timber, the trial court erred in denying the landowner's attempts to elicit testimony from the landowner's expert and from the lumber company's expert through cross-examination on whether it was reckless to cut timber before determining boundary lines, because that testimony was a crucial part of the evidence needed by the jury to determine whether the landowner should receive the statutory penalty under Miss. Code Ann. § 95-5-10(2), and the testimony was admissible. Smith v. Parkerson Lumber, Inc., 2004 Miss. App. LEXIS 326 (Miss. Ct. App. Apr. 20, 2004), op. withdrawn, sub. op., 888 So. 2d 1197, 2004 Miss. App. LEXIS 1149 (Miss. Ct. App. 2004).

Where defendant was charged with driving under the influence, the trial court did not commit reversible error under Miss. R. Evid. 701 and 704 in allowing police officers to give their opinions that defendant was under the influence because the opinions were rationally based on the perceptions of the officers, helpful to the trier of fact, and not based on scientific knowledge. Christian v. State, 859 So. 2d 1068, 2003 Miss. App. LEXIS 1074 (Miss. Ct. App. 2003).

In a motorist's suit against a county, the trial court erred (albeit harmlessly) in preventing a traffic engineer from opining on whether the county failed to adequately warn motorists; the standard of care was a question of fact, not, as the trial judge incorrectly stated, a legal question. Donaldson v. Covington County, 846 So. 2d 219, 2003 Miss. LEXIS 133 (Miss. 2003).

The rule did not prohibit an officer from testifying that boot prints at the scene of a burglary appeared to be made by boots taken from the defendant's home. Bryant v. State, 748 So. 2d 780, 1999 Miss. App. LEXIS 232 (Miss. Ct. App. 1999).

Experts were properly allowed to testify that railroad crossing was "extra hazardous," since this was not the ultimate issue; the ultimate issue was whether or not the railroad was negligent in not doing more to warn of impending approach of trains, and testimony that crossing was extra hazardous merely assisted trier of fact in this regard. Illinois C. R. Co. v. White, 610 So. 2d 308, 1992 Miss. LEXIS 584 (Miss. 1992).

## Rule 705. Disclosing the facts or data underlying an expert's opinion.

Unless the court orders otherwise, an expert may state an opinion – and give the reasons for it – without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

**HISTORY: Restyled effective July 1, 2016.**

### ADVISORY COMMITTEE NOTE

The language of Rule 705 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

All reference to an "inference" has been deleted, on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Rule 705 is an attempt to eliminate the use of the hypothetical question or, at the least, reduce its use. The almost universal criticism of the hypothetical question is that it is unduly complex and time-consuming. While dispensing with the requirement of preliminary disclosure at the trial of underlying facts or data, Rule 705 nonetheless offers two protections. The court may, in its discretion, require disclosure. Regardless of whether it does, the expert may still be required to state the underlying facts on cross-examination. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

### JUDICIAL DECISIONS

#### ANALYSIS

Cross-examination.
Illustrative cases.

**Cross-examination.**

Trial court in eminent domain proceeding should have allowed property owners to cross-examine city's expert appraiser to determine whether tax appraisal aided him in arriving at his determination of the property's market value. Morley v. Jackson Redevelopment Auth., 632 So. 2d 1284, 1994 Miss. LEXIS 75 (Miss. 1994).

**Illustrative cases.**

Trial court did not err in admitting testimony that the images found on defendant's laptop were "known images" of child pornography because an investigator and an agent, as experts, were entitled to rely on information from other sources to form their opinions, even though they did not personally create that information; the investigator and agent were subjected to vigorous cross-examination, and defendant had a meaningful opportunity to confront the witnesses against him. Travelstead v. State, 232 So. 3d 752, 2017 Miss. App. LEXIS 323 (Miss. Ct. App. 2017).

During resentencing in the state inmate's capital murder case, the inmate's attorneys were not constitutionally ineffective for opening the door to allow in evidence of the inmate's prior bad acts and for failing to object to the State's invocation of prior bad acts in its closing statement. Because the inmate's prior criminal history was included in a defense expert's report as part of the information which formed the basis for expert's opinions, counsel would have been unsuccessful in any objection raised regarding the contents of the report pursuant to Miss. R. Evid. 705; thus, counsel was not deficient in preemptively introducing the evidence or in failing to object to the evidence during closing arguments. Woodward v. Epps, 580 F.3d 318, 2009 U.S. App. LEXIS 19065 (5th Cir. Miss. 2009), cert. denied, 559 U.S. 1071, 130 S. Ct. 2093, 176 L. Ed. 2d 729, 2010 U.S. LEXIS 3297 (U.S. 2010).

Defendant claimed that the testimony of the accident reconstructionist and the forensic toxicologist should have been excluded because the defense was not allowed to voir dire those witnesses about the principles and methods used in arriving at their opinions. However, the defense extensively cross-examined the witnesses at issue regarding the methods used to arrive at their opinions on speed determination and the qualifications to calibrate the machine used to determine the blood alcohol level of defendant; the trial court did not err in its handling of those matters and discovery was not improperly restricted as to Miss. Unif. Cir. & County Ct. Prac. R. 9.04(A), where the defense claimed that the reports from the various expert witnesses of the State were insufficient, but where said cross-examination of experts and voir dire of other experts was allowed. Lawrence v. State, 931 So. 2d 600, 2005 Miss. App. LEXIS 552 (Miss. Ct. App. 2005), cert. denied, 933 So. 2d 303, 2006 Miss. LEXIS 345 (Miss. 2006).

Trial court was within its discretion in admitting an expert in human factors and warnings, with special expertise in the National Highway Traffic Safety Administration's (NHTSA) promulgation of a Federal Motor Vehicle Safety Standard by virtue of his peer review paper on the subject, to testify as to the NHTSA's though proscesses in making certain decisions. Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564, 2003 Miss. App. LEXIS 752 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 2005 Miss. LEXIS 21 (Miss. Jan. 13, 2005), aff'd in part and rev'd in part, 904 So. 2d 1077, 2005 Miss. LEXIS 247 (Miss. 2005).

## Rule 706. Court-appointed expert witnesses.

(a) *Appointment process.* — On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

(b) *Expert's role.* — The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:

(1) must advise the parties of any findings the expert makes;
(2) may be deposed by any party;
(3) may be called to testify by the court or any party; and

(4) may be cross-examined by any party, including the party that called the expert.

(c) *Compensation.* — The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows:

(1) in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and

(2) in any other civil case, by the parties in the proportion and at the time that the court directs – and the compensation is then charged like other costs.

(d) *Disclosing the appointment to the jury.* — The court may authorize disclosure to the jury that the court appointed the expert.

(e) *Parties' choice of their own experts.* — This rule does not limit a party in calling its own experts.

(f) *Certain eminent domain cases.* — Subdivisions (a)-(d) do not apply to an appraiser whom a court appoints – as required by law – for an immediate possession claim in an eminent domain case.

**HISTORY: Amended November 16, 1988, effective retroactive to January 1, 1986; amended January 31, 1990; restyled effective July 1, 2016.**

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective March 20, 1995, the Advisory Committee Note to Rule 706 was amended to note the repeal of a statute. 648-651 So. 2d 651 So. 2d XXVI (West Miss. Cas. 1995).

Effective January 31, 1990, Rule 706 was amended to reflect the decision in *Hudspeth v. State Highway Comm'n of Miss.*, 534 So. 2d 210 (Miss. 1988), amending Rule 706, November 16, 1988, effective retroactive to January 1, 1986. 553-556 So. 2d XXVII (West Miss. Cas. 1990).

## ADVISORY COMMITTEE NOTE

The language of Rule 706 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. The provisions regarding the appointment process and the expert's role – formerly combined in a single subdivision – now appear in separate subdivisions (a) and (b). These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The essence of Rule 706 is contained in subdivision (a). Subdivision (a) provides specifically for the appointment of an expert either on the motion of a party or on the judge's own motion. It also provides for input by the parties into the selection process. Under the rule, the court-appointed expert may be deposed. Any party, including the party calling the expert, may cross-examine him. This rule was amended in 1988 in *Hudspeth v. State Highway Commission of Mississippi,* 534 So. 2d 210 (Miss. 1988), to be consistent with the provisions of then existing M.C.A. § 11-27-89 which provided that court appointed experts would not be compelled to testify. The amendment was made retroactive to January 1, 1986, the effective date of the Mississippi Rules of Evidence. Subsequent to the *Hudspeth* amendment, Rule 706(f) was amended to retain the substance of Rule 706(f) as originally approved by the Court in *Hudspeth* while deleting any reference to and dependence upon a specific statutory provision. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

**Appointment.**

Chancellor did not abuse his discretion by not appointing an expert sua sponte; there was sufficient evidence to support the chancellor's finding that appellant failed to meet his burden of proving forgery by clear evidence, given the notary's testimony that appellant did sign the deed of trust, and his tax returns showed mortgage interest deductions and attached mortgage interest statements from the bank, showing he was aware of the deed of trust. Matthews v. Whitney Bank, 282 So. 3d 786, 2019 Miss. App. LEXIS 414 (Miss. Ct. App. 2019).

In an action involving the change of primary physical custody of the child from the father to the mother, the mother's contention that a doctor was improperly appointed because there was nothing in the record to indicate that he was informed of his duties in writing or at a conference that was participated in by all the parties was without merit. The mother neither objected to the doctor's being allowed to testify, nor did she demand that his duties be specified in writing or outlined during a conference; therefore, it was unnecessary to engage in further discussion concerning the procedural technicalities surrounding the appointment. Schmidt v. Bermudez, 5 So. 3d 1100, 2008 Miss. App. LEXIS 36 (Miss. Ct. App. 2008), rev'd, 5 So. 3d 1064, 2009 Miss. LEXIS 104 (Miss. 2009).

Chancellor did not abuse his discretion in failing to appoint his own expert to value the personal property at issue, which merely included miscellaneous houseware, in a divorce proceeding, since complex issues were not involved. Wells v. Wells, 800 So. 2d 1239, 2001 Miss. App. LEXIS 495 (Miss. Ct. App. 2001).

The chancellor did not abuse his discretion in appointing an expert in an equal distribution proceeding since the mechanics of the case were extremely complicated where (1) involved in the case was the valuation of a partnership that was in bankruptcy at the time of the parties' divorce, (2) the partnership subsequently had ended the bankruptcy and had begun rebuilding its operations, (3) the parties had lived in a home allegedly paid for and owned by the partnership, and (4) living expenses for the parties had been paid by the partnership. Heigle v. Heigle, 771 So. 2d 341, 2000 Miss. LEXIS 220 (Miss. 2000).

The trial court did not err in refusing to order a court appointed expert on the question of credits against the judgment to which the movant was entitled where the record reflected that the circuit court did not find a need for an expert but specifically reserved the right to reconsider and appoint an expert for the issue of the credits. Trilogy Communs., Inc. v. Thomas Truck Lease, Inc., 733 So. 2d 313, 1998 Miss. App. LEXIS 1056 (Miss. Ct. App. 1998).

## RESEARCH REFERENCES

**ALR.**

Right of indigent defendant in state criminal prosecution to ex parte in-camera hearing on request for state-funded expert witness. 83 A.L.R.5th 541.

# ARTICLE VIII. HEARSAY

**Editor's Note —** By order adopted effective January 1, 1986, the Mississippi Supreme Court found as follows:

A witness's testimony is evaluated on the basis of four factors: perception, memory, narration, and sincerity. In order that the testimony can be properly considered in the light of these factors, the testimony should comply with three conditions. The witness should testify (1) under oath, (2) in the presence of the trier of fact, and (3) be subjected to cross-examination. Past experience as well as common sense indicate that some testimony which does not conform to these three conditions may be more valuable than testimony that does. The four factors may, in some instances, be present in the absence of compliance with the three aforementioned conditions. The solution that the common law developed over a period of time was a general rule against hearsay which permitted exceptions which furnished guarantees of trustworthiness and reliability.

The hearsay provisions of the uniform rules retain the common law scheme. The traditional common law hearsay exceptions have been retained in Rules 803 and 804. Rule 803 concerns itself with situations where availability of the declarant is immaterial. Rule 804 pertains to exceptions which are usable only where the declarant is unavailable. The concluding provisions of both Rule 803 and 804 (Rule 803(24) and Rule 804(b)(5) respectively) allow for the use of hearsay statements which do not fall within the recognized exceptions, when the guarantees of trustworthiness and necessity are present. These two provisions are a recognition that the law is not stagnant; they are designed to encourage the development of this area of the law.

## Rule 801. Definitions that apply to this article; exclusions from hearsay.

(a) *Statement.* — "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) *Declarant.* — "Declarant" means the person who made the statement.

(c) *Hearsay.* — "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(d) *Statements that are not hearsay.* — A statement that meets the following conditions is not hearsay:

(1) *A declarant-witness's prior statement.* The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(C) identifies a person as someone the declarant perceived earlier.

(2) *An opposing party's statement.* The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

**HISTORY: Amended effective July 1, 2009; restyled effective July 1, 2016.**

## ADVISORY COMMITTEE NOTE

The language of Rule 801 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Statements falling under the hearsay exclusion provided by Rule 801(d)(2) are no longer referred to as "admissions" in the title to the subdivision. The term "admissions" is confusing because not all statements covered by the exclusion are admissions in the colloquial sense – a statement can be within the exclusion even if it "admitted" nothing and was not against the party's interest when made. The term "admissions" also raises confusion in comparison with the Rule 804(b)(3) exception for declarations against interest. No change in application of the exclusion is intended.

Subdivision (a) defines with clarity the concept of a statement. The significant point is that nothing is an assertion unless intended to be one. This becomes particularly important in situations which deal with nonverbal conduct. Some nonverbal conduct is clearly tantamount to a verbal assertion, e.g., pointing to someone to identify that person. The definition of statement excludes nonverbal conduct which is not assertive. Thus, the definition of hearsay in Rule 801(c) concerns itself with conduct that is assertive.

When evidence of conduct is offered on the basis that the conduct was not a statement and, therefore, not hearsay, the trial judge must make a preliminary determination to ascertain whether an assertion was intended by the conduct. The burden is upon the party claiming that the intention existed.

Subdivision (c) codifies and simultaneously clarifies the common law definition of hearsay. If the significance of a statement is simply that it was made and there is no issue about the truth of the matter asserted, then the statement is not hearsay.

Under this definition of hearsay an out-of-court statement made and repeated by a witness testifying at trial is hearsay. The key is whether the statement is made while testifying or whether it is out-of-court. An out-of court statement otherwise hearsay is technically no less hearsay because it was made in the presence of a party.

Subdivision 801(d) has two major parts and both are departures from past Mississippi practice. The purpose of subdivision (d) is to exclude statements which literally fall within the definition of hearsay from the hearsay rule.

Subdivision 801(d)(l) is concerned with prior statements of the witness. In three specific instances, a witness's prior statement is not hearsay.

Prior inconsistent statements have generally been admissible for impeachment purposes but not admissible as substantive evidence. *Moffett v. State,* 456 So. 2d 714, 719 (Miss. 1984). This has been the traditional practice in Mississippi. Under Rule 80l(d)(l)(A) the prior inconsistent statements may be admissible as substantive evidence if they were made under oath, e.g., at a deposition or at a judicial proceeding. This covers statements made before a grand jury. There is no requirement that the prior statement be written. If the defendant in a criminal trial has made a prior inconsistent statement, the situation is governed by Rule 801(d)(2).

Rule 801(d)(l)(B) provides that prior consistent statements may be introduced for substantive evidence when offered to rebut a charge against the witness of recent fabrication.

Rule 801(d)(1)(C), which declares that prior statements of identification made by a witness are not hearsay, is not a departure from pre-rule practice. The Court in *Fells v. State,* 345 So. 2d 618 (Miss. 1977), departed from the traditional view that such statements were hearsay by adopting what was then the minority view that statements of identification could be admitted as substantive evidence of that identification. The scope of the rule is broader than the *Fells* holding in that: (1) there is no need for a prior attempt to impeach the witness for the identifying statement to be admissible; (2) the testimony about the prior statement may be from the witness who made it or another person who heard it; (3) the witness who made the statement need not make an in-court identification; and (4) the statement may have been made either in or apart from an investigative procedure. Statements physically describing a person are not statements of identification under this rule. The Confrontation Clause is not violated when a third party testifies about an out of-court identification made by a witness who is unable to recall or unwilling to testify about that identification, provided the identifying witness testifies at the trial or hearing and is subject to cross-examination. *U.S. v. Owens,* 484 U.S. 554, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988).

Rule 801(d)(2) deals with admissions made by a party-opponent other than admissions made pursuant to M.R.C.P. 36(b). Admissibility of admissions made pursuant to M.R.C.P. 36(b) is controlled by that rule and is not affected by Rule 801(d)(2). The practice has been in Mississippi to treat an admission as an exception to the hearsay rule. Rule 801(d)(2) achieves the same result of admissibility although it classifies admissions as nonhearsay. There are five classes of statements which fall under the rule:

(A) A party's own statement is the classic example of an admission. Ifhe has a representative capacity and the statement is offered against him in that capacity, no inquiry whether he was acting in the representative capacity in making the statement is required. It is only necessary that the statement be relevant to representative affairs.

(B) If a party adopts or acquiesces in another person's statement, it will be deemed that the statement is indeed his admission. Knowledge is not a necessary ingredient. *Matthews v. Carpenter,* 231 Miss. 677, 97 So. 2d 522 (1957); *Haver v. Hinson,* 385 So. 2d 606 (Miss. 1980). This raises the question of when silence is a form of admission. Silence may constitute a tacit admission if a person would have, under the circumstances, protested the statement made in his presence if the statement were untrue. In civil cases, this does not pose a significant problem. In criminal cases, much may depend on the person's constitutional right not to incriminate himself.

(C) The general principle survives that a statement by an agent authorized to speak by a party is tantamount to an admission by a party. The rule covers statements made by the agent to third persons as well as statements made by the agent to the principal. The essence of this is that a party's own records are admissible against him, even where there has been no intent to disclose the information therein to third persons.

(D) The common law required that the agent's statement be uttered as part of his duties, i.e., within the scope of his agency. 801(d)(2)(D) regards this rigid requirement and admits a statement "concerning a matter within the scope of his agency" provided it was uttered during the existence of the employment relationship.

(E) This subparagraph codifies the principle that only those statements of co-conspirators will be admissible which were made (1) during the conspiracy and (2) in furtherance of it. This is consistent with the United States Supreme Court's ruling in *Krulewitch v. United States,* 336 U.S. 440, 69 S. Ct. 716, 93 L .Ed. 709 (1949), which deemed inadmissible statements made after the conspiracy's objectives had either succeeded or failed.

Rule 801(d)(2) provides that the court shall consider the contents of the declarant's statement in resolving preliminary questions relating to a declarant's authority under subparagraph (C), the agency or employment relationship and scope thereof under subparagraph (D), and the existence of a conspiracy and the identity of the participants therein under subparagraph (E). Generally, foundational facts are governed by Rule 104, not the law of agency. *See Bourjaily v. United States,* 107 S. Ct. 2775 (1987). Under Rule 104(a), these preliminary questions are to be established by a preponderance of the evidence. Of course, in determining preliminary questions, the court may give the contents of the statement as much (or as little) weight as the court in its discretion deems appropriate. Moreover, Rule 801(d)(2) provides that the contents of the statement do not alone suffice to establish the preliminary questions. Rather, the court must in addition consider the circumstances surrounding the statement, such as the identity of the speaker, the context in which the statement was made, and evidence corroborating the contents of the statement. *See Ponthieux v. State,* 532 So. 2d 1239, 1244 (Miss. 1988) ("on appeal . . . [w]e search the entire record to determine whether the preliminary fact has been established"); *Martin v. State,* 609 So. 2d 435 (Miss. 1992). (Amended effective July 1, 2009; "Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

In general.
Admission by party opponent.
– In general.
– Adoption.
– By agent.
– By coconspirators.
– By party.
– Harmless error.
Excited utterances.
Personal observation.
Rebuttal of implication raised by opponent.
Reports.
Statement.
– Against interest.
– Conduct.
– Consistent.
– Conversation.
– Court proceedings.
– Inconsistent.
– Identification.
– Of co-conspirator.
– Recorded.
– Truth of matter asserted.
Illustrative cases.

**In general.**

Defendant failed to cite any authority in support of his argument the trial court erred by permitting hearsay testimony to establish the essential elements of the charged offenses; this failure was a procedural bar on appeal. Eubanks v. State, 291 So. 3d 309, 2020 Miss. LEXIS 49 (Miss. 2020).

State was not offering the statement to prove the truth of the matter asserted; even if the statement was erroneously admitted, such error was harmless as there was already testimony before the jury regarding the matter. Pugh v. State, 270 So. 3d 949, 2018 Miss. App. LEXIS 455 (Miss. Ct. App. 2018).

Circuit court did not abuse its discretion in prohibiting cross-examination regarding a victim's statement to the police about defendant's other possible sexual encounters with other teenage girls because it was within the circuit court's discretion to find that the victim had insufficient personal knowledge about the other encounters and that her statement was too speculative to be deemed relevant for impeachment as a prior inconsistent statement under Miss. R. Evid. 613(b); furthermore, what the victim could have been told by another teenage girl was inadmissible hearsay under Miss. R. Evid. 801 and 802. Timmons v. State, 44 So. 3d 1021, 2010 Miss. App. LEXIS 32 (Miss. Ct. App.), cert. denied, 49 So. 3d 106, 2010 Miss. LEXIS 517 (Miss. 2010).

The circuit court did not abuse its discretion in prohibiting cross-examination regarding a victim's statement to the police about defendant's other possible sexual encounters with other teenage girls; it was within the circuit court's discretion to find that the victim had insufficient personal knowledge about the other encounters and that her statement was too speculative to be deemed relevant for impeachment as a prior inconsistent statement under Miss. R. Evid. 613(b), and furthermore, what the victim could have been told by another teenage girl was inadmissible hearsay under Miss. R. Evid. 801 and 802. Timmons v. State, 44 So. 3d 1021, 2010 Miss. App. LEXIS 32 (Miss. Ct. App.), cert. denied, 49 So. 3d 106, 2010 Miss. LEXIS 517 (Miss. 2010).

Under Miss. R. Evid. 801, the introduction of a co-defendant's guilty plea colloquy during defendant's trial was admissible to rehabilitate the co-defendant's testimony and showed that co-defendant did not omit facts during his guilty plea as much as trial court focused on certain facts during the guilty plea and did not ask for elaboration on matters to degree to which the co-defendant testified at defendant's trial. Esco v. State, 9 So. 3d 1156, 2008 Miss. App. LEXIS 592 (Miss. Ct. App. 2008), cert. denied, 12 So. 3d 531, 2009 Miss. LEXIS 228 (Miss. 2009).

Accident victim's testimony that she heard a neighbor say that the defendant driver had previously been speeding was inadmissable hearsay because it was made out-of-court and the victim was not the declarant; the statement was no less hearsay merely because it had been made in the driver's presence. Washington v. Kelsey, 990 So. 2d 242, 2008 Miss. App. LEXIS 243 (Miss. Ct. App. 2008).

Trial judge is capable of sorting through exhibits based upon their relevancy and ignoring inadmissible evidence such as hearsay. Therefore, there was no error in the admission of 50 exhibits at one time to speed up the post-conviction process, even though the state did not have a chance to argue the exhibit's relevancy or rebut hearsay statements contained in the exhibits; moreover, the state was unable to specifically point to any prejudicial exhibit. State v. Bass, 4 So. 3d 353, 2008 Miss. App. LEXIS 85 (Miss. Ct. App. 2008), cert. dismissed, 2009 Miss. LEXIS 113 (Miss. Mar. 12, 2009).

Denial of defendant's motion for a new trial after he had been convicted of aggravated assault and rape was appropriate because each of the prerequisites of Miss. R. Evid. 801(d)(1)(B) were satisfied so as to remove the witnesses' statements from the category of impermissible hearsay, as the victim had already testified that defendant raped her, her testimony was subject to cross-examination, and each of the witnesses confirmed that the victim told them that she was raped; the statements refuted the defense of consensual sex. Moss v. State, 977 So. 2d 1201, 2007 Miss. App. LEXIS 632 (Miss. Ct. App. 2007), cert. denied, 977 So. 2d 1144, 2008 Miss. LEXIS 151 (Miss. 2008).

Trial court correctly refused to allow hearsay testimony from an officer regarding what the inmates told him that the accessory-after-the-fact said about the murder; if defendant wanted to inquire about those alleged statements, he should have called the inmates themselves to testify. Bailey v. State, 960 So. 2d 583, 2007 Miss. App. LEXIS 427 (Miss. Ct. App. 2007).

Detective's testimony, which divulged that he relied in part on anonymous tips, was merely a statement of fact regarding his investigative process; accordingly, the detective's testimony was not hearsay, and the trial court did not err by allowing its admission. Johnson v. State, 956 So. 2d 358, 2007 Miss. App. LEXIS 333 (Miss. Ct. App. 2007).

In a case involving the dismissal of a superintendent, the superintendent was unable to overcome the presumption of honesty and integrity normally given to school boards by the hearsay evidence that the superintendent presented because this alone was not a proper basis for a finding of fact. Wilder v. Bd. of Trs. of the Hazlehurst City Sch. Dist., 969 So. 2d 83, 2007 Miss. App. LEXIS 253 (Miss. Ct. App.), cert. denied, 968 So. 2d 948, 2007 Miss. LEXIS 657 (Miss. 2007).

Defendant sought to introduce hearsay statements of the victim in histrial for capital murder. Defendant never claimed the statements were not hearsay, despite his claim that he should be allowed great latitude in the introduction of evidence; trial court properly determined the statements were inadmissible. Shaw v. State, 915 So. 2d 442, 2005 Miss. LEXIS 465 (Miss. 2005).

Witness' testimony was properly excluded because defendant intended to introduce the witness' prior statements to show that the victim had been coached to lie, and, therefore, the statement constituted hearsay under Miss.R. Evid. 801 (c) because defendant intended to use his witness' prior statement in the guise of impeachment under Miss. R. Evid. 607 for the primary purpose of placing before the jury substantive evidence which was not otherwise admissible in order to avoid the hearsay rule. Elkins v. State, 918 So. 2d 828, 2005 Miss. App. LEXIS 483 (Miss. Ct. App. 2005), cert. denied, 921 So. 2d 1279, 2006 Miss. LEXIS 26 (Miss. 2006), cert. denied, 547 U.S. 1194, 126 S. Ct. 2865, 165 L. Ed. 2d 898, 2006 U.S. LEXIS 4564 (U.S. 2006).

Trial court erred by failing to sustain defendant's objection to a police officer's testimony that another officer checked with dispatch to see if defendant had called 911 to report that her fugitive son had returned to the house and that the dispatcher reported there was no record of a 911 call because the testimony contained inadmissible hearsay and double hearsay under Miss. R. Evid. 801(c) as it was an out of court statement offered for its truth and the statements did not fall within a hearsay exception that would render it admissible as provided in Miss. R. Evid. 805. However, the error was harmless because defendant was convicted based on a later incident in which she failed to report that her son had returned to the house, therefore the hearsay testimony about the earlier incident was not especially probative of her intent to aid her son evade police in the later incident and there was overwhelming evidence that defendant's conduct in the later incident conformed with the elements of the crime of accessory-after-the-fact. Young v. State, 908 So. 2d 819, 2005 Miss. App. LEXIS 445 (Miss. Ct. App. 2005).

Court properly disallowed defendant's proffered hearsay testimony because the declarant was not under subpoena to appear at trial and defendant made no efforts to procure his attendance, and a presumption or suspicion that a witness would assert his Fifth Amendment privilege against self-incrimination and refuse to testify was insufficient to declare a witness unavailable. The witness must be called to the stand and there refuse to testify before he became unavailable due to invoking the Fifth Amendment. Cochran v. State, 913 So. 2d 371, 2005 Miss. App. LEXIS 268 (Miss. Ct. App. 2005).

Although defendant argued that the victim's testimony pertaining to the fact that a desk similar to the one that was stolen was for sale for $4,399 was hearsay, pursuant to Miss. R. Evid. 801(c), the introduction of price tags was not hearsay and was admissible to prove the value of a stolen item; the trial judge did not err in admitting this testimony. Thompson v. State, 910 So. 2d 60, 2005 Miss. App. LEXIS 31 (Miss. Ct. App. 2005).

Witness's deposition would be hearsay because it was a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted, and did not meet the exemption requirements under Miss. R. Evid. 801(d)(1); the witness's availability did not change the result, since the son could have objected to the deposition as hearsay regardless of whether the witness was present at trial or not. Gibson v. Wright, 870 So. 2d 1250, 2004 Miss. App. LEXIS 323 (Miss. Ct. App. 2004).

Statements made to a 911 operator by the owner of a trailer where defendant had just murdered her husband relating to events that had occurred while the owner was asleep in the trailer or repeated statements made to the owner by defendant, were hearsay statements under Miss. R. Evid. 801(c) that did not fall within the Miss. R. Evid. 803(1) present sense exception to the hearsay rule; as the owner was asleep when the murder took place, his statements to the 911 operator were not made while he was perceiving the occurrence of the murder or immediately thereafter. Moore v. State, 859 So. 2d 379, 2003 Miss. LEXIS 654 (Miss. 2003).

Hearsay claimed by the estate in the investigating officer's testimony were merely her conclusions, rather than out-of-court statements; however, her testimony regarding what one of the flagmen told her was clearly hearsay. Estate of Carter v. Phillips & Phillips Constr. Co., 860 So. 2d 332, 2003 Miss. App. LEXIS 1117 (Miss. Ct. App. 2003).

In a capital murder case, the trial court did not err in allowing a witness to testify that a codefendant had told him defendant had shot someone, as the statement was made in defendant's presence and defendant did not contradict, deny, or object to it; thus, the statement amounted to an "adoptive admission" pursuant to Miss. R. Evid. 801(d)(2)(B). Howell v. State, 860 So. 2d 704, 2003 Miss. LEXIS 556 (Miss. 2003), cert. dismissed, 543 U.S. 440, 125 S. Ct. 856, 160 L. Ed. 2d 873, 2005 U.S. LEXIS 1371 (U.S. 2005).

Statement of an officer to explain why a particular person was approached on a certain date was admissible because it did not constitute hearsay; moreover, the statement did not violate defendant's right to confrontation because the officer was cross-examined at trial, despite the fact that the officer's actions were based on the statements of several anonymous tipsters. Hill v. State, 865 So. 2d 371, 2003 Miss. App. LEXIS 983 (Miss. Ct. App. 2003).

Defendant's conviction for depraved heart murder was proper where an improperly admitted hearsay statement in which the victim said that defendant was going to hit him and take his money was harmless error because the properly admitted evidence was more than sufficient to support the jury's verdict, Miss. R. Evid. 801(c), 802. Edwards v. State, 856 So. 2d 587, 2003 Miss. App. LEXIS 557 (Miss. Ct. App. 2003), cert. dismissed, 860 So. 2d 1223, 2003 Miss. LEXIS 812 (Miss. 2003), cert. denied, 571 U.S. 841, 134 S. Ct. 92, 187 L. Ed. 2d 69, 2013 U.S. LEXIS 6108 (U.S. 2013).

In a wrongful death action, despite the general rule on exclusion of books, pamphlets and treatises as hearsay, it was not contested that the decedent had received a copy of the drilling company's handbook, which referenced the safety manual, and that both addressed fall protection. The handbook and manual would have shown the decedent's state of mind, and the extent of his exercise of reasonable care, and the trial court abused its discretion by excluding the handbook, manual and accompanying deposition testimony. Crane Co. v. Kitzinger, 2003 Miss. LEXIS 52 (Miss. Jan. 30, 2003), op. withdrawn, sub. op., 860 So. 2d 1196, 2003 Miss. LEXIS 689 (Miss. 2003).

In a prosecution for uttering forgery arising from the defendant's attempt to cash three checks at a hardware store, a marking on one of the checks that read, "DO NOT PRESENT AGAIN AS A CASH ITEM," was not hearsay as the language did not go to any element of the charged offense and was not prejudicial to the defendant since the account on which the checks were drawn was not the defendant's. Davis v. State, 762 So. 2d 347, 2000 Miss. App. LEXIS 276 (Miss. Ct. App. 2000).

**Admission by party opponent.**

Witness's testimony relating defendant's statements to the witness while the witness waited to be questioned by investigators was not inadmissible hearsay because (1) the statements were admissions of a party opponent, and (2) the statements were admissible to show why the witness said what the witness said to investigators. Brisco v. State, 295 So. 3d 498, 2019 Miss. App. LEXIS 481 (Miss. Ct. App. 2019), cert. denied, 293 So. 3d 834, 2020 Miss. LEXIS 142 (Miss. 2020).

Defendant's statements to the police investigators were an exception to the hearsay rule as an opposing party's statement against interest and therefore the trial court did not err by admitting them. Sullivan v. State, 281 So. 3d 1146, 2019 Miss. App. LEXIS 267 (Miss. Ct. App. 2019).

Trial court properly found that the witnesses' out-of-court statements were hearsay and were not admissible under any exception to the hearsay rule because the witnesses for the State were not party opponents, and their statements were not made by a co-conspirator of a party opponent in furtherance of a conspiracy. Maggett v. State, 230 So. 3d 722, 2016 Miss. App. LEXIS 799 (Miss. Ct. App. 2016), cert. denied, 2017 Miss. LEXIS 505 (Miss. Nov. 16, 2017), cert. denied, 229 So. 3d 709, 2017 Miss. LEXIS 511 (Miss. 2017), cert. denied, 2017 Miss. LEXIS 512 (Miss. Nov. 16, 2017).

Defense counsel did not erroneously withdraw an objection to witness testimony that defendant made threats about potentially killing someone because the repeated hearsay statements were admissions by a party-opponent and, therefore, admissible; defense counsel's retraction of his objection to the witness's testimony and lack of objection to a second witness's testimony were in line with the Mississippi Rules of Evidence and did not constitute ineffective assistance. Ford v. State, 206 So. 3d 486, 2016 Miss. LEXIS 396 (Miss. 2016).

Trial court did not abuse its discretion by admitting into evidence defendant's prior testimony from his first trial where it was offered against him and therefore was an exception to the hearsay rule. Parvin v. State, 212 So. 3d 863, 2016 Miss. App. LEXIS 101 (Miss. Ct. App. 2016), cert. denied, 2017 Miss. LEXIS 95 (Miss. Mar. 9, 2017), cert. denied, — U.S. —, 138

S. Ct. 140, 199 L. Ed. 2d 36, 2017 U.S. LEXIS 5483 (U.S. 2017).

Lower court erroneously treated a daughter-in-law's affidavit as inadmissible when finding that the husband and wife failed to demonstrate the existence of a genuine dispute of material fact in their failure-to-warn claim against the state transportation agencies where the employees' alleged statements to the daughter-in-law were admissible as an admission by a party opponent under Miss. R. Evid. 801(d)(2)(D). Logan v. Miss. DOT, 174 So. 3d 249, 2015 Miss. LEXIS 460 (Miss. 2015).

Trial court did not abuse its discretion in allowing a witness's testimony as to what defendant communicated because it properly limited the testimony to statements made by the witness or defendant. Corrothers v. State, 148 So. 3d 278, 2014 Miss. LEXIS 311 (Miss. 2014), cert. denied, 576 U.S. 1023, 135 S. Ct. 2835, 192 L. Ed. 2d 877, 2015 U.S. LEXIS 3926 (U.S. 2015).

Trial court did not err by not allowing a police officer to testify to the results of a fingerprint analysis because anything that he might have testified to regarding the results of the analysis would have been inadmissible hearsay. Pryor v. State, 148 So. 3d 381, 2014 Miss. App. LEXIS 143 (Miss. Ct. App. 2014), cert. denied, 154 So. 3d 33, 2015 Miss. LEXIS 49 (Miss. 2015).

Trial court did not err in refusing to admit the State's closing argument from the other accused person's trial because the theories regarding who was driving the truck that struck and killed the county sheriff gave rise to a situation that was nothing more than an invitation to the jury to draw certain inferences about who was driving and the basis of the other individual's responsibility as either the director or as an aider and abettor. Williams v. State, 174 So. 3d 275, 2014 Miss. App. LEXIS 694 (Miss. Ct. App. 2014), aff'd, 234 So. 3d 1278, 2017 Miss. LEXIS 388 (Miss. 2017).

In an action arising from a motor vehicle accident, exclusion of statements made by the driver to the motorist's husband immediately following the accident was proper; although they were not hearsay because they qualified as admissions by a party-opponent, the driver was not available for cross-examination and liability was not an issue, such that there was no need to confuse the jury. Heflin v. Merrill, 154 So. 3d 887, 2013 Miss. App. LEXIS 688 (Miss. Ct. App. 2013), aff'd, 154 So. 3d 857, 2014 Miss. LEXIS 558 (Miss. 2014).

Defendant's statements in his Facebook messages to the murder victim's mother were properly admitted because they were not hearsay under Miss. R. Evid. 801(d)(2)(A), as they were admissions by a party-opponent. Smith v. State, 168 So. 3d 992, 2013 Miss. App. LEXIS 318 (Miss. Ct. App. 2013), aff'd in part, vacated in part, 136 So. 3d 424, 2014 Miss. LEXIS 209 (Miss. 2014).

Pursuant to Miss. R. Evid. 801(d)(2), defendant's testimony from his first trial was properly admitted against him in his second trial as an admission by a party opponent, as that testimony had been voluntary and had not been compelled by the State; that he chose not to testify at his second trial was immaterial. Fulks v. State, 110 So. 3d 764, 2013 Miss. LEXIS 147 (Miss. 2013).

In a suit brought against a water park for injuries a patron sustained while on a water slide, the trial court did not err in excluding the testimony of the patron's mother regarding her discussion the day after the accident with an unidentified employee of the water park. The conversation did not qualify as an admission by a party opponent under Miss. R. Evid. 801(d)(2) as the mother could not identify the employee she spoke to and as the employee worked at a concession stand; therefore, it did not appear that the provisions of Rule 801(d)(2) applied since the mother did not prove that the employee was authorized to speak on the subject of where lifeguards should be or should not be on duty. Boyd v. Magic Golf, 52 So. 3d 455, 2011 Miss. App. LEXIS 36 (Miss. Ct. App. 2011).

Trial court did not err in allowing evidence related to a homeowner's letter to her insurance company, which placed the blame of the damage to the homeowner's real and personal property upon the insurance company because the evidence was admissible under Miss. R. Evid. 801(d)(2) as an admission by party-opponent; the evidence was offered for a purpose other than to allow a carpet cleaning company to mitigate its damages, and the statement's probative value outweighed the possibility of prejudice. Wright v. Royal Carpet Servs., 29 So. 3d 109, 2010 Miss. App. LEXIS 92 (Miss. Ct. App. 2010).

Defendant called the State witness on her cell phone immediately after the shooting and made incriminating admissions, and approximately a month after the shooting, law enforcement provided defendant with Miranda warnings, and upon being so advised, he chose not to exercise his right to remain silent. Instead, he made oral statements to law enforcement disclaiming his connection to the shooting, which was admissible under Miss. R. Evid. 801(d)(2); therefore, the case presented no violation of post-Miranda silence. Robinson v. State, 40 So. 3d 570, 2009 Miss. App. LEXIS 720 (Miss. Ct. App. 2009).

Defendants' murder convictions were appropriate because an officer's testimony about one defendant's admission was not hearsay, Miss. R. Evid. 801(d)(2)(A); extrajudicial statements by a criminal defendant, so long as the statements were relevant to the matter being tried, were admissible in evidence. Further, the probative evidence of the officer's testimony was not outweighed by its prejudice. Sneed v. State, 31 So. 3d 33, 2009 Miss. App. LEXIS 556 (Miss. Ct. App. 2009), cert. denied, 2010 Miss. LEXIS 150 (Miss. Mar. 25, 2010), cert. denied, 29 So. 3d 774, 2010 Miss. LEXIS 152 (Miss. 2010), cert. denied, 562 U.S. 1150, 131 S. Ct. 931, 178 L. Ed. 2d 775, 2011 U.S. LEXIS 350 (U.S. 2011).

Granting of a directed verdict in favor of a physician provider, a physician, and a medical center, in a claim for medical malpractice was appropriate pursuant to Miss. R. Evid. 801(d)(2)(A) because, although the circuit court erred in refusing to allow the patient to play an edited video deposition of a doctor, the error was legally harmless since the patient was permitted to examine the doctor and then impeach him with his videotaped deposition statements on cross-examination if it was inconsistent with his live testimony. Hartel v. Pruett, 998 So. 2d 979, 2008 Miss. LEXIS 578 (Miss. 2008).

Trial judge did not abuse his discretion in allowing the witness's testimony under Miss. R. Evid. 801(d)(2) because a statement was not hearsay if it was the party's own statement offered against him; it was irrelevant that defendant did not intend it to be a statement against interest and that it was self-serving when made. Grant v. State, 8 So. 3d 213, 2008 Miss. App. LEXIS 495 (Miss. Ct. App. 2008), cert. denied, 12 So. 3d 531, 2009 Miss. LEXIS 207 (Miss. 2009).

In a murder case, the trial court didi not err in permitting a law enforcement officer to testify about defendant's prior statements because defendant's statements offered against him were admissible under Miss. R. Evid. 801(d)(2). Walden v. State, 29 So. 3d 17, 2008 Miss. App. LEXIS 462 (Miss. Ct. App. 2008), cert. denied, 29 So. 3d 774, 2010 Miss. LEXIS 105 (Miss. 2010).

Two defendants' convictions for depraved-heart murder were appropriate because a police officer's testimony about what the second defendant said regarding an assault on the victim was an admission by a party opponent and thus not hearsay under Miss. R. Evid. 801(d)(2). McDowell v. State, 984 So. 2d 1003, 2007 Miss. App. LEXIS 669 (Miss. Ct. App. 2007), cert. denied, 984 So. 2d 277, 2008 Miss. LEXIS 328 (Miss. 2008).

Victim's mother's testimony about a letter defendant wrote to her while he was incarcerated was an admission by a party-opponent, not considered hearsay, and thus admissible under Miss. R. Evid. 801(d)(2); there could be no violation of the confrontation clause when defendant was the person making the incriminating statement, as defendant could not cross-examine himself, and there was nothing in the testimony about the letter which was an absolute admission of guilt on the part of defendant. Rankin v. State, 963 So. 2d 1255, 2007 Miss. App. LEXIS 553 (Miss. Ct. App. 2007).

Grant of summary judgment in favor of the employer and against the employees in their intentional infliction of emotional distress claims was improper because, referring to a group of black employees as "monkeys" could have been possible passed off as a tasteless joke; however, that insult coupled with an apparent reference to lynching could have permitted a reasonable juror to conclude that the comment was outrageous and revolting, and the supervisor's statement was admissible under Miss. R. Evid. 801(d)(2)(D). Jones v. Fluor Daniel Servs. Corp., 959 So. 2d 1044, 2007 Miss. LEXIS 366 (Miss. 2007).

Defendant's conviction for the sale of cocaine was improper because the state presented no evidence identifying the persons on the tape at issue, and thus the appellate court was unable to determine whether the statements on the tape would have been exempt from hearsay under Miss. R. Evid. 801(d)(2)(A), in the case of defendant's own statements, or under Rule 801(d)(2)(E), in the case of statements by a co-conspirator. Brown v. State, 969 So. 2d 891, 2007 Miss. App. LEXIS 19 (Miss. Ct. App.), rev'd, 969 So. 2d 855, 2007 Miss. LEXIS 680 (Miss. 2007).

Defendant's conviction for the sale of cocaine was inappropriate because the state failed to present evidence that identified the people on the tape in question; thus, the appellate court was unable to determine whether the statements on the tape would have been exempt from hearsay under Miss. R. Evid. 801(d)(2)(A), in the case of defendant's own statements, or under Rule 801(d)(2)(E), in the case of statements by a co-conspirator. Brown v. State, 969 So. 2d 891, 2007 Miss. App. LEXIS 19 (Miss. Ct. App.), rev'd, 969 So. 2d 855, 2007 Miss. LEXIS 680 (Miss. 2007).

During defendant's burglary trial, the trial court did not err in overruling his hearsay objections, where the extrajudicial statements that he made to the police were admissible pursuant to Miss. R. Evid. 801(d)(2)(A), because they were relevant to the crime at issue. Biggs v. State, 942 So. 2d 185, 2006 Miss. App. LEXIS 1 (Miss. Ct. App.), cert. denied, 942 So. 2d 164, 2006 Miss. LEXIS 715 (Miss. 2006).

Finding against the driver in her action for injuries resulting from a collision with a train at a railroad crossing was appropriate where the trial court rightfully excluded evidence from an officer about a conversation that he had on the day after the accident with an individual in the city's traffic division because the issue of whether the railroad had negligently failed to comply with its obligations to maintain the crossing would have been unaffected by the challenged evidence; thus, there was no reversible error in excluding the potentially nonhearsay statements. Bowman v. CSX Transp., Inc., 931 So. 2d 644, 2006 Miss. App. LEXIS 418 (Miss. Ct. App. 2006).

Defendant's conviction for murdering her husband in violation of Miss. Code Ann. § 97-3-19 was proper where her confession to a State witness was sufficient to establish the corpus delicti of murder. Further, that testimony was clearly admissible pursuant to Miss. R. Evid. 801(d)(2) as an admission by a party opponent. Stephens v. State, 911 So. 2d 424, 2005 Miss. LEXIS 386 (Miss. 2005).

Statements made in a phone call by plaintiff's attorney to defendant's attorney in an action to dissolve a business were admissible as admissions by party opponent. Vaughn v. Rettig, 912 So. 2d 795, 2005 Miss. LEXIS 165 (Miss. 2005).

**– In general.**

Trial court properly granted summary judgment to the Department of Transportation and the Transportation Commission on the injured parties' claim regarding the failure to warn of a dangerous condition in a road because the injured parties failed to show there was a genuine issue of material fact as to the defendants' notice of the dangerous condition there was nothing to demonstrate that the workers, who allegedly spoke to the injured parties' relative, were authorized to make the statement concerning a matter within the scope of their employment. Logan v. Miss. DOT, 174 So. 3d 264, 2014 Miss. App. LEXIS 486 (Miss. Ct. App. 2014), cert. denied, 160 So. 3d 704, 2015 Miss. LEXIS 180 (Miss. 2015), aff'd in part and rev'd in part, 174 So. 3d 249, 2015 Miss. LEXIS 460 (Miss. 2015).

In defendant's trial for the sale of cocaine and marijuana to an undercover officer, the trial court did not err in admitting an amended drug document that showed the crime lab's weight label for the drugs had been accidentally switched and then corrected because the defense admitted two reports containing contradictory weights of the drug evidence and cross-examined the crime lab scientist on the document, thus the defense opened the door for the State to discuss and attempt to admit the corrected document into evidence to clarify and explain the discrepancy for the different package weights. Hearsay testimony elicited by the prosecution is not error where the record clearly discloses that defense counsel provoked the questions by the prosecutor because he first interrogated the State's witness at great length on the same subject. Johnson v. State, 908 So. 2d 100, 2005 Miss. LEXIS 363 (Miss. 2005).

Rule 613(b) does not apply to admissions of a party-opponent as defined in subsection (d)(2) of this rule. Ratcliff v. State, 752 So. 2d 435, 1999 Miss. App. LEXIS 680 (Miss. Ct. App. 1999).

**– Adoption.**

In a prosecution for armed robbery and aggravated assault, it was not error to allow a witness to testify that defendant and two others who had participated in a failed attempt to rob a fast food store had made out-of-court statements to the witness while the four were together at a social event in which they each detailed their participation in the crime; defendant's own statements were not hearsay and defendant had adopted the statements of the other two by failing to challenge their truthfulness. Ellis v. State, 799 So. 2d 159, 2001 Miss. App. LEXIS 412 (Miss. Ct. App. 2001).

A statement made by the defendant to an insurance agent in a murder prosecution in an attempt to obtain the proceeds of a life insurance policy he had taken out on the decedent was properly admitted against the defendant as an admission by a party-opponent. Conley v. State, 790 So. 2d 773, 2001 Miss. LEXIS 100 (Miss. 2001).

In an action by a police officer against an insurance company for actual and punitive damages arising out of the failure to pay a claim for theft, the trial court did not err in admitting an estimate of the cost of repairs as an adoptive admission where the insurance company solicited the estimate, incorporated it into their records, and used it in its conclusion that the claim should be paid as a total loss. State Farm Mut. Auto. Ins. Co. v. Grimes, 722 So. 2d 637, 1998 Miss. LEXIS 525 (Miss. 1998).

**– By agent.**

Deposition of one party's counsel was admissible into evidence because Miss. R. Civ. P. 30(a) permitted either party to take a deposition of any person, Miss. R. Civ. P. 32(a)(3) permitted the admission of the deposition in the absence of the witness, and the counsel was authorized, under Miss. R. Evid. 801(d)(2)(C), to make the statement that co-counsel had informed the counsel the borrowers had accepted a settlement agreement. Williams v. Homecomings Fin. Network, 134 So. 3d 779, 2012 Miss. App. LEXIS 827 (Miss. Ct. App. 2012).

Bar disciplinary tribunal did not err in allowing introduction of declarant's statements through hearsay testimony of other witnesses, where declarant had first been called as a witness and an agency relationship between attorney and declarant established. Emil v. The Mississippi Bar, 690 So. 2d 301, 1997 Miss. LEXIS 3 (Miss. 1997).

Injured patient should have been permitted to enter portions of nurse's deposition into evidence without calling nurse as a witness, even though nurse was available to be called as a witness, since nurse was an employee of defendant hospital and statements were admissible as admissions by a party-opponent. McMillan v. King, 557 So. 2d 519, 1990 Miss. LEXIS 42 (Miss. 1990).

**– By coconspirators.**

Testimony by two narcotics agents as to what they heard defendant and a coconspirator say during a drug transaction was admissible because this testimony was not hearsay but rather an admission by a party-opponent under Miss. R. Evid. 801(d)(2)(E); the testimony regarding what the coconspirator had said to one of the agents was also admissible under

Miss. R. Evid. 801(d)(2)(E) as a statement by a coconspirator of a party during the course of and in furtherance of the conspiracy. Towner v. State, 837 So. 2d 221, 2003 Miss. App. LEXIS 54 (Miss. Ct. App. 2003).

In a prosecution for robbery, the court properly allowed the introduction into evidence of a statement made at the time of the crime by a coperpetrator that identified the defendant by his first name, since the statement was made during the course and in furtherance of a conspiracy. Knickel v. State, 764 So. 2d 1247, 2000 Miss. App. LEXIS 346 (Miss. Ct. App. 2000).

In a prosecution for murder, a coconspirator was properly permitted to testify about a conversation between the defendant and another coconspirator that occurred in a car on the way to kidnap the victim since the testimony related to an admission by a party-opponent during the course and in furtherance of a conspiracy. Jones v. State, 776 So. 2d 643, 2000 Miss. LEXIS 187 (Miss. 2000).

The conspiracy that forms the basis for admitting coconspirators' statements need not be the same conspiracy for which a defendant is indicted; thus, where the defendant admitted that a conspiracy existed between all of the coconspirators named in the indictment, excluding himself, his omission in the admitted conspiracy did not necessarily preclude statements made under Rule 801(d)(2)(E). Farris v. State, 764 So. 2d 411, 2000 Miss. LEXIS 141 (Miss. 2000).

The prosecution is entitled to offer evidence at trial of a plan and motive to establish the admissibility of Rule 801(d)(2)(E) statements by showing that a conspiracy preceded consummation of the principal offense. Farris v. State, 764 So. 2d 411, 2000 Miss. LEXIS 141 (Miss. 2000).

Statements at issue occurred in the course of the conspiracy and in furtherance of the conspiracy with the defendant and, therefore, such statements were properly admitted into evidence pursuant to Rule 801(d)(2)(E). Farris v. State, 764 So. 2d 411, 2000 Miss. LEXIS 141 (Miss. 2000).

There is no need for the trial court to make a finding that a conspiracy existed before admitting testimony regarding statements made by co-conspirators. Sullivan v. State, 749 So. 2d 983, 1999 Miss. LEXIS 347 (Miss. 1999).

Once a conspiracy is established, statements of co-conspirators are admissible if made in the course of and in furtherance of conspiracy; however, statements made after objectives of conspiracy have either succeeded or failed are inadmissible. Nixon v. State, 533 So. 2d 1078, 1987 Miss. LEXIS 2917 (Miss. 1987), cert. denied, 490 U.S. 1102, 109 S. Ct. 2458, 104 L. Ed. 2d 1012, 1989 U.S. LEXIS 2745 (U.S. 1989), overruled, Wharton v. State, 734 So. 2d 985, 1998 Miss. LEXIS 576 (Miss. 1998).

**– By party.**

Board of Review of the Mississippi Department of Employment Security did not err in denying the employee benefits where she repeatedly acted in disregard of company policy, Miss. Code Ann. § 71-5-513(A)(1)(c), and she was aware of the casino's policy that required her to radio another security officer if she needed to leave her post; under Miss. R. Evid. 801(d)(2), the employee's own statements were not hearsay and supported the denial of her employment benefits. Austin v. Miss. Dep't of Empl. Sec., 976 So. 2d 969, 2008 Miss. App. LEXIS 138 (Miss. Ct. App. 2008).

There was no error in the trial court's allowing the testimony of two police officers as to what they overheard defendant saying on the telephone after defendant committed murder, as said statements were properly admitted as admissions by a party opponent, pursuant to Miss. R. Evid. 801(d)(2). Poindexter v. State, 856 So. 2d 296, 2003 Miss. LEXIS 377 (Miss. 2003).

Defendant's testimony at a prior revocation hearing was a statement made by a party opponent and, thus, was admissible pursuant to Miss. R. Evid. 801(d)(2) for impeachment purposes. Oby v. State, 827 So. 2d 731, 2002 Miss. App. LEXIS 528 (Miss. Ct. App. 2002).

State introduced handwritten receipts for $ 227.53 to the victim's children to challenge defendant's contention that she was taking good care of the victim's children when hundreds of thousands of dollars were at issue in an arson murder for insurance money where defendant had promised to take care of victim's children; therefore, the receipts were incriminating admissions of defendant that were admissible under the admission by a party-opponent rule, Miss. R. Evid. 801(d)(2). Leedom v. State, 796 So. 2d 1010, 2001 Miss. LEXIS 241 (Miss. 2001).

In the prosecution of a felon in possession of firearms, it was reversible error for the court to allow a police officer to testify that he had found a handgun in a third party's purse and that she then stated that the gun belonged to the defendant, notwithstanding the contention that the defendant overheard this statement and did not object to its accuracy, where the evidence showed that the defendant, who was in custody at the time of the statement, was standing two feet away, but there was no evidence as to whether he stood mutely, objected vociferously, or did anything between these extremes. Gavin v. State, 785 So. 2d 1088, 2001 Miss. App. LEXIS 180 (Miss. Ct. App. 2001).

Testimony by a witness in a murder prosecution regarding a conversation among herself, her boyfriend, and the defendant was not hearsay since the statements by the defendant constituted admissions and the statements and questions by the witness and her boyfriend were not asserted for truth. Alexander v. State, 759 So. 2d 411, 2000 Miss. LEXIS 104 (Miss. 2000).

Statements made by the defendant to witnesses with whom he was incarcerated regarding his stabbing of the victim constituted admissions, notwithstanding his assertion that such statements were not admissions since no other facts proved his guilt. Alexander v. State, 759 So. 2d 411, 2000 Miss. LEXIS 104 (Miss. 2000).

Letters written by the defendant in which he admitted killing a man were admissions within subsection (d)(2) and, therefore, were properly admitted into evidence in his murder prosecution. Burns v. State, 729 So. 2d 203, 1998 Miss. LEXIS 567 (Miss. 1998), cert. denied, 527 U.S. 1041, 119 S. Ct. 2406, 144 L. Ed. 2d 804, 1999 U.S. LEXIS 4526 (U.S. 1999).

A statement made by the defendant that he was surprised that he was not being arrested for murder when he was being arrested for burglary, was an admission, as the arresting officer had not even mentioned the murder before the defendant made the statement. Underwood v. State, 708 So. 2d 18, 1998 Miss. LEXIS 45 (Miss. 1998).

Statement made by candidate for office of Supervisor, to two members of the Democratic Executive Committee at canvass the day after election, was correctly classified as an admission against interest. Pegram v. Bailey, 708 So. 2d 1307, 1997 Miss. LEXIS 170 (Miss. 1997).

Circuit court correctly allowed police officer to describe defendant's reenactment of murder for the jury's benefit, since reenactment was an admission and the proper predicate had been laid. Jackson v. State, 551 So. 2d 132, 1989 Miss. LEXIS 330 (Miss. 1989).

**– Harmless error.**

Defendant's murder conviction was proper even though the circuit court erred under Miss. R. Evid. 801(c) and Miss. R. Evid. 802 in allowing the prosecution to elicit improper hearsay testimony during a witness's testimony because the portion of the testimony that was not hearsay would still have been admissible and equally prejudicial to defendant's case; thus, the error was harmless at best. Bailey v. State, 956 So. 2d 1016, 2007 Miss. App. LEXIS 112 (Miss. Ct. App.), cert. denied, 957 So. 2d 1004, 2007 Miss. LEXIS 301 (Miss. 2007).

Defendant's conviction for the sale of dextropropoxyphene, a schedule IV controlled substance was proper because her claim that the circuit court improperly admitted hearsay testimony during a deputy's testimony was without merit under Miss. R. Evid. 801(c) since she experienced no prejudice from the testimony of which she complained. Smith v. State, 948 So. 2d 474, 2007 Miss. App. LEXIS 43 (Miss. Ct. App. 2007).

In a child custody modification case, the admission of a father's testimony, although hearsay under Miss. R. Evid. 801(c), amounted to harmless error because there was other credible evidence upon which to base the custody determination; the mother testified regarding her lack of cooperation, and the mother refused to allow the father's new wife to pick up the child from day care and told the child she was changing her last name. Giannaris v. Giannaris, 962 So. 2d 574, 2006 Miss. App. LEXIS 668 (Miss. Ct. App. 2006), rev'd, 960 So. 2d 462, 2007 Miss. LEXIS 399 (Miss. 2007).

Most important of the hearsay issues concerned the witness's testimony about what defendant's secretary had told the witness. That error was harmless because the witness also testified that defendant, charged with wire fraud, also stated, in effect, "the check's in the mail"; there is no hearsay issue as to testimony recounting what a defendant himself has told a witness. Miss. R. Evid. 801(d)(2)(A). McGee v. State, 853 So. 2d 125, 2003 Miss. App. LEXIS 159 (Miss. Ct. App.), cert. denied, 852 So. 2d 577, 2003 Miss. App. LEXIS 834 (Miss. Ct. App. 2003).

In an action for breach of contract arising from the termination of the plaintiff's employment by the defendant, it was error for the court not to allow the introduction of evidence that the plaintiff's supervisor had told a witness that the employer was losing money because the owner was spending the employer's money for personal reasons, but the error was harmless in light of the bulk of evidence presented that established credible reasons for the plaintiff to be terminated. Baine v. River Oaks Convalescent Ctr., 791 So. 2d 844, 2001 Miss. App. LEXIS 123 (Miss. Ct. App. 2001).

The court erred when it admitted the defendant's confession into evidence as an admission under subsection (d)(2), but excluded portions of her three previous statements to police in which she said "I didn't do it" as inadmissible hearsay; however, she failed to show that this error prejudiced the outcome of the trial and, therefore, the error was harmless. Swinney v. State, 2001 Miss. LEXIS 45 (Miss. Mar. 1, 2001), op. withdrawn, 2002 Miss. LEXIS 360 (Miss. Oct. 31, 2002).

Although two questions asked by the state in a murder prosecution elicited answers that were hearsay, such error was harmless and did not prejudice the defendant. Tanner v. State, 764 So. 2d 385, 2000 Miss. LEXIS 109 (Miss. 2000).

**Excited utterances.**

During defendant's trial for capital murder arising from the death of his girlfriend's son, the trial court did not err by admitting the daughter's hearsay statement to her mother that defendant beat the victim with a stick until the child stopped moving; while the statement was made two hours after the incident, the child spent the great majority of the time following the incident in the presence of the perpetrator and appeared to still be under great stress when she made the statement. The statement qualified as an excited utterance under Miss. R. Evid. 803(2). Eubanks v. State, 28 So. 3d 607, 2009 Miss. App. LEXIS 303 (Miss. Ct. App. 2009), cert. denied, 27 So. 3d 404, 2010 Miss. LEXIS 83 (Miss. 2010).

In a criminal prosecution for aggravated assault, an officer's testimony as to the victim's statement at the crime scene that defendant was a shooter was hearsay. However, the excited utterance exception applied; the victim was still under the stress of the situation when he made the statement. Bankston v. State, 907 So. 2d 966, 2005 Miss. App. LEXIS 80 (Miss. Ct. App. 2005).

Shortly after defendant's arrest, and while he was sitting in the back of the patrol car, defendant was heard by one of the investigating officers to loudly remark something to the effect that defendant had shot the (expletive), and would shoot the victim again. It was certainly not reversible error to let the jury know of defendant's spontaneous statements, and defendant's alleged intoxication bore only on the probative value of the evidence. Moore v. State, 837 So. 2d 794, 2003 Miss. App. LEXIS 81 (Miss. Ct. App. 2003).

**Personal observation.**

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the trial court did not err in not excluding the testimony of the decedent's friend concerning the decedent's alleged making, using, or selling methamphetamine before the accident since the testimony regarding methamphetamine was relevant and concerned the type of activity that the decedent was involved in prior to the accident and what impact that activity might have had on the decedent's alertness at the time of the accident. The testimony was not hearsay because it was the personal observation and knowledge of the witness. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450, 2010 Miss. LEXIS 200 (Miss. 2010).

**Rebuttal of implication raised by opponent.**

Under Miss. R. Evid. 801(d)(1)(B), an officer's testimony as to what the widow told him was admissible and not hearsay because it served to rebut the implication raised by defendant that the widow's testimony was shaped by her unhappiness with the cost of the work or by her son's reaction to the incident. Cooper v. State, 68 So. 3d 741, 2011 Miss. App. LEXIS 241 (Miss. Ct. App.), cert. denied, 69 So. 3d 9, 2011 Miss. LEXIS 404 (Miss. 2011).

**Reports.**

Because a laboratory report was admitted without a sponsoring witness, it was hearsay pursuant to Miss. R. Evid. 801(c), and the admission of the report violated defendant's Sixth Amendment right to confrontation because defendant had no opportunity to cross-examine the conclusions of the laboratory; however, the court concluded that the admission was harmless error because the proper admission of the initial test contained the same evidence, and the testimony of certain witnesses about the initial test was sufficient to support the jury's verdict against defendant. Jones v. State, 881 So. 2d 209, 2002 Miss. App. LEXIS 869 (Miss. Ct. App. 2002), aff'd, 2003 Miss. LEXIS 588 (Miss. Oct. 30, 2003).

It was error to permit the introduction of an officer's written version of the defendant's statement into evidence as an exhibit since it was never adopted by the defendant; the proper method of introducing the defendant's oral confession, in the absence of an actual recording in some form, would have been for the officer to relate from the stand those things that the defendant told him during the interrogation. Cobb v. State, 734 So. 2d 182, 1999 Miss. App. LEXIS 4 (Miss. Ct. App. 1999).

Testimony by police officers concerning radio dispatches is not hearsay and thus is admissible for the purpose of explaining the officer's actions. Parker v. State, 724 So. 2d 482, 1998 Miss. App. LEXIS 1072 (Miss. Ct. App. 1998).

Written FBI profile was properly excluded as inadmissible hearsay, where FBI agent who prepared report was not present to testify, and profile was offered into evidence to prove truth of the matter asserted. Alexander v. State, 610 So. 2d 320, 1992 Miss. LEXIS 580 (Miss. 1992).

**Statement.**

Defendant failed to demonstrate constitutional ineffectiveness for defense counsel's failure to request a limiting instruction or a balancing test with regard to a prosecution witness's prior unsworn statements because the decision was trial strategy; the witness's prior sworn and unsworn statements coincided, and given the admissibility of his prior sworn inconsistent statements, any success in keeping his prior unsworn inconsistent statements out of the trial would have been minimal at most. Thames v. State, 310 So. 3d 1163, 2021 Miss. LEXIS 17 (Miss. 2021).

There was no plain error in allowing the State to use a prosecution witness's unsworn statements because the inconsistency requirement of subsection (d)(1)(A) was met, as were the foundational requirements, so as to allow for proper cross-examination by the defense; throughout the State's examination of the witness, he was given the opportunity to admit, deny, or explain his prior sworn statements, and he continuously contradicted in fact what he had previously testified to under oath. Thames v. State, 310 So. 3d 1163, 2021 Miss. LEXIS 17 (Miss. 2021).

Trial court did not plainly err by admitting a witness's testimony that defendant had been overheard saying that he had assaulted the victim because it was not offered for proof of defendant's guilt but rather to establish the basis for the police photo lineup presented to the victim. Sullivan v. State, 281 So. 3d 1146, 2019 Miss. App. LEXIS 267 (Miss. Ct. App. 2019).

Trial court properly restrained a coconspirator's testimony at defendant's criminal trial to events that happened only while defendant was present, but allowed the co-conspirator to testify outside of that perimeter in error. However, the error was harmless as none of the testimony that was given went to prove the elements of any of the charges of which defendant was convicted. Liddell v. State, 281 So. 3d 34, 2019 Miss. App. LEXIS 1 (Miss. Ct. App. 2019).

Trial court did not err in allowing police investigators' testimonies in defendant's criminal trial because the investigators' statements were not hearsay, as the investigators' statements were made about the description of the course of action taken by the investigators in the criminal investigation and not for the truth of the matters asserted. Liddell v. State, 281 So. 3d 34, 2019 Miss. App. LEXIS 1 (Miss. Ct. App. 2019).

Admission of a detective's testimony was not plain error because the jury was not exposed to inadmissible hearsay, and defendant's rights under the Confrontation Clause were not implicated; the detective's testimony was relevant and related to his decisionmaking in his investigatory process. Smith v. State, 258 So. 3d 292, 2018 Miss. App. LEXIS 343 (Miss. Ct. App. 2018).

Trial court properly excluded a witness's affidavit as pure hearsay because the witness would not be exposed to further criminal liability at the time he executed his affidavit; the affidavit was executed after the witness had entered a plea of guilty and had been sentenced to probation, and the witness was terminally ill at the time he executed his affidavit, which was at the direction of defendant's counsel. Fontaine v. State, 256 So. 3d 615, 2018 Miss. App. LEXIS 124 (Miss. Ct. App.), cert. denied, 256 So. 3d 593, 2018 Miss. LEXIS 447 (Miss. 2018).

Excluding defendant's testimony as hearsay erred harmlessly because, while the statement at issue was not offered for the truth of the matter asserted, excluding the statement was not prejudicial, as other testimony on the issue was admitted. Crump v. State, 237 So. 3d 808, 2017 Miss. App. LEXIS 385 (Miss. Ct. App. 2017), cert. denied, 237 So. 3d 1268, 2018 Miss. LEXIS 93 (Miss. 2018).

Testimony of the victim's friend was not hearsay and was admissible because it was consistent with the victim's testimony; the victim testified at trial before the friend's testimony was admitted, the victim was subject to cross-examination, and the defense's neglect to question her regarding her statements to the friend did not result in the friend's testimony being inadmissible hearsay. Dandass v. State, 233 So. 3d 856, 2017 Miss. App. LEXIS 247 (Miss. Ct. App. 2017), cert. denied, 2017 Miss. LEXIS 517 (Miss. Dec. 7, 2017).

Both the question to and the answer from a police investigator exceeded merely testifying as to the course of the police investigation into an armed robbery and constituted improper hearsay because the question and answer were given for the purpose of proving the truth of the matter asserted – that defendant was the armed robber in the surveillance video from a store. The investigator improperly testified that a former police officer identified defendant from the video. Birkley v. State, 203 So. 3d 689, 2016 Miss. App. LEXIS 709 (Miss. Ct. App. 2016).

Testimony by a police officer that another officer identified defendant from a surveillance video did not constitute plain error, as admission of hearsay evidence, because the police officer merely referenced the other officer as a source of information to show how law enforcement came to interview defendant as a suspect for an armed robbery. The police officer's testimony was not given for the purpose of proving the truth of the other officer's assertion. Birkley v. State, 203 So. 3d 689, 2016 Miss. App. LEXIS 709 (Miss. Ct. App. 2016).

Law enforcement agent's testimony that the recipient of a package at a residence told the agent and other agents that the package was for defendant and that defendant was coming to get the package was admissible and not hearsay, as the testimony was provided for the basis of why the agents acted as they did in waiting for defendant to arrive for the package and was not offered for proof of the matter asserted. Jefferson v. State, 214 So. 3d 1071, 2016 Miss. App. LEXIS 705 (Miss. Ct. App. 2016), cert. dismissed, 229 So. 3d 118, 2017 Miss. LEXIS 396 (Miss. 2017).

Circuit court properly convicted defendant of the statutory rape of his 13-year-old cousin and sentenced him as a habitual offender because, inter alia, a handwritten letter given by defendant to a jailmate to be delivered to a friend–asking the friend to testify in his defense and corroborate his account–was properly admitted into evidence, the trial court was under no obligation to remove a juror for sleeping, a recording of a police interview with the victim was properly admitted as a prior consistent statement, and various documents establishing that defendant was a habitual offender were made a part of the record, without objection, during a pretrial hearing. Henderson v. State, 185 So. 3d 1038, 2015 Miss. App. LEXIS 347 (Miss. Ct. App. 2015), cert. denied, 186 So. 3d 854, 2016 Miss. LEXIS 101 (Miss. 2016).

Defendant waived his claim that the victims' video-recorded statements, which identified him as the perpetrator of the crime, constituted inadmissible hearsay because defendant withdrew his motion in limine by conceding that the statements were made for the purposes of diagnosis and treatment and, therefore, were admissible as nonhearsay statements; the audio records of the statements were marked, entered into evidence, and played for the jury without any objection from defense counsel. Cook v. State, 161 So. 3d 1057, 2015 Miss. LEXIS 192 (Miss. 2015).

Since the statements of defendant's son were admissible to rehabilitate a witness's credibility, the circuit court did not abuse its discretion in allowing the admission of the son's testimony. McKnight v. State, 187 So. 3d 635, 2015 Miss. App. LEXIS 276 (Miss. Ct. App. 2015), cert. denied, 188 So. 3d 575, 2016 Miss. LEXIS 142 (Miss. 2016).

Automatic e-mail notification to a murder victim's mother that defendant had sent the mother a Facebook message was not excludable as hearsay, as there was no "assertion," there was no "declarant," and the statement was not made by a human. Smith v. State, 168 So. 3d 992, 2013 Miss. App. LEXIS 318 (Miss. Ct. App. 2013), aff'd in part, vacated in part, 136 So. 3d 424, 2014 Miss. LEXIS 209 (Miss. 2014).

There was no Confrontation Clause or hearsay violation in an officer's testimony because the officer did not testify that the two people who identified defendant as the shooter were eyewitnesses, the officer did not convey any statements or assertions made by the two anonymous people, either directly or indirectly, and the officer did not reveal the substance of the conversations; the officer stated that defendant became a suspect during the course of her investigation, but it was clear that her investigation involved much more than a conversation with these two people. Thus, it was not apparent that the testimony at issue was hearsay or that the unnamed people could be classified as accusers. Keithley v. State, 111 So. 3d 1202, 2013 Miss. LEXIS 161 (Miss. 2013).

In a medical malpractice action, a circuit court did not abuse its discretion in allowing an affidavit of an expert witness for a medical center to be admitted into evidence because the use of the affidavit by the estate of a deceased surgical patient in an attempt to show inconsistency in the expert's testimony brought the affidavit into the realm of admissibility. Triplett v. River Region Med. Corp., 50 So. 3d 1032, 2010 Miss. App. LEXIS 657 (Miss. Ct. App. 2010).

There was no error in the trial court's refusal to allow the introduction of evidence about a victim's prior bad acts through testimony from a witness about what he had heard others say, as it was double hearsay under Miss. R. Evid. 801(c) and 805, and defendant failed to establish a hearsay exception that was applicable to the statements. Branch v. State, 118 So. 3d 646, 2013 Miss. App. LEXIS 649 (Miss. Ct. App.), cert. denied, 117 So. 3d 330, 2013 Miss. LEXIS 376 (Miss. 2013).

Trial court did not err in admitting a witness's testimony that the victim had told the witness that defendant had raped her because the victim's prior statements served a purpose other than to prove the truth of the matter asserted, i.e., that defendant had raped her; the statements rehabilitated the victim as a witness and were admissible for that purpose because they recounted that defendant had forced himself on the victim, and they were consistent with the victim's trial testimony and refuted defendant's assertions that the victim had instigated their encounter and had fabricated her story for trial. Ben v. State, 95 So. 3d 1236, 2012 Miss. LEXIS 411 (Miss. 2012), cert. denied, 569 U.S. 905, 133 S. Ct. 1723, 185 L. Ed. 2d 788, 2013 U.S. LEXIS 2589 (U.S. 2013).

Defendant's manslaughter conviction was proper because a witness's testimony that the victim had cursed the witness's father and that the victim had a bad temper and was overbearing was correctly deemed not admissible. The hearsay testimony was not only too remote in time to be admissible, it was also irrelevant, and its probative value was outweighed by its prejudicial effect. Booker v. State, 64 So. 3d 988, 2010 Miss. App. LEXIS 329 (Miss. Ct. App. 2010), aff'd, 64 So. 3d 965, 2011 Miss. LEXIS 316 (Miss. 2011).

Defendant's murder conviction was appropriate because the trial judge correctly refused to allow a witness to testify in further detail about a conversation the two purportedly had in the past due to hearsay concerns, Miss. R. Evid. 801(c). The trial judge did not abuse his discretion in limiting the extent of testimony because defendant had laid the predicate for impeachment and had asked the question that would impeach the witness. Whittington v. State, 49 So. 3d 107, 2010 Miss. App. LEXIS 182 (Miss. Ct. App.), cert. denied, 49 So. 3d 1139, 2010 Miss. LEXIS 636 (Miss. 2010).

Defendant's murder conviction was appropriate because statements were submitted to show the actions that the chief took during the investigation and were therefore not hearsay under Miss. R. Evid. 801(c). Whittington v. State, 49 So. 3d 107, 2010 Miss. App. LEXIS 182 (Miss. Ct. App.), cert. denied, 49 So. 3d 1139, 2010 Miss. LEXIS 636 (Miss. 2010).

Statements that witness overheard a victim make while the witness was on the phone with the victim were properly admitted as they established the victim's state of mind communicated as she experienced the events leading up to a collision. In addition, testimony for an eyewitness regarding the victim being fearful of defendant was not hearsay as the witness never testified regarding what the victim actually told her. Nichols v. State, 27 So. 3d 433, 2009 Miss. App. LEXIS 473 (Miss. Ct. App. 2009), cert. denied, 27 So. 3d 404, 2010 Miss. LEXIS 70 (Miss. 2010), cert. denied, 562 U.S. 849, 131 S. Ct. 97, 178 L. Ed. 2d 61, 2010 U.S. LEXIS 5836 (U.S. 2010).

**– Against interest.**

Trial court's exclusion of the victim's letters and the text message to the defendant cannot be said to have been an abuse of discretion because they were inadmissible hearsay because the declarant, the victim, testified as a witness at trial and, thus, she was not unavailable as a witness under any of the applicable unavailability definitions for a statement against interest or present-sense impression. Kirk v. State, 160 So. 3d 685, 2015 Miss. LEXIS 68 (Miss. 2015).

Any statements made by defendant to the deputy that were not offered or introduced into evidence by the state would serve defendant's argument at trial – that his actions of breaking into the house were justified by necessity. Therefore, the statements were self-serving and were properly excluded by the trial judge as inadmissible hearsay under Miss. R. Evid. 801(d)(2)(A). Flowers v. State, 51 So. 3d 963, 2009 Miss. App. LEXIS 776 (Miss. Ct. App. 2009), rev'd, 51 So. 3d 911, 2010 Miss. LEXIS 584 (Miss. 2010).

In a negligence case, a prior consistent statement should not have been introduced under Miss. R. Evid. 801(d)(1)(B) because it was made when there was a motive to fabricate, even if it was characterized as work product; a driver made a statement to his insurance company regarding oncoming traffic a few days after striking a pedestrian. Alexander v. Greer, 959 So. 2d 586, 2007 Miss. App. LEXIS 436 (Miss. Ct. App. 2007).

Defendant's conviction for aggravated domestic violence against his girlfriend was appropriate because his mother's proffered testimony regarding the victim's recollection was consistent with the victim's testimony, and as such defendant's mother's testimony could not have been admissible as prior inconsistent testimony under Miss. R. Evid. 801(d)(1) and Miss. R. Evid. 613(b). Fugate v. State, 951 So. 2d 604, 2007 Miss. App. LEXIS 145 (Miss. Ct. App. 2007).

In a case in which defendant and two accomplices had taken four school buses for the purpose of playing demolition derby, the trial court properly allowed a prior statement made by one of the accomplices into evidence under Miss. R. Evid. 801(d)(1)(b) in order to rebut defense counsel's implied charge of fabrication. Hendrix v. State, 957 So. 2d 1023, 2007 Miss. App. LEXIS 34 (Miss. Ct. App. 2007).

Victim testified at the trial, and defendant had the opportunity to extensively cross-examine him, and therefore his right to confront witnesses against him under the Sixth Amendment was not violated; the videotape of the victim's statement to the police was not offered as direct evidence, but was offered as a prior consistent statement under Miss. R. Evid. 801(d)(1)(B) to refute defense counsel's implication that the tape had been fabricated, and the witness testified and was cross-examined. Mingo v. State, 944 So. 2d 18, 2006 Miss. LEXIS 679 (Miss. 2006).

Defendant's armed robbery conviction was proper where admitted hearsay evidence was not in error because the same information was obtained from another witness and was properly admitted as a statement against interest pursuant to Miss. R. Evid. 804(b)(3). Brown v. State, 868 So. 2d 1027, 2003 Miss. App. LEXIS 1118 (Miss. Ct. App. 2003), cert. denied, 868 So. 2d 345, 2004 Miss. LEXIS 312 (Miss. 2004).

Under Miss. R. Evid. 801(c), the trial court did not abuse its discretion by allowing a detective's testimony about the credit card usage reports, since the testimony was offered for the purpose of establishing the steps that the police took during their investigation and not the content of the credit card report. Smith v. State, 984 So. 2d 295, 2007 Miss. App. LEXIS 643 (Miss. Ct. App. 2007).

In a wrongful death action, portions of a journal could not have been introduced to rebut an inference of recent fabrication because there was no testimony at trial to rebut; because the trial court did not distinguish between statements made by testifying family members and non-testifying family members, it was error to find that journal entries made by non-testifying family members were not hearsay under Miss. R. Evid. 801. Mariner Health Care, Inc. v. Estate of Edwards, 964 So. 2d 1138, 2007 Miss. LEXIS 520 (Miss. 2007).

There is no statutory provision mandating that Mississippi's justice courts obtain and record individuals' address information as either an activity of the justice court or as to matters observed pursuant to duty imposed by law as to which matters there was a duty to report; therefore, a computer printout of a justice court record containing defendant's address would not fall under Miss. R. Evid. 803(8), and would be inadmissible hearsay. Singleton v. State, 948 So. 2d 465, 2007 Miss. App. LEXIS 52 (Miss. Ct. App. 2007).

In a child support case, medical evidence presented by a father to show that he was unable to work due to a injuries suffered in a childhood accident was not accepted by a chancery court because it constituted hearsay; a third document was not accepted because there was no testimony of a custodian under Miss. R. Civ. 803(6), and the document was not self-authenticated under Miss. R. Evid. 902(11).Davison v. Miss. Dep't of Human Servs., 938 So. 2d 912, 2006 Miss. App. LEXIS 716 (Miss. Ct. App. 2006).

Victim, the first declarant, was available for cross-examination and also made an in-court identification of defendant as the individual who stole his truck; the second declarant, the police officer, testified at trial and was also available for and subject to cross-examination; therefore, the statements regarding the victim's identification were not hearsay under Miss. R. Evid. 801(d)(1)(C). Mixon v. State, 921 So. 2d 275, 2005 Miss. LEXIS 798 (Miss. 2005).

**– Conduct.**

Testimony of mother in paternity action concerning affection shown child by defendant's family amounted to inadmissible hearsay, since it was no more than a non-verbal assertion showing family's belief in paternity of child. Thornton v. Shows, 537 So. 2d 1363, 1989 Miss. LEXIS 27 (Miss. 1989).

**– Consistent.**

In defendant's statutory rape case, statements in a note written by the victim to a friend were not hearsay because the State brought out that the victim had recanted the sex allegations in a conversation with the defense investigator, then the State questioned the victim about the contents of the note. The note contained her statements prior to the recantation that were consistent with her trial testimony and tended to rebut the notion that she fabricated the allegations for trial. Woods v. State, 973 So. 2d 1022, 2008 Miss. App. LEXIS 75 (Miss. Ct. App. 2008).

In defendant's statutory rape case, the trial court correctly excluded a witness's taped statement as hearsay because the purpose of introduction of the witness's prior consistent statement was solely to bolster the credibility of the witness's trial testimony. Woods v. State, 973 So. 2d 1022, 2008 Miss. App. LEXIS 75 (Miss. Ct. App. 2008).

In a case where defendant father and defendant adopted son were convicted of conspiracy to commit sexual battery, sexual battery, and contributing to the delinquency of a minor, because the trial judge had previously heard argument, outside the presence of the jury, on the reliability of the child victim's statements, which described sexual contact with defendant father and the victim had previously testified regarding the statement, although perhaps cumulative, allowing defendant father's other son to testify to the victim's statement was not erroneous under Miss. R. Evid. 803(25) and 801(d)(1)(B), especially since the son had solicited the statement from the victim, and defense attorneys had attacked the victim's credibility; thus, Miss. R. Evid. 404(b) was not violated. King v. State, 857 So. 2d 702, 2003 Miss. LEXIS 450 (Miss. 2003).

Witness's testimony about a defendant's accomplice's statement implicating defendant in a murder was admissible as a prior consistent statement under Miss. R. Evid. 801(d)(1)(b), as the accomplice's trial testimony was "all over the page": he testified that he committed the crime alone, but he also admitted making the statement and that it was true, and he often claimed he could not remember what happened on the night of the murder. Wells v. State, 849 So. 2d 1231, 2003 Miss. LEXIS 213 (Miss. 2003).

In the murder prosecution arising from the death of a young child, an out-of-court statement by the mother was properly introduced into evidence as nonhearsay as the testimony she gave on direct examination was wholly consistent with the statement in question and was offered by the state to refute an expressed or implied claim of recent fabrication. Conley v. State, 790 So. 2d 773, 2001 Miss. LEXIS 100 (Miss. 2001).

Where defense counsel questioned a witness regarding her first statement to the police and elicited information that was inconsistent with her trial testimony, the state was entitled to question the witness on redirect with regard to her second statement to the police in order to rebut the defendant's implied charge of recent fabrication. Jackson v. State, 766 So. 2d 795, 2000 Miss. App. LEXIS 398 (Miss. Ct. App. 2000).

Where a witness to a murder initially indicated a lack of any knowledge of the assailant, apparently out of fear for her safety, but was then taken to police headquarters and gave a formal statement in which she claimed to be able to identify the defendant as the shooter and also testified at trial that the defendant was the shooter, evidence of her statement implicating the defendant was admissible to refute an inference of recent fabrication of the version of the facts she gave at trial. Brown v. State, 764 So. 2d 463, 2000 Miss. App. LEXIS 139 (Miss. Ct. App. 2000).

In a prosecution for murder and aggravated assault arising from the stabbing death of one victim and stabbing of her four year child, in which the defense contended that the child had been prompted by family members and investigating officers, either directly or by improperly suggestive questioning, to identify the defendant as the assailant, statements by the child to his grandmother, which was made immediately after she found him bleeding and in shock, and to the treating physician at the emergency room, in which the child identified the defendant as the assailant, were properly introduced into evidence in order to refute the defense contention. Barnett v. State, 757 So. 2d 323,

2000 Miss. App. LEXIS 136 (Miss. Ct. App. 2000).

When a witness testified that he made an agreement with the state to plead guilty to accessory after the fact, he gave evidence of a prior consistent statement within the definition of subsection (d)(1)(B). Clemons v. State, 732 So. 2d 883, 1999 Miss. LEXIS 28 (Miss. 1999).

**– Conversation.**

Error in admitting hearsay in a divorce, on finding a husband was present when a wife received a phone call containing the hearsay, was harmless because sufficient other evidence showed the husband's habitual cruel and inhuman treatment. Jackson v. Jackson, 172 So. 3d 221, 2014 Miss. App. LEXIS 638 (Miss. Ct. App. 2014), aff'd in part and rev'd in part, 172 So. 3d 179, 2015 Miss. LEXIS 413 (Miss. 2015).

Witness's testimony did not meet the definition of hearsay as, although the witness testified as to decisions that a third party made, the witness never relayed the content of any of the conversations that he had with the third-party company. Gilmer v. Morris Goodman Builders, Inc., 131 So. 3d 1203, 2013 Miss. App. LEXIS 397 (Miss. Ct. App. 2013), cert. denied, 132 So. 3d 579, 2014 Miss. LEXIS 105 (Miss. 2014).

Trial court did not err in sustaining the state's hearsay objection to an exchange between defense counsel and a narcotics agent during defendant's trial for the sale of cocaine where testimony was solicited from the agent concerning a statement made by a paid informant; the testimony was offered to prove that the informant had his back turned at the time of the drug transaction. Sturkey v. State, 946 So. 2d 790, 2006 Miss. App. LEXIS 456 (Miss. Ct. App. 2006), cert. denied, 947 So. 2d 960, 2007 Miss. LEXIS 65 (Miss. 2007), cert. denied, 552 U.S. 918, 128 S. Ct. 276, 169 L. Ed. 2d 201, 2007 U.S. LEXIS 10167 (U.S. 2007).

In a prosecution for uttering forgery, the store clerk's testimony that the defendant's cousin had expressed suspicion with regard to the validity of defendant's check was admissable to explain the clerk's actions in response to this information. Arnold v. State, 739 So. 2d 422, 1999 Miss. App. LEXIS 200 (Miss. Ct. App. 1999).

A witness' testimony that she had heard a conversation between defendant, defendant's sister and an unknown individual discuss the selling of drugs was inadmissible as the speaker could not be identified and the evidence could not be used merely to show the defendant's association with others who openly discuss their drug-dealing plans. Martin v. State, 726 So. 2d 1210, 1998 Miss. App. LEXIS 1124 (Miss. Ct. App. 1998).

**– Court proceedings.**

Prior statements made by the victim were admissible when, in his trial for armed robbery, defendant opened the door by accusing the victim of lying. Morgan v. State, 818 So. 2d 1163, 2002 Miss. LEXIS 188 (Miss. 2002).

The co-defendant's testimony at his plea hearing and sentencing hearing was admissible since such testimony was given under oath, subject to penalty of perjury, and subject to cross-examination both at the hearings and at the defendant's trial. Gleeton v. State, 716 So. 2d 1083, 1998 Miss. LEXIS 312 (Miss. 1998).

**– Inconsistent.**

It was reversible error for the trial court to allow a prior inconsistent, unsworn statement by a witness to be considered by the jury as substantive evidence; the witness had told police officers that the victim's vehicle door had been closed before he was shot by defendant, but at trial the witness testified that the victim's vehicle door had been ajar at the time of the shooting; because the witness's statement did not meet the criteria of Miss. R. Evid. 801(d)(1)(A) and did not fall within an exception to the general prohibition against hearsay, it should not have been admitted into evidence for substantive purposes. Bailey v. State, 952 So. 2d 225, 2006 Miss. App. LEXIS 393 (Miss. Ct. App. 2006), cert. denied, 2007 Miss. LEXIS 166 (Miss. Mar. 1, 2007), cert. denied, 951 So. 2d 563, 2007 Miss. LEXIS 167 (Miss. 2007).

Trial court did not abuse its discretion in allowing the State to use the testimony of a defense witness in defendant's trial for armed robbery and taking a motor vehicle, given in a related federal case, to impeach the witness; probative value of the witness's statements outweighed the prejudice to defendant. Edwards v. State, 838 So. 2d 990, 2002 Miss. App. LEXIS 430 (Miss. Ct. App. 2002), cert. denied, 837 So. 2d 771, 2003 Miss. LEXIS 124 (Miss. 2003).

The defendant was not allowed to introduce into evidence an allegedly prior inconsistent statement of a prosecution witness that was given to police two days after the shooting at issue since (1) the defendant failed to prove that the first statement was inconsistent with the trial testimony and, in fact, did not even inform the court which statements he considered to be contradictory, and (2) the defendant failed to establish that the prior statement was given under oath. Ratcliff v. State, 752 So. 2d 435, 1999 Miss. App. LEXIS 680 (Miss. Ct. App. 1999).

Trial court's exclusion of statement as hearsay was error, because it was a prior inconsistent statement that was not being offered in evidence to prove the truth of the matter asserted; rather, statement was being offered as circumstantial evidence from which jury could infer that trial testimony of declarant was unreliable. Hall v. State, 691 So. 2d 415, 1997 Miss. LEXIS 73 (Miss. 1997).

**– Identification.**

A shooting victim's prior inconsistent statement to police, which unequivocally identified the shooter, but which the victim contradicted on the witness stand, was admissible as substantive evidence of the defendant's guilt under Miss. R. Evid. 801(c)(1)(C). Smith v. State, 25 So. 3d 264, 2009 Miss. LEXIS 546 (Miss. 2009).

Police officer's testimony that he showed a photographic lineup to two witnesses and that both witnesses identified defendant as the shooter was not hearsay because both witnesses testified at trial and were subject to cross-examination regarding the identification procedure. Jordan v. State, 995 So. 2d 94, 2008 Miss. LEXIS 489 (Miss. 2008).

A police officer's testimony regarding a photo-lineup identification by a witness was properly allowed, notwithstanding that there was no subsequent in-court identification or photo-lineup identification by the witness, where the witness testified on direct that he made a photo-lineup identification of the defendant and was subject to cross-examination. Williams v. State, 759 So. 2d 509, 2000 Miss. App. LEXIS 186 (Miss. Ct. App. 2000).

**– Of co-conspirator.**

Text messages among defendants sent and received after the incident occurred were admissible; the statements were made after the alleged sexual battery occurred and pertained to a coverup of that act, as they discussed what they needed to do to prevent anyone else from finding out about what actually happened that night. Pugh v. State, 270 So. 3d 949, 2018 Miss. App. LEXIS 455 (Miss. Ct. App. 2018).

Male suspect's testimony about shoplifting plan related to acts and conduct that occurred during the course and in furtherance of a conspiracy at a time when the defendant, based upon the evidence and reasonable inferences drawn from the evidence, could be deemed to be a co-conspirator, and was thus not hearsay under Miss. R. Evid. 801(a)(1) or (2). Wilson v. State, 967 So. 2d 32, 2007 Miss. LEXIS 593 (Miss. 2007).

Defendant's attempted admission of a third party's testimony at trial, which was prohibited by the trial court, would have been hearsay because what defendant was attempting to admit was the third party's response to defendant's question, not what defendant had said; moreover, the testimony as to what the third party said when the men were arrested for drug possession would not have benefitted defendant. Randolph v. State, 973 So. 2d 254, 2007 Miss. App. LEXIS 506 (Miss. Ct. App. 2007).

In a capital murder case, a witness testified that approximately one week prior to the robbery and murder of the victim at the convenience store,the witness overheard defendant, a co-conspirator, and an unidentified individual planning the robbery; accordingly, the preliminary fact of conspiracy was established, and any statements made by the co-conspirator in furtherance of the conspiracy could be offered against defendant as non-hearsay pursuant to Miss. R. Evid. 801(d)(2)(E). Johnson v. State, 956 So. 2d 358, 2007 Miss. App. LEXIS 333 (Miss. Ct. App. 2007).

In a capital murder case, statements made in an attempt to conceal evidence of a consummated crime were undoubtedly statements made in furtherance of the conspiracy; thus, the testimony of a witness that either defendant or the co-conspirator asked her to throw away bloody clothes was not hearsay under Miss. R. Evid. 801(d)(2)(E). Johnson v. State, 956 So. 2d 358, 2007 Miss. App. LEXIS 333 (Miss. Ct. App. 2007).

To be considered non-hearsay, Miss. R. Evid. 801(d)(2)(E) merely requires the statement to be made by a co-conspirator, not to a co-conspirator, but nowhere does the rule state that the person giving testimony must have been part of the conspiracy; nor is the person to whom the statement is made required to be a co-conspirator in order for the statement to be non-hearsay. Johnson v. State, 956 So. 2d 358, 2007 Miss. App. LEXIS 333 (Miss. Ct. App. 2007).

Testimony of a co-conspirator involving alleged statements made by another party in furtherance of the conspiracy were admissible and not considered to be hearsay under Miss. R. Evid. 801(d)(2)(E). Grayson v. State, 850 So. 2d 196, 2003 Miss. App. LEXIS 638 (Miss. Ct. App. 2003).

**– Recorded.**

In a child custody case, the trial court properly excluded an answering machine tape containing a message from tending to show that the mother was considered to be mentally unstable. The trial court correctly found that the tape was inadmissible hearsay. Balius v. Gaines, 95 So. 3d 730, 2012 Miss. App. LEXIS 488 (Miss. Ct. App. 2012).

**– Truth of matter asserted.**

Chancellor did not abuse its discretion by excluding testimony as hearsay because the proponent sought to admit the testimony to convince the chancellor of the truth of the matter asserted rather than to show the effect on the hearer. Smith v. Martin, 202 So. 3d 263, 2016 Miss. App. LEXIS 110 (Miss. Ct. App. 2016), aff'd, 222 So. 3d 255, 2017 Miss. LEXIS 151 (Miss. 2017).

When hearing defendant's post-conviction claim that defendant was sentenced to death despite being mentally retarded, it was no error to admit an expert report or rely on statements therein because (1) the expert was cross-examined, (2) Miss. R. Evid. 703 let the expert rely on others' statements, (3) statements explaining the opinion's basis were not hearsay, and (4) nothing showed the court relied on a statement that was false or improperly admitted. Brown v. State, 168 So. 3d 884, 2015 Miss. LEXIS 149 (Miss. 2015).

In a wrongful death case under the Federal Employers' Liability Act, an expert designation constituted improper summary judgment evidence because it was not sworn to upon personal knowledge, and it constituted inadmissible hearsay as it was offered for the truth of the matter asserted and met no hearsay exception; the designation set out the expert's opinions on asbestos in the railroad industry, but it was sworn to and signed by a widow. A supplemental response was improper summary judgment evidence because it was unsworn and never filed; testimony from a coworker was insufficient to create a genuine issue as to the decedent's asbestos exposure because the coworker lacked personal knowledge of whether putty used on the job contained asbestos. Ill. Cent. R.R. Co. v. Jackson, 179 So. 3d 1037, 2015 Miss. LEXIS 588 (Miss. 2015).

It was not error to allow an officer to testify to a crime witness's statements because (1) the statements were not offered for the truth of the matter asserted but to show why the officer acted as the officer did, and (2) any error was harmless, as the statements did not concern the crux of the case. Franklin v. State, 136 So. 3d 1021, 2014 Miss. LEXIS 123 (Miss. 2014).

In a sexual-battery case, the trial court incorrectly identified the evidence of the testimony of the victim's mother about what her son told her as hearsay because it was not admitted to prove the truth of the matter asserted, but, rather, it was admitted only to show why the victim's mother went to the back room where she stated that she found the victim kneeling on the floor facing defendant, who had his pants and underwear pulled down around his knees. Pickett v. State, 143 So. 3d 596, 2013 Miss. App. LEXIS 761 (Miss. Ct. App. 2013), cert. denied, 141 So. 3d 947, 2014 Miss. LEXIS 374 (Miss. 2014).

Because a witness's testimony about defendant's statement that his father had "turned State on him" was not against defendant's interest subjecting him to criminal liability, it was not admissible under the hearsay exception of a statement against interest; however, because the statement was not offered for the truth of the matter asserted, it was not hearsay and was admissible. Thomas v. State, 134 So. 3d 357, 2013 Miss. App. LEXIS 717 (Miss. Ct. App. 2013).

Notations written on photographs were inadmissible hearsay because they were out-of-court written statements offered for the truth of the matter asserted. Estate of Luster v. Mardi Gras Casino Corp., 121 So. 3d 962, 2013 Miss. App. LEXIS 608 (Miss. Ct. App. 2013).

Testimony from a police officer, reciting the statement of a witness to defendant's fatal shooting of a victim, was properly admitted because it was admissible as an out-of-court statement made to the police officer during the course of his investigation and it was not admitted for the truth of the matter asserted therein; moreover, any error was harmless because it mostly benefited defendant and other parts were independently established. Davis v. State, 130 So. 3d 1141, 2013 Miss. App. LEXIS 490 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 578, 2014 Miss. LEXIS 73 (Miss. 2014).

While the trial court erred by sustaining the State's hearsay objection, the error was not reversible because defendant's substantial rights were not affected by the exclusion of the statement where it was cumulative of defendant's own testimony. Pauley v. State, 113 So. 3d 557, 2013 Miss. LEXIS 304 (Miss. 2013).

Where appellant was sued under Miss. Code Ann. § 95-5-10 for cutting trees on appellees' land, his testimony that his father told him he would one day own the land was not hearsay to the extent that it was offered to prove that appellant had a good-faith reason to believe that he owned the property and thus was not liable for statutory damages under § 95-5-10(2). However, he waived this argument by failing to present it to the trial court. Taylor v. Galloway, 105 So. 3d 1160, 2012 Miss. App. LEXIS 825 (Miss. Ct. App. 2012).

Where appellant was sued under Miss. Code Ann. § 95-5-10 for cutting trees on appellees' land, his testimony that his father told him he would one day own the land was inadmissible hearsay.to the extent it was offered to prove the truth of the matter asserted–i.e., appellant's ownership of the land. Taylor v. Galloway, 105 So. 3d 1160, 2012 Miss. App. LEXIS 825 (Miss. Ct. App. 2012).

Proposed testimony of defendant's mother would have been admissable to impeach the victim's earlier denial of bias against defendant; because the significance of the victim's alleged statement was simply that it was made and there was no issue about the truth of the matter asserted, the statement was not hearsay under Miss. R. Evid. 801(c). Banks v. State, 45 So. 3d 676, 2010 Miss. App. LEXIS 84 (Miss. Ct. App. 2010).

Finding in favor of a trucking company and truck driver in a wrongful-death action brought by the decedent's widow was proper because the documents at issue, by the widow's own explanation, were hearsay since they would have been used to prove the truth of the matter asserted, which was what constituted reflective tape, why it was used, its cost, and its effects in connection with accidents. Notwithstanding that, the widow was not prejudiced by the exclusion of the documents. Utz v. Running & Rolling Trucking, Inc., 32 So. 3d 450, 2010 Miss. LEXIS 200 (Miss. 2010).

Videotaped statements containing potentially prejudicial statements by law enforcement officer were not improperly admitted, as they were not being admitted to prove the truth of the matter asserted, that appellant planned and committed the murder of her parents, but rather, to demonstrate that appellant's statements were inconsistent as to the events of the day of the murder, and to elicit further information from appellant about the events of that day. Blakeney v. State, 2009 Miss. App. LEXIS 887 (Miss. Ct. App. Dec. 8, 2009, op. withdrawn, sub. op., 2009 Miss. App. LEXIS 978 (Miss. Ct. App. Dec. 8, 2009).

Statement made by a detective concerning what doctors told him was hearsay under Miss. R. Evid. 801(c), but defendant failed to show how counsel's failure to object prejudiced his defense. German v. State, 30 So. 3d 348, 2009 Miss. App. LEXIS 517 (Miss. Ct. App. 2009), cert. denied, 29 So. 3d 774, 2010 Miss. LEXIS 142 (Miss. 2010).

Testimony of the mother of a five-year-old victim was not hearsay under Miss. R. Evid. 801(c) because the statement was not offered to prove that the victim was sexually assaulted but for the limited purpose to relate why the mother took the victim to the hospital. Murray v. State, 20 So. 3d 739, 2009 Miss. App. LEXIS 515 (Miss. Ct. App. 2009), cert. denied, 27 So. 3d 404, 2010 Miss. LEXIS 64 (Miss. 2010).

Neighbor's hearsay testimony did not violate defendant's Sixth Amendment, U.S. Const. Amend. VI, right, because only testimonial hearsay was capable of violating the Sixth Amendment; the victim's child's statements to the neighbor were not made for any prosecutorial purpose and was nontestimonial, and the investigator's testimony was responsive to questions from the State as to why he contacted the Department of Human Services to pick up the children from the scene. Neal v. State, 15 So. 3d 388, 2009 Miss. LEXIS 272 (Miss. 2009), dismissed, 2016 Miss. LEXIS 340 (Miss. June 22, 2016).

Testimony of a police lieutenant was not hearsay under Miss. R. Evid. 801(c) because it was not offered to prove that defendant sold drugs to a special agent; rather, the testimony was offered to corroborate the agent's testimony that the agent had entered a particular house in order to conduct a drug buy. Newberry v. State, 19 So. 3d 752, 2008 Miss. App. LEXIS 745 (Miss. Ct. App. 2008), cert. denied, 19 So. 3d 82, 2009 Miss. LEXIS 509 (Miss. 2009).

During defendant's trial for possession of cocaine, the court did not err in denying defendant's motion in limine and overruling defendant's objections to an officer's testimony regarding information obtained from an unidentified tipster because the officer's statement was admissible to show why the officers noticed defendant and acted the way that they did. The statement was not offered to prove the truth of the matter asserted to implicate defendant in a drug sale, and was not hearsay under Miss. R. Evid. 801(c). Jenkins v. State, 993 So. 2d 862, 2008 Miss. App. LEXIS 655 (Miss. Ct. App. 2008).

Police officer's testimony referencing the store manager's comments that defendant was shoplifting was not hearsay and was properly admitted where defendant was not charged with shoplifting and the testimony complained of was not used to prove the truth of whether or not defendant shoplifted; defendant was charged with feloniously eluding a law enforcement in a motor vehicle and the purpose of the testimony was to show why the officer followed defendant into the parking lot where she fled from him. Watson v. State, 8 So. 3d 901, 2008 Miss. App. LEXIS 637 (Miss. Ct. App. 2008), cert. denied, 12 So. 3d 531, 2009 Miss. LEXIS 217 (Miss. 2009).

Trial court did not err when it allowed a sergeant to testify about the statements given to him by the victims during the course of his investigation because the statements were not admitted for the purpose of proving the truth of the matter asserted and thus, not hearsay under Miss. R. Evid. 801(c). The statements were admitted to explain the next step in the sergeant's investigation, which was to develop a photographic lineup that included defendant's picture. Anderson v. State, 1 So. 3d 905, 2008 Miss. App. LEXIS 543 (Miss. Ct. App. 2008), cert. denied, 999 So. 2d 1280, 2009 Miss. LEXIS 15 (Miss. 2009).

An officer's testimony that a murder victim tried to make a stalking complaint against defendant was not hearsay because it was not offered to prove that defendant was in fact stalking the victim; rather, it was offered to prove that defendant was on notice that the victim was trying to make a police complaint against him. Young v. State, 987 So. 2d 1074, 2008

Miss. App. LEXIS 456 (Miss. Ct. App. 2008).

In defendant's criminal case, the statement sought from an investigator that the victim's wife was a possible suspect in the victim's murder was hearsay since, when asked by the trial court to state another purpose for eliciting the statement from the investigator, defense counsel could state none. Thus, the attempt to introduce it was to prove the truth of the matter asserted and the admission of the statement was barred. Vickers v. State, 994 So. 2d 200, 2008 Miss. App. LEXIS 208 (Miss. Ct. App.), cert. denied, 998 So. 2d 1010, 2008 Miss. LEXIS 675 (Miss. 2008).

Trial court excluded testimony from witnesses that were not disclosed by defendant, but the trial court did this without performing the three-part test of Miss. Unif. Cir. & Cty. R. 9.04(I); however, this error was harmless as to certain witnesses because had they been allowed to testify, the substance of such would have amounted to impermissible hearsay under Miss. R. Evid. 801(c), 802, as the witness's intended testimonies would have provided a statement made by another in an attempt to prove the truth of the matter asserted and this hearsay did not fall into any exception. Davis v. State, 995 So. 2d 767, 2008 Miss. App. LEXIS 181 (Miss. Ct. App.), cert. denied, 999 So. 2d 374, 2008 Miss. LEXIS 678 (Miss. 2008).

Defendant's conviction for the sale of a controlled substance was appropriate, in part pursuant to Miss. R. Evid. 801(c) because an audiotape of telephone conversations between a confidential informant and unknown persons was not offered for any purpose other than to corroborate the witnesses' testimony for the State that pre-buy conversations occurred between a confidential informant and unknown persons. Thus, its introduction into evidence was appropriate. Brown v. State, 969 So. 2d 855, 2007 Miss. LEXIS 680 (Miss. 2007).

Circuit court did not err by admitting an investigator's statement that he had contacted the mother, who told him that the victim had been molested, and therefore defendant's motion for a new trial was properly denied, because the investigator's statement was not hearsay under Miss. R. Evid. 801, as he was merely recounting the facts of his investigation and was not offering the testimony as truth of the matter asserted. Foxworth v. State, 982 So. 2d 453, 2007 Miss. App. LEXIS 751 (Miss. Ct. App. 2007), cert. denied, 981 So. 2d 298, 2008 Miss. LEXIS 241 (Miss. 2008).

Trial court did not erroneously admit hearsay testimony from defendant's wife where her testimony, which included a statement that when she went to the police department to obtain a restraining order, she was told to wait until the next day, was not offered by the State to prove the truth of the matter asserted, but to show why the wife did not get a restraining order on the day in question. Hence, the statement was not hearsay under Miss. R. Evid. 801(c). Harris v. State, 970 So. 2d 151, 2007 Miss. LEXIS 709 (Miss. 2007).

Videotaped testimony of forensic interviewer and victim was hearsay, but based on the fact that law enforcement was intimately involved in obtaining the interview and was present at the interview, the videotaped interview was testimonial in nature; defendant was not unduly prejudiced because he cross-examined the victim later during the trial and even called her during his case-in-chief, and he had the opportunity to question her about her statements on the videotape and in general. Williams v. State, 970 So. 2d 727, 2007 Miss. App. LEXIS 577 (Miss. Ct. App. 2007).

Narcotics officer's testimony that he had received complaints concerning defendant's possible manufacture of methamphetamine was not hearsay because the agent was simply offering an explanation as to his actions in an investigation. Myhand v. State, 981 So. 2d 988, 2007 Miss. App. LEXIS 544 (Miss. Ct. App. 2007), cert. denied, 981 So. 2d 298, 2008 Miss. LEXIS 225 (Miss. 2008).

Defendant proposed that an officer's remarks were inadmissible hearsay as there was no proof presented as to the unavailability of a lieutenant, but the officer's remarks were not hearsay because: (1) the officer's statement in question was not offered to prove the matter asserted as the officer did not offer his statement to prove that the lieutenant called him or even that a cooperating source called the lieutenant, but rather it was offered to show how he came in contact with the informant; and (2) if the officer's statement did qualify as hearsay it would still be admissible to the extent required to show why he acted as he did and where he was at a particular place at a particular time. Singleton v. State, 948 So. 2d 465, 2007 Miss. App. LEXIS 52 (Miss. Ct. App. 2007).

Defendant's reason to admit that the victim made a statement that he was going to get defendant, as stated in defendant's brief, was in fact being offered for the truth of the matter asserted; therefore, under Miss. R. Evid. 801(c), the statement was hearsay and properly excluded. Chandler v. State, 946 So. 2d 355, 2006 Miss. LEXIS 689 (Miss. 2006).

Defendant's conviction for aggravated assault was appropriate under Miss. R. Evid. 801(c) where the victim's testimony was made in order to provide the details of the victim's telephone conversation with the victim's mother; as such, the victim's testimony as to what defendant's mother stated regarding surveyors amounted to hearsay. Gates v. State, 936 So. 2d 335, 2006 Miss. LEXIS 384 (Miss. 2006).

In a criminal trial for murder, the court did not err by excluding an out of court statement indicating that the defendant was being beaten at the time of the murder. The jury would have believed the truth of the statement; therefore, the statement was hearsay. Amos v. State, 911 So. 2d 644, 2005 Miss. App. LEXIS 652 (Miss. Ct. App. 2005).

Defendants' conspiracy convictions were proper where the warden's testimony involving a letter sent to one of the defendants was appropriate because the significance of the letter was simply that a statement had been made about a criminal act and there was no issue regarding the truth of that asserted matter in the trial court, Miss. R. Evid. 801(c). Thus, the statement was not offered for the truth of the matter asserted. Farris v. State, 906 So. 2d 113, 2004 Miss. App. LEXIS 1126 (Miss. Ct. App. 2004).

Witness's testimony that he finally came forward about a crime because defendant's brother told him to do so was not hearsay as it was not offered for the truth of the matter asserted, but to explain why the witness had actually come forward. Brown v. State, 890 So. 2d 901, 2004 Miss. LEXIS 1104 (Miss. 2004), cert. denied, 544 U.S. 981, 125 S. Ct. 1842, 161 L. Ed. 2d 735, 2005 U.S. LEXIS 3424 (U.S. 2005).

Where defendant was prosecuted after a controlled drug buy involving an informant and other officers, defendant was not prejudiced as the result of the admission of one officer's statement on the audiotape where that officer did not testify at trial. Defendant was able to cross-examine each and every witness the State offered, and there was no violation of defendant's constitutional rights of confrontation and cross-examination; further, the statement itself was not the incriminating evidence, it was not offered to prove the truth of the matter asserted, it qualified as a present sense impression, and it was not inadmissible hearsay. Burton v. State, 875 So. 2d 1120, 2004 Miss. App. LEXIS 600 (Miss. Ct. App. 2004).

Statements contained within the proffered reports regarding similar accidents were not being offered for the truth of the matter asserted therein, and the decedent's parent made no argument that the contents of the reports were truthful. They were offered to show the automobile manufacturer was aware that reports of prior similar incidents had been made, thus, the reports were not hearsay to which the exclusionary rules would have applied. Noah v. GMC, 882 So. 2d 235, 2004 Miss. App. LEXIS 172 (Miss. Ct. App.), cert. denied, 882 So. 2d 772, 2004 Miss. LEXIS 1150 (Miss. 2004).

Defendant's confrontation rights are not violated when a police officer testifies about the statement of a confidential informant if the informant is available for cross-examination; moreover, an officer's testimony regarding an informant's statement that defendant sold drugs was not hearsay because it was merely offered to show the reason behind the officer's actions, and it was not offered to prove the truth of the matter asserted. Stubbs v. State, 878 So. 2d 130, 2004 Miss. App. LEXIS 31 (Miss. Ct. App.), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 936 (Miss. 2004).

Officer's hearsay testimony that paid informants told the officer that they could buy and had bought crack cocaine from defendant was admissible to the extent necessary to show why the officer had acted as he had while using the informants to conduct a controlled buy of cocaine by the informants from defendant. Tate v. State, 2002 Miss. App. LEXIS 296 (Miss. Ct. App. May 21, 2002).

Testimony in a murder prosecution by a third party regarding a conversation among the defendant and two others about the fact that the victim had some money on him and a plan to get that money was not hearsay as the testimony was not offered to prove the truth of the matter, that the victim actually had money on him, but was offered to prove that it was said and to explain subsequent actions. Fair v. State, 766 So. 2d 787, 2000 Miss. App. LEXIS 400 (Miss. Ct. App. 2000).

In a prosecution for murder, it was not hearsay for the victim's mother to testify that a coperpetrator knocked on her door and told her that her son would be killed if she did not come up with money he owed and that she ran out to the car in which he was sitting and begged for her son's life, explaining she saw her son being hit on the head in the back seat, since the testimony was not offered to prove the truth of the matter asserted, but rather was offered to show what was said and the surrounding circumstances. Jones v. State, 776 So. 2d 643, 2000 Miss. LEXIS 187 (Miss. 2000).

In a prosecution for murder, it was not hearsay for the victim's sister to testify that she heard her brother ask his mother to give up the keys to her car since the testimony was not offered for the truth of the matter asserted, but rather was offered for the fact it was said. Jones v. State, 776 So. 2d 643, 2000 Miss. LEXIS 187 (Miss. 2000).

A statement by a police officer, that he called directory assistance to determine whether there was a listing for a business that the defendant claimed to own with another person and that he was informed that there was no such listing, was admitted for truth and was, therefore, hearsay, notwithstanding the state's contention that it was only offered for the fact that it was said, since there was no relevance to what a directory assistance operator told the officer other than the fact that there was no listing. Harrison v. State, 2000 Miss. App. LEXIS 44 (Miss. Ct. App. Feb. 8, 2000), aff'd, 800 So. 2d 1134, 2001 Miss. LEXIS 223 (Miss. 2001).

In a prosecution for burglary of a business, testimony by a witness that a bystander told her that he was leaving to get the police was not hearsay as it was not offered to prove the truth of the matter asserted by the bystander, i.e., his intent to summon law enforcement authorities. Sanders v. State, 757 So. 2d 1022, 2000 Miss. App. LEXIS 94 (Miss. Ct. App. 2000).

Testimony by a witness in a murder prosecution regarding a conversation among herself, her boyfriend, and the defendant was not hearsay since the statements by the defendant constituted admissions and the statements and questions by the witness and her boyfriend were not asserted for truth. Alexander v. State, 759 So. 2d 411, 2000 Miss. LEXIS 104 (Miss. 2000).

Sheriff's testimony that he went to a house after being informed that either defendant or his brother was in possession of a firearm similar to the one used in the murder was inadmissible since possession of the murder weapon was at issue. Clemons v. State, 732 So. 2d 883, 1999 Miss. LEXIS 28 (Miss. 1999).

The murder defendant should have been allowed to introduce evidence that his unapprehended coperpetrator told him that he and the victim had had a fight and that he wanted to meet the victim to talk it out since such statement was not offered to prove the truth of the coperpetrator's statement, but instead was offered to show the defendant's purpose in going to the victim's home. Pham v. State, 716 So. 2d 1100, 1998 Miss. LEXIS 326 (Miss. 1998).

Out-of-court statement contained in witness' recollection of his office manager's explanation to him about notation on plaintiff's medical history was not hearsay, since it was not offered in evidence to prove truth of the matter asserted, but was merely put in evidence by witness as an explanation for presence of notation on the document. Moody v. RPM Pizza, 659 So. 2d 877, 1995 Miss. LEXIS 382 (Miss. 1995).

Statements of former insureds, that they thought agency was going out of business and that they blamed agency for their policy cancellations, were not hearsay since they were offered to prove that such statements were made by agency's clients in response to cancellation notices sent them by defendant insurance carrier. Eselin-Bullock & Assoc. Ins. Agency, Inc. v. National General Ins. Co., 604 So. 2d 236, 1992 Miss. LEXIS 324 (Miss. 1992).

Statement was properly admitted where it was offered not to prove that someone had killed one victim and attempted to kill a second, but to explain circumstances surrounding surviving victim's call to her minister and minister's call to authorities, as well as minister's presence at victim's home. Shell v. State, 554 So. 2d 887, 1989 Miss. LEXIS 492 (Miss. 1989), rev'd in part, 498 U.S. 1, 111 S. Ct. 313, 112 L. Ed. 2d 1, 1990 U.S. LEXIS 5501 (U.S. 1990).

**Illustrative cases.**

Detective's testimony of his investigation of a later robbery was given the prove a key fact, that the man shown in the videos was the perpetrator, and without victims testifying to this fact, the detective's assertion amounted to testimonial hearsay, and defendant's right to confront witnesses was violated; even if the evidence qualified as a Miss. R. Evid. 404(b)(2) exception, it failed to pass the balancing test, as defendant had not been charged with the later robbery and that testimony was not needed. Jones v. State, 287 So. 3d 995, 2019 Miss. App. LEXIS 617 (Miss. Ct. App. 2019).

Trial court did not abuse its discretion by excluding defendant's statements that the arresting officers and victims had made that defendant appeared to be belligerent and under the influence of drugs or alcohol because they were hearsay, as defendant wanted to offer the statements for the truth of what they had asserted. Parker v. State, 273 So. 3d 695, 2019 Miss. LEXIS 211 (Miss. 2019).

Text messages on defendant's phone were solicitations from unknown persons to purchase drugs, and the messages were neither positive declarations nor intended to be assertions. Thus, the messages were not "statements" as contemplated by Miss. R. Evid. 801, and there was no error in overruling defendant's hearsay objection to their admission. Holloway v. State, 270 So. 3d 1113, 2018 Miss. App. LEXIS 515 (Miss. Ct. App. 2018), cert. dismissed, 263 So. 3d 667, 2019 Miss. LEXIS 82 (Miss. 2019).

In a case in which defendant was convicted of two counts of armed robbery, the trial court did not err in admitting text messages that were recovered from a cell phone in defendant's possession when he was arrested because the statements sent from the phone were not considered hearsay, and the messages coming in to the phone were not hearsay as they were not offered to prove the truth of the matter asserted; the text messages sent from defendant proved a conversation took place prior to the armed robberies and showed that he needed money and was looking for a gun; and the text messages from the unidentified individual to defendant gave context to defendant's statements that he was looking for a gun. Ferguson v. State, 266 So. 3d 1032, 2018 Miss. App. LEXIS 451 (Miss. Ct. App. 2018), cert. denied, — So. 3d —, 2019 Miss. LEXIS 139 (Miss. 2019), cert. denied, 267 So. 3d 279, 2019 Miss. LEXIS 148 (Miss. 2019).

Trial court erred in granting a principal and a surety summary judgment because the discrepancy among the affidavit of a subcontractor's employee and daily logs created a genuine issue of material fact as to whether the employee had personal knowledge that material supplied to the subcontractor was incorporated into the project; the daily work logs were unauthenticated, and the record was void of any sworn testimony that they identified the only persons who were on the project site. Mathes Elec. Supply Co. v. Can't Be Beat Fence Co., 267 So. 3d 788, 2018 Miss. App. LEXIS 424 (Miss. Ct. App. 2018), cert. denied, 267 So. 3d 281, 2019 Miss. LEXIS 167 (Miss. 2019).

Chancellor did not err in refusing to admit into evidence in a child custody hearing a copy of an e-mail with handwritten notes from a grandmother of the children because one of the parents offered the annotated e-mail to support the parent's claim that the grandmother's testimony was a recent fabrication. Pevey v. Pevey, 270 So. 3d 250, 2018 Miss. App. LEXIS 406 (Miss. Ct. App. 2018).

Trial court did not err in defendant's trial for statutory rape, sexual battery of a minor child, and gratification of lust by allowing testimony from a forensic interviewer because the interviewer's testimony was not hearsay as the interviewer testified to the interviewer's experiences, to the process the interviewer used in conducting the interview of the alleged victim, and to the recommendations that the interviewer made after the interview. The interviewer did not testify as to the alleged victim's statements made during the interview. Whittaker v. State, 269 So. 3d 1226, 2018 Miss. App. LEXIS 409 (Miss. Ct. App. 2018).

Trial court did not abuse its discretion allowing the State to introduce an officer's testimony regarding a screenshot of a text message found on a phone in defendant's possession because the officer only testified that she was present when an investigator took the screenshot and why the screenshot was taken in the first place; defendant had the opportunity to cross examine the officer regarding her statement and the text message. Saunders v. State, 241 So. 3d 645, 2018 Miss. App. LEXIS 166 (Miss. Ct. App. 2018).

Trial court did not abuse its discretion allowing the State to introduce an officer's testimony regarding a screenshot of a text message found on a phone in defendant's possession because defendant did not object when the officer testified about the information in the text. Saunders v. State, 241 So. 3d 645, 2018 Miss. App. LEXIS 166 (Miss. Ct. App. 2018).

Trial court did not abuse its discretion in permitting a parent's testimony about the advice the parent's former attorney gave the parent because the testimony was not offered to prove the truth of the matter asserted, that the other parent might have absconded with the parties' child or that the other parent could not have been required to return the child without a court order, but as evidence of the parent's state of mind and why the parent withheld visitation from the other parent after moving out of the parties' home. Harden v. Scarborough, 240 So. 3d 1246, 2018 Miss. App. LEXIS 145 (Miss. Ct. App. 2018).

Police chief's testimony did not constitute inadmissible hearsay because the chief testified about what he did and learned over the course of his investigation, including why he took certain steps; because the testimony was not hearsay, the admission of the evidence did not result in plain error. Swinney v. State, 241 So. 3d 599, 2018 Miss. LEXIS 8 (Miss. 2018).

Trial court did not abuse its discretion in allowing a police chief's testimony of what the victim had reported to him because it was offered to show why the chief acted the way he did during the course of his investigation, and thus, the testimony was not hearsay. Swinney v. State, 241 So. 3d 599, 2018 Miss. LEXIS 8 (Miss. 2018).

Witness's testimony that he heard an accomplice talking about robbing a convenience store with defendant was not hearsay and did not prejudice the outcome of the trial because the same testimony had been offered through the police chief without objection when the chief was describing why he took certain steps during the course of his investigation into the robbery. Swinney v. State, 241 So. 3d 599, 2018 Miss. LEXIS 8 (Miss. 2018).

Recorded statement by a clubhouse manager at a country club was substantive evidence that the trial judge was entitled to consider in ruling on the manager's pretrial motion in limine to exclude a photograph from the evidence in a negligence action brought by the manager. Brown v. Prof'l Bldg. Servs., 284 So. 3d 754, 2017 Miss. App. LEXIS 605 (Miss. Ct. App. 2017), aff'd, 252 So. 3d 23, 2018 Miss. LEXIS 372 (Miss. 2018).

Trial court did not abuse its discretion by allowing the State to introduce a witness's written pretrial statements on redirect to support her accuracy and credibility, as the topic of the pretrial statements was broached by defense counsel on cross-examination. Herrington v. State, 242 So. 3d 909, 2017 Miss. App. LEXIS 601 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 67, 2018 Miss. LEXIS 221 (Miss. 2018).

Trial court did not abuse its discretion when it allowed a police chief to testify about witness statements given to him during the course of his investigation. None of the statements were admitted to prove the truth of the matter asserted but rather to explain the next steps in the chief's investigation. Johnson v. State, 224 So. 3d 549, 2017 Miss. App. LEXIS 104 (Miss. Ct. App. 2017).

Trial court did not abuse its discretion in limiting a defense witness's testimony because the testimony of the victim's statement was hearsay since the statement bore on defendant's intent to commit the crimes, and defendant did not establish the hearsay statement fell within a hearsay exception; defendant sought to offer the testimony to establish the victim smoked marijuana with him in order to prove he intended to break and enter into the victim's home to recover drug money, not to rape her. Scott v. State, 231 So. 3d 1024, 2016 Miss. App. LEXIS 404 (Miss. Ct. App. 2016), aff'd, 231 So. 3d 995, 2017 Miss. LEXIS 440 (Miss. 2017).

Circuit court correctly granted a nursing home summary judgment in a daughter's medical negligence action because the daughter failed to produce competent evidence in opposition to the summary judgment motion; the daughter's expert designations were nothing but her own statements of what her expert witnesses would say, signed by her counsel, and those statements were not sworn by the experts. Handy v. Madison Cnty. Nursing Home, 192 So. 3d 1005, 2016 Miss. LEXIS 243 (Miss. 2016).

Circuit court did not abuse its discretion in defendant's trial for sexual battery when it allowed a nurse's testimony regarding statements the minor victim made during a medical examination of the victim because the victim's statements as to the identity of defendant were pertinent to the nurse's treatment of the victim, based on the nurse's concern regarding the potential for further inappropriate contact between the defendant and the victim. Grant v. State, 198 So. 3d 400, 2016 Miss. App. LEXIS 139 (Miss. Ct. App. 2016).

In an armed robbery case, the issue of whether the trial court erred when it allowed the State to present evidence of defendant's prior inconsistent statement was not a proper issue for the appellate court because defendant failed to raise the issue before the trial court. Hoffman v. State, 189 So. 3d 715, 2016 Miss. App. LEXIS 217 (Miss. Ct. App. 2016).

Trial court did not abuse its discretion by excluding the telephone records from evidence when offered through a deputy's testimony where the records were hearsay and to have been admitted as records of regularly conducted activity they would have needed a sponsoring witness or to be self-authenticated. Parvin v. State, 212 So. 3d 863, 2016 Miss. App. LEXIS 101 (Miss. Ct. App. 2016), cert. denied, 2017 Miss. LEXIS 95 (Miss. Mar. 9, 2017), cert. denied, — U.S. —, 138 S. Ct. 140, 199 L. Ed. 2d 36, 2017 U.S. LEXIS 5483 (U.S. 2017).

Trial court did not abuse its discretion by allowing an officer testify that the confidential informant (CI) told him that she had made contact with defendant and arranged to buy drugs because it was not hearsay as it was admissible to explain why he and the agent met with the CI, searched her vehicle, and gave her cash and a video camera. Thomas v. State, 195 So. 3d 843, 2016 Miss. App. LEXIS 97 (Miss. Ct. App. 2016).

Text message which the murder victim sent to a friend about one hour before the victim's death, in which the victim asked the friend to come save the victim, and a telephone conversation which the victim had with neighbors shortly before the victim's death, in which the victim was upset and crying because defendant was being mean to the victim, were admissible into evidence as present sense impressions or then-existing mental or emotional state exceptions to the hearsay rule. Kuebler v. State, 205 So. 3d 623, 2015 Miss. App. LEXIS 461 (Miss. Ct. App. 2015), rev'd, 204 So. 3d 1220, 2016 Miss. LEXIS 462 (Miss. 2016).

## RESEARCH REFERENCES

**ALR.**

Admissibility of party's own statement under Rule 801(d)(2)(a) of the Federal Rules of Evidence. 191 A.L.R. Fed. 27.

Admissibility of statement under Rule 801(d)(2)(B) of Federal Rules of Evidence, providing that statement is not hearsay if party-opponent has manifested adoption or belief in its truth. 156 A.L.R. Fed. 217.

## Rule 802. The rule against hearsay.

Hearsay is not admissible except as provided by law. The words "as provided by law" include other rules prescribed by the Mississippi Supreme Court.

**HISTORY: Amended effective December 1, 2015; restyled effective July 1, 2016.**

## ADVISORY COMMITTEE NOTE

The language of Rule 802 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 802 is a statement of existing common law. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

Construction.
Harmless error.
Purpose.
Illustrative cases.

**Construction.**

Police officer's testimony referencing the store manager's comments that defendant was shoplifting was not hearsay and was properly admitted where defendant was not charged with shoplifting and the testimony complained of was not used to prove the truth of whether or not defendant shoplifted; defendant was charged with feloniously eluding a law enforcement in a motor vehicle and the purpose of the testimony was to show why the officer followed defendant into the parking lot where she fled from him. Watson v. State, 8 So. 3d 901, 2008 Miss. App. LEXIS 637 (Miss. Ct. App. 2008), cert. denied, 12 So. 3d 531, 2009 Miss. LEXIS 217 (Miss. 2009).

It was not hearsay for a detective to testify that he learned of two people who had been in the victim's home or that he learned their names. Bailey v. State, 2006 Miss. App. LEXIS 508 (Miss. Ct. App. June 27, 2006), op. withdrawn, sub. op., modified, 956 So. 2d 1016, 2007 Miss. App. LEXIS 112 (Miss. Ct. App. 2007).

The legislature did not have authority to confer legal validity upon the portion of the Evidence of Child Sexual Abuse Act which enlarged the power of courts to hear hearsay evidence. Hall v. State, 539 So. 2d 1338, 1989 Miss. LEXIS 104 (Miss. 1989).

**Harmless error.**

Excluding defendant's testimony as hearsay erred harmlessly because, while the statement at issue was not offered for the truth of the matter asserted, excluding the statement was not prejudicial, as other testimony on the issue was admitted. Crump v. State, 237 So. 3d 808, 2017 Miss. App. LEXIS 385 (Miss. Ct. App. 2017), cert. denied, 237 So. 3d 1268, 2018 Miss. LEXIS 93 (Miss. 2018).

Error in admitting hearsay in a divorce, on finding a husband was present when a wife received a phone call containing the hearsay, was harmless because sufficient other evidence showed the husband's habitual cruel and inhuman treatment. Jackson v. Jackson, 172 So. 3d 221, 2014 Miss. App. LEXIS 638 (Miss. Ct. App. 2014), aff'd in part and rev'd in part, 172 So. 3d 179, 2015 Miss. LEXIS 413 (Miss. 2015).

Videotaped testimony of forensic interviewer and victim was hearsay, but based on the fact that law enforcement was intimately involved in obtaining the interview and was present at the interview, the videotaped interview was testimonial in nature; defendant was not unduly prejudiced because he cross-examined the victim later during the trial and even called her during his case-in-chief, and he had the opportunity to question her about her statements on the videotape and in general. Williams v. State, 970 So. 2d 727, 2007 Miss. App. LEXIS 577 (Miss. Ct. App. 2007).

Defendant's murder conviction was proper even though the circuit court erred under Miss. R. Evid. 801(c) and Miss. R. Evid. 802 in allowing the prosecution to elicit improper hearsay testimony during a witness's testimony because the portion of the testimony that was not hearsay would still have been admissible and equally prejudicial to defendant's case; thus, the error was harmless at best. Bailey v. State, 956 So. 2d 1016, 2007 Miss. App. LEXIS 112 (Miss. Ct. App.), cert. denied, 957 So. 2d 1004, 2007 Miss. LEXIS 301 (Miss. 2007).

While the trial court erred in allowing a store clerk's hearsay testimony under Miss. R. Evid. 802 regarding another person telling her defendant's name, it was harmless because the only testimony of that witness that was prejudicial to defendant was all admissible in that the prejudicial feature of the witness's testimony was that she identified defendant, even if she did not know him by name, and she noticed the vehicle that he drove, even if she did not know it to be the victim's. Bailey v. State, 2006 Miss. App. LEXIS 508 (Miss. Ct. App. June 27, 2006), op. withdrawn, sub. op., modified, 956 So. 2d 1016, 2007 Miss. App. LEXIS 112 (Miss. Ct. App. 2007).

Defendant's conviction for depraved heart murder was proper where an improperly admitted hearsay statement in which the victim said that defendant was going to hit him and take his money was harmless error because the properly admitted evidence was more than sufficient to support the jury's verdict, Miss. R. Evid. 801(c), 802. Edwards v. State, 856 So. 2d 587, 2003 Miss. App. LEXIS 557 (Miss. Ct. App. 2003), cert. dismissed, 860 So. 2d 1223, 2003 Miss. LEXIS 812 (Miss. 2003), cert. denied, 571 U.S. 841, 134 S. Ct. 92, 187 L. Ed. 2d 69, 2013 U.S. LEXIS 6108 (U.S. 2013).

**Purpose.**

Trial court did not err in revoking an inmate's probation based on hearsay testimony regarding charges that were later dismissed, as the Mississippi Rules of Evidence, including the hearsay rule, did not apply to probation revocation hearings. Forshee v. State, 853 So. 2d 136, 2003 Miss. App. LEXIS 471 (Miss. Ct. App. 2003).

The hearsay rule and its exceptions effect a delicate balance between twin towering goals of the trial process: truth and fairness; triers of fact should have all evidence that will aid them in the search for truth, and at the same time, every citizen brought before the bar of justice should have every fair opportunity to test the worth of that evidence. Hall v. State, 539 So. 2d 1338, 1989 Miss. LEXIS 104 (Miss. 1989).

**Illustrative cases.**

Law enforcement agent's testimony that the recipient of a package at a residence told the agent and other agents that the package was for defendant and that defendant was coming to get the package was admissible and not hearsay, as the testimony was provided for the basis of why the agents acted as they did in waiting for defendant to arrive for the package and was not offered for proof of the matter asserted. Jefferson v. State, 214 So. 3d 1071, 2016 Miss. App. LEXIS 705 (Miss. Ct. App. 2016), cert. dismissed, 229 So. 3d 118, 2017 Miss. LEXIS 396 (Miss. 2017).

Trial court did not abuse its discretion in limiting a defense witness's testimony because the testimony of the victim's statement was hearsay since the statement bore on defendant's intent to commit the crimes, and defendant did not establish the hearsay statement fell within a hearsay exception; defendant sought to offer the testimony to establish the victim smoked marijuana with him in order to prove he intended to break and enter into the victim's home to recover drug money, not to rape her. Scott v. State, 231 So. 3d 1024, 2016 Miss. App. LEXIS 404 (Miss. Ct. App. 2016), aff'd, 231 So. 3d 995, 2017 Miss. LEXIS 440 (Miss. 2017).

Circuit court did not abuse its discretion in defendant's trial for sexual battery when it allowed a nurse's testimony regarding statements the minor victim made during a medical examination of the victim because the victim's statements as to the identity of defendant were pertinent to the nurse's treatment of the victim, based on the nurse's concern regarding the potential for further inappropriate contact between the defendant and the victim. Grant v. State, 198 So. 3d 400, 2016 Miss. App. LEXIS 139 (Miss. Ct. App. 2016).

Judge did not err in admitting the victim's dying declaration because the officer remained consistent that he believed the victim could understand him and was responding to his questions, and the victim nodded his head "yes" when the officer asked if defendant was the person who shot him. Grindle v. State, 134 So. 3d 330, 2013 Miss. App. LEXIS 535 (Miss. Ct. App. 2013), cert. denied, 133 So. 3d 818, 2014 Miss. LEXIS 163 (Miss. 2014).

Because a witness's testimony about defendant's statement that his father had "turned State on him" was not against defendant's interest subjecting him to criminal liability, it was not admissible under the hearsay exception of a statement against interest; however, because the statement was not offered for the truth of the matter asserted, it was not hearsay and was admissible. Thomas v. State, 134 So. 3d 357, 2013 Miss. App. LEXIS 717 (Miss. Ct. App. 2013).

Notations written on photographs were inadmissible hearsay because they were out-of-court written statements offered for the truth of the matter asserted. Estate of Luster v. Mardi Gras Casino Corp., 121 So. 3d 962, 2013 Miss. App. LEXIS 608 (Miss. Ct. App. 2013).

Defendant's statements in his Facebook messages to the murder victim's mother were properly admitted because they were not hearsay under Miss. R. Evid. 801(d)(2)(A), as they were admissions by a party-opponent. Smith v. State, 168 So. 3d 992, 2013 Miss. App. LEXIS 318 (Miss. Ct. App. 2013), aff'd in part, vacated in part, 136 So. 3d 424, 2014 Miss. LEXIS 209 (Miss. 2014).

Automatic e-mail notification to a murder victim's mother that defendant had sent the mother a Facebook message was not excludable as hearsay, as there was no "assertion," there was no "declarant," and the statement was not made by a human. Smith v. State, 168 So. 3d 992, 2013 Miss. App. LEXIS 318 (Miss. Ct. App. 2013), aff'd in part, vacated in part, 136 So. 3d 424, 2014 Miss. LEXIS 209 (Miss. 2014).

In a slip-and-fall case, an affidavit a mall customer filed in opposition to summary judgment was insufficient to establish that the mall owner or maintenance company had actual or constructive knowledge of spilled water and sufficient time to correct it, as the affidavit was not based upon personal knowledge but on hearsay, and did not set forth facts that would be admissible in evidence, as required by by Miss. R. Civ. P. 56(e). Karpinsky v. Am. Nat'l Ins. Co., 109 So. 3d 84, 2013 Miss. LEXIS 67 (Miss. 2013).

Where appellant was sued under Miss. Code Ann. § 95-5-10 for cutting trees on appellees' land, his testimony that his father told him he would one day own the land was not hearsay to the extent that it was offered to prove that appellant had a good-faith reason to believe that he owned the property and thus was not liable for statutory damages under § 95-5-10(2). However, he waived this argument by failing to present it to the trial court. Taylor v. Galloway, 105 So. 3d 1160, 2012 Miss. App. LEXIS 825 (Miss. Ct. App. 2012).

Where appellant was sued under Miss. Code Ann. § 95-5-10 for cutting trees on appellees' land, his testimony that his father told him he would one day own the land was inadmissible hearsay.to the extent it was offered to prove the truth of the matter asserted–i.e., appellant's ownership of the land. Taylor v. Galloway, 105

So. 3d 1160, 2012 Miss. App. LEXIS 825 (Miss. Ct. App. 2012).

Defendant's manslaughter conviction was proper because a witness's testimony that the victim had cursed the witness's father and that the victim had a bad temper and was overbearing was correctly deemed not admissible. The hearsay testimony was not only too remote in time to be admissible, it was also irrelevant, and its probative value was outweighed by its prejudicial effect. Booker v. State, 64 So. 3d 988, 2010 Miss. App. LEXIS 329 (Miss. Ct. App. 2010), aff'd, 64 So. 3d 965, 2011 Miss. LEXIS 316 (Miss. 2011).

Circuit court did not abuse its discretion in prohibiting cross-examination regarding a victim's statement to the police about defendant's other possible sexual encounters with other teenage girls because it was within the circuit court's discretion to find that the victim had insufficient personal knowledge about the other encounters and that her statement was too speculative to be deemed relevant for impeachment as a prior inconsistent statement under Miss. R. Evid. 613(b); furthermore, what the victim could have been told by another teenage girl was inadmissible hearsay under Miss. R. Evid. 801 and 802. Timmons v. State, 44 So. 3d 1021, 2010 Miss. App. LEXIS 32 (Miss. Ct. App.), cert. denied, 49 So. 3d 106, 2010 Miss. LEXIS 517 (Miss. 2010).

Circuit court did not abuse its discretion in prohibiting cross-examination regarding a victim's statement to the police about defendant's other possible sexual encounters with other teenage girls because it was within the circuit court's discretion to find that the victim had insufficient personal knowledge about the other encounters and that her statement was too speculative to be deemed relevant for impeachment as a prior inconsistent statement under Miss. R. Evid. 613(b); furthermore, what the victim could have been told by another teenage girl was inadmissible hearsay under Miss. R. Evid. 801 and 802. Timmons v. State, 44 So. 3d 1021, 2010 Miss. App. LEXIS 32 (Miss. Ct. App.), cert. denied, 49 So. 3d 106, 2010 Miss. LEXIS 517 (Miss. 2010).

Car dealership's former business manager's affidavit did not present a meritorious defense to the default judgment since the cancellation worksheet was inadmissible hearsay pursuant to Miss. R. Evid. 802; the manager failed to qualify the cancellation worksheet as an exception to the hearsay rule pursuant to Miss. R. Evid. 803(6), or authenticate the worksheet pursuant to Miss. R. Evid. 902; and because the dealership failed to assert a meritorious defense, its motion to set aside default judgment under Miss. R. Civ. P. 60(b)(6) was properly denied. Greater Canton Ford Mercury, Inc. v. Lane, 997 So. 2d 198, 2008 Miss. LEXIS 517 (Miss. 2008).

Trial court excluded testimony from witnesses that were not disclosed by defendant, but the trial court did this without performing the three-part test of Miss. Unif. Cir. & Cty. R. 9.04(I); however, this error was harmless as to certain witnesses because had they been allowed to testify, the substance of such would have amounted to impermissible hearsay under Miss. R. Evid. 801(c), 802, as the witness's intended testimonies would have provided a statement made by another in an attempt to prove the truth of the matter asserted and this hearsay did not fall into any exception. Davis v. State, 995 So. 2d 767, 2008 Miss. App. LEXIS 181 (Miss. Ct. App.), cert. denied, 999 So. 2d 374, 2008 Miss. LEXIS 678 (Miss. 2008).

Denial of defendant's motion for a new trial after he had been convicted of aggravated assault and rape was appropriate because each of the prerequisites of Miss. R. Evid. 801(d)(1)(B) were satisfied so as to remove the witnesses' statements from the category of impermissible hearsay as the victim had already testified that defendant raped her, her testimony was subject to cross-examination, and each of the witnesses confirmed that the victim told them that she was raped; the statements refuted the defense of consensual sex. Moss v. State, 977 So. 2d 1201, 2007 Miss. App. LEXIS 632 (Miss. Ct. App. 2007), cert. denied, 977 So. 2d 1144, 2008 Miss. LEXIS 151 (Miss. 2008).

Trial court correctly refused to allow hearsay testimony from an officer regarding what the inmates told him that the accessory-after-the-fact said about the murder; if defendant wanted to inquire about those alleged statements, he should have called the inmates themselves to testify. Bailey v. State, 960 So. 2d 583, 2007 Miss. App. LEXIS 427 (Miss. Ct. App. 2007).

Defendant proposed that an officer's remarks were inadmissible hearsay as there was no proof presented as to the unavailability of a lieutenant, but the officer's remarks were not hearsay because: (1) the officer's statement in question was not offered to prove the matter asserted as the officer did not offer his statement to prove that the lieutenant called him or even that a cooperating source called the lieutenant, but rather it was offered to show how he came in contact with the informant; and (2) if the officer's statement did qualify as hearsay it would still be admissible to the extent required to show why he acted as he did and where he was at a particular place at a particular time. Singleton v. State, 948 So. 2d 465, 2007 Miss. App. LEXIS 52 (Miss. Ct. App. 2007).

There is no statutory provision mandating that Mississippi's justice courts obtain and record individuals' address information as either an activity of the justice court or as to matters observed pursuant to duty imposed by law as to which matters there was a duty to report; therefore, a computer printout of a justice court record containing defendant's address would not fall under Miss. R. Evid. 803(8), and would be inadmissible hearsay. Singleton v. State, 948 So. 2d 465, 2007 Miss. App. LEXIS 52 (Miss. Ct. App. 2007).

In a criminal trial for murder, the court did not err by excluding an out of court statement indicating that the defendant was being beaten at the time of the murder. The jury would have believed the truth of the statement; therefore, the statement was hearsay. Amos v. State, 911 So. 2d 644, 2005 Miss. App. LEXIS 652 (Miss. Ct. App. 2005).

### RESEARCH REFERENCES

**ALR.**

Validity, construction, and application of child hearsay statutes. 71 A.L.R.5th 637.

Sufficiency of Hearsay Evidence in Probation Revocation Hearings. 21 A.L.R. 6th 771.

## Rule 803. Exceptions to the rule against hearsay — regardless of whether the declarant is available as a witness.

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) *Present sense impression.* A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) *Excited utterance.* A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(3) *Then-existing mental, emotional, or physical condition.* A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

(4) *Statement made for medical diagnosis or treatment.* A statement that:

(A) is made to any person at any time for – and is reasonably pertinent to – medical diagnosis or treatment;

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause; and

(C) is supported by circumstances that substantially indicate its trustworthiness.

In this paragraph, "medical" includes emotional, mental, and physical health.

(5) *Recorded recollection.* A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) *Records of a regularly conducted activity.* A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by – or from information transmitted by – someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11); and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

(7) *Absence of a record of a regularly conducted activity.* Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

(8) *Public records.* A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law enforcement personnel; or

(iii) in a civil case or against the prosecution in a criminal case, factual findings from a legally authorized investigation; and

(B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

(9) *Public records of vital statistics.* A record of a vital statistic, if reported to a public office in accordance with a legal duty.

(10) *Absence of a public record.* Testimony – or a certification under Rule 902 – that a diligent search failed to disclose a public record or statement if:

(A) the testimony or certification is admitted to prove that

(i) the record or statement does not exist; or

(ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind: and

(B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice – unless the court sets a different time for the notice or the objection.

(11) *Records of religious organizations concerning personal or family history.* A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) *Certificates of marriage, baptism, and similar ceremonies.* A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) *Family records.* A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) *Records of documents that affect an interest in property.* The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) *Statements in documents that affect an interest in property.* A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose – unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) *Statements in ancient documents.* A statement in a document that is at least 20 years old that was prepared before January 1, 1998, and whose authenticity is established.

(17) *Market reports and similar commercial publications.* Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) *Statements in learned treatises, periodicals, or pamphlets.* A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on crossexamination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit. A treatise used in direct examination must be disclosed to an opposing party without charge in discovery.

(19) *Reputation concerning personal or family history.* A reputation among a person's family by blood, adoption, or marriage – or among a person's associates or in the community – concerning the person's birth, adoption,

legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) *Reputation concerning boundaries or general history.* A reputation in a community – arising before the controversy – concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) *Reputation concerning character.* A reputation among a person's associates or in the community concerning the person's character.

(22) *Judgment of a previous conviction.* Evidence of a final judgment of conviction if:

(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

Rules of Evidence

(23) *Judgments involving personal, family, or general history, or a boundary.* A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; andtter:

(B) could be proved by evidence of reputation.

(25) *Tender years exception.* A statement by a child of tender years describing any act of sexual contact with or by another is admissible if:

(A) (A) the court – after a hearing outside the jury's presence – determines that the statement's time, content, and circumstances provide substantial indicia of reliability; and

(B) the child either:

(i) testifies; or

(ii) is unavailable as a witness, and other evidence corroborates the act.

**HISTORY: Amended effective March 27, 1991; amended effective July 1, 1997; restyled effective July 1, 2016; amended effective July 1, 2020.**

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 1997, Rule 803(6) was amended to allow predicate evidence for admission of these records to be presented by affidavit in appropriate cases. – So. 2d – (West Miss. Cases).

Effective March 20, 1995, the Advisory Committee Note to Rules 803(10) and (11) were amended to note the repeal of statutes. 648-651 So. 2d 651 So. 2d XXVI (West Miss. Cas. 1995).

Effective March 27, 1991, Rule 803(4) was amended to permit the use of statements made to persons who are not doctors and to define the term "medical." 574-576 So. 2d XXVIII (West Miss.Cas. 1991).

Effective March 27, 1991, the Court adopted Rule 803(25). 574-576 So. 2d XXVIII (West Miss.Cas. 1991).

## ADVISORY COMMITTEE NOTE

The language of Rule 803 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. As before, Rule 803 uses numbered paragraphs as first-level formatting, rather than typical lower-case lettered subdivisions, because changing the structure of the Rule would disrupt electronic search results and thus impose transaction costs that outweigh any benefit in strictly consistent formatting. Rules 803(5)-(10) are simplified by using "'record," defined in Rule 101(b)(3)-(4). In Rule 803(8), "prosecution" has replaced "state" to conform with Rule 1101(a), which provides that the Evidence Rules apply to all cases and proceedings, including those where the State is not the prosecuting authority, such as those brought in the name of a municipality. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 803 provides that the hearsay rule does not exclude certain kinds of statements regardless of whether the declarant is available to testify. The rule explicitly does not state that the exceptions therein are admissible. The rationale for this is to put the parties on notice that, while the hearsay hurdle may not exist, other reasons may be present which justify the exclusion of the evidence. Rule 803 collects the vast majority of the recognized hearsay exceptions.

**(1) Present Sense Impression.** This exception is a new addition in Mississippi. It is based on the theory that the contemporaneous occurrence of the event and the statement render it unlikely that the declarant made a deliberate or conscious misrepresentation. Precise contemporaneity of the event and the statement may not be possible; a slight lapse may be permissible. Spontaneity is the essential factor. Cited cases which discuss the present sense impression exception are scant. *Houston Oxygen Co. v. Davis,* 139 Tex. 1, 161 S.W.2d 474 (1942), provides, perhaps, the clearest illustration of the exception. The appropriate subject matter of a statement of present sense impression is a description or explanation of an event or condition.

The present sense impression is not the same thing as the *res gestae* exception, although the *res gestae* concept has been used to cover situations where present sense impression would have been appropriate. *Houston Contracting Co. v. Atkinson,* 251 Miss. 220, 168 So. 2d 797 (1964). Rule 803 does not provide for an explicit *res gestae* exception. The rules, in effect, abandon the elusive concept of *res gestae.* Rules 803(1), (2), (3), and (4) have elements of the old *res gestae* exception, but they are far more specific and, therefore, they surmount much of the justified criticism regarding *res gestae.* For criticism in Mississippi of the *res gestae* concept, *see McCaskill v. State,* 227 So. 2d 847 (Miss. 1969); *Masonite Corp. v. International Woodworkers,* 215 So. 2d 691 (Miss. 1968); Barton and Cowart, *"The Enigma of Hearsay,"* 49 Miss. L.J. 31 (1978).

**(2) Excited Utterance.** In many respects, the excited utterance exception is similar to the former *res gestae* rule. The underlying theory of the excited utterance exception is that circumstances may create such an excited condition that the capacity for reflection is temporarily impeded and that statements uttered in that condition are thus free of conscious fabrication. As in the present sense impression exception, the essential ingredient here is spontaneity. With respect to the time element, the issue is the duration of the excited state. This, depending on the exact circumstances of a case, can vary greatly. The declarant need not be a participant but only an observer of the event which triggered the excitement. An excited utterance need only "relate" to the startling event, and, therefore, the scope of the subject matter of the statement may be fairly broad.

**(3) Then Existing Mental, Emotional, or Physical Condition.** As the FRE Advisory Committee Note states, this exception is really a specialized application of Rule 803(1). Its purpose in being specially listed is to enhance its usefulness. The pre-rule *res gestae* exception is even more closely linked with Rule 801(3) than it is with Rule 801(1), (2), and (4). The exclusion in Rule 801(3) of statements which reflect backwards is necessary to prevent the hearsay rule from being totally consumed by the exception. The important case, *Shepard v. United States,* 290 U.S. 96, 54 S. Ct. 22, 78 L. Ed. 196 (1933), indicates the necessity for the exclusion. On the other hand, statements which indicate intention to do something in the future are admissible to prove that the act intended took place. *See Mutual Life Ins. Co. v. Hillman,* 145 U.S. 285, 12 S. Ct. 909, 36 L. Ed 706 (1892); *Hall v. Hall,* 199 Miss. 4 78, 24 So. 2d 34 7 (1946).

One exemption from the exclusion is for statements of memory or belief which relate to the execution, revocation, identification, or terms of a declarant's will. There is no particular logical reason for this. Rather, the basis for allowing such statements is founded on necessity and expediency.

**(4) Statements for Purposes of Medical Diagnosis or Treatment.** Rule 803(4) represents a deviation from previous Mississippi practice in three significant ways. First, Rule 803(4) permits statements of past symptoms as well as present symptoms. Second the rule allows for statements which relate to the source or cause of the medical problem, whereas Mississippi courts formerly disallowed such statements. *See Field v. State,* 57 Miss 474 (1879) and *Miss. Cent. R.R. Co. v. Turnage,* 95 Miss. 854, 49 So. 840 (1909) for pre-rule Mississippi law. While statements about cause are permissible, statements concerning fault are still excludible. Third, the statement may be made either to a physician or to diagnostic medical personnel. Mississippi's pre-rule practice distinguished between narrative statements made to a treating physician and those made to an examining physician who was retained for use as an expert witness in the litigation. Statements made to the former were generally admissible, whereas no statements made to the latter were admissible. *See Miss. Cent. R.R. v. Turnage,* 95 Miss. 854, 49 So. 840 (1909). Rule 803(4) eliminates that distinction and permits statements made both for treating and diagnostic purposes. Under Rule 803(4) the statement need not be made to a physician. This is consistent with traditional Mississippi practice.

The amendment to Rule 803(4) is a recognition that medical diagnosis and treatment may encompass mental and emotional conditions as well as physical conditions. Moreover, the rule, by requiring the judge to find trustworthiness, gives the trial judge greater discretion than the original rule. By permitting the recipient to be non-medical personnel, MRE 803(4) modifies case law interpretations of the former language of this exception and now conforms with prevailing interpretations of F.R.E. 803(4). See F.R.E. 803(4), Advisory Committee Notes.

**(5) Recorded Recollection.** Past recollection recorded has been recognized as a hearsay exception in Mississippi practice. Rule 803(5), however, clarifies much of the past confusion regarding that exception. An essential feature is that this exception may not be employed until there has been a preliminary showing that the witness's memory is exhausted to the extent that he is unable to testify fully and accurately.

There is great judicial discretion in Rule 803(5). As pointed out in the FRE Advisory Committee Note, the circumstances of a particular case will govern the method of establishing the initial knowledge and the contemporaneity and accuracy of the record in question. It is possible under Rule 803(5) to have several persons involved in the process of observing and recording.

**(6) Records of Regularly Conducted Activity.** Rule 803(6) is an expansion of the common law business records exception used in Mississippi. The records must be those of a regularly conducted business activity; however, the definition of business is broader than pre-rule practice in Mississippi permitted. It includes records of non-profit institutions and associations. It is important to note that the custodian as well as other qualified witnesses may testify. Thus, it is not necessary to call or to account for all participants who made the record.

However, the source of the material must be an informant with knowledge who is acting in the course of the regularly conducted activity. This is exemplified by the leading case of *Johnson v. Lutz,* 253 N.Y. 124, 170 N.E. 517 (1930) which is still the applicable law today under the rule. That case held that a police report which contained information obtained from a bystander was inadmissible; the officer qualified as one acting in the regular course of a business, but the informant did not.

Rule 803(6) specifically includes diagnoses and opinions as proper subjects of admissible entries, as well as the traditionally admissible entries pertaining to acts, events and conditions. The rule calls for the exercise of judicial discretion if there is an indication of a lack of trustworthiness. This permits the court to take into account the motivation of the informant.

Rule 803(6) provides that if the proponent has established the stated requirements of the exception – regular business with regularly kept record, source with personal knowledge, record made timely, and foundation testimony or certification – then the burden is on the opponent to show a lack of trustworthiness. It is appropriate to impose the burden of proving untrustworthiness on the opponent, as the basic admissibility requirements tend to guarantee trustworthiness in the first place and thus suffice to establish a presumption that the record is reliable. "[B]y showing that the records regularly record regularly conducted activity, the proponent has made a sufficient showing that the records are trustworthy enough to be admissible. The proponent should not have to make an extra affirmative showing of trustworthiness." Saltzburg, Martin, & Capra, Federal Rules of Evidence Manual, vol. 4, § 803.02[7][g] (11th ed.) (2017).

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point. The Supreme Court has noted that the use of the term "'indicates' certainly imposes less of a burden than, say, 'requires' or 'necessitates.'" *Rowland v. California Men's Colony*, 506 U.S. 194,200 (1993). A determination of untrustworthiness necessarily depends on the circumstances.

The reference to self-authentication under Rule 902(11) is to confirm that the predicate for records under this exception may be by affidavit in appropriate cases.

**(7) Absence of Entry in Records Kept in Accordance with the Provision of Paragraph (6).** A record's failure to mention a matter which would ordinarily be contained in it is admissible to prove the nonexistence of the matter. This is innovative in Mississippi. Traditional Mississippi courts have admitted evidence of the absence of matter in the record only in the cases of public records.

While it has been unclear whether the absence of information was even hearsay, some courts have treated it as such and have found no exception to apply. Rule 803(7) settles the question of admissibility by clearly making the absence factor an exception.

Rule 803(7) provides that if the proponent has established the stated requirements of the exception – set forth in Rule 803(6) – then the burden is on the opponent to show a lack of trustworthiness. Rule 803(7) thus maintains consistency with the trustworthiness clause of Rule 803(6).

**(8) Public Records and Reports.** Public records and reports have been admissible in evidence as an exception to the hearsay rule. Countless statutory provisions in Mississippi formerly provided for the admission of public records. Additionally, there was similar development in the common law. *Ludlow v. Arkwright-Boston Mfrs. Mut. Ins. Co.,* 317 So. 2d 47 (Miss 1975). Subparagraphs (A)(i) and (A)(ii) are similar to Mississippi practice. The rule makes no distinction between state and local records. Subparagraph (A)(iii) adds the new element to the exception as traditionally applied in Mississippi. Subparagraph (A)(iii) provides that some investigative reports may be treated as hearsay exceptions. To be admissible they must be factual findings made in an investigation which was conducted pursuant to lawful authority. Opinions and conclusions contained in such reports should be excluded.

The experience in other jurisdictions which have adopted an identical rule has been that judges are exercising great caution in admitting these reports. Often they are being excluded if based on hearsay or the opinions of those not involved in the preparation of the report. The rule expressly gives judges the discretion to exclude such reports. Even when admissible, public records under Subparagraph (A)(iii) may only be used in civil cases and in criminal cases on behalf of a defendant against the state. To permit the state to use such reports against a defendant would be to create confrontation rights problems.

Rule 803(8) provides that if the proponent has established the stated requirements of the exception – prepared by a public office and setting out information as specified in the Rule – then the burden is on the opponent to show a lack of trustworthiness. It is appropriate to impose the burden of proving untrustworthiness on the opponent. as the basic admissibility requirements tend to guarantee trustworthiness in the first place and thus suffice to establish a presumption that the record is reliable. *See* Saltzburg. Martin. & Capra. Federal Rules of Evidence Manual, vol. 4. § 803.02[9][a] (11th ed.) (2017) ("Because of the strong presumption of reliability accorded to public reports. the burden of proving untrustworthiness is borne by the party seeking exclusion."); *Ellis v. International Playtex. Inc.*, 745 F.2d 292, 301 (4th Cir. 1984) (Public records rightly carry a presumption of reliability, hence it is up to the opponent to "demonstrate why a timetested and carefully considered presumption is not appropriate."). Rule 803(8) thus maintains consistency with the trustworthiness clause of rule 803(6).

The opponent, in meeting its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point. The Supreme Court has noted that the use of the term "'indicates' certainly imposes less of a burden than, say, 'requires' or 'necessitates.'" *Rowland v. California Men's Colony*, 506 U.S. 194,200 (1993). A determination of untrustworthiness necessarily depends on the circumstances.

Even when admissible, public records under Subparagraph (A)(iii) may only be used in civil cases and in criminal cases on behalf of a defendant against the state. To permit the state to use such reports against a defendant would be to create confrontation rights problems

**(9) Records of Vital Statistics.** This rule is similar to pre-existing Mississippi law. For example, M.C.A. § 41-57-9 formerly provided for the admission of certified copies of birth and death, and M.C.A. § 41-57-47 formerly provided for the admission of certified copies of marriage records.

**(10) Absence of Public Record or Entry.** Rule 803(10) permits proof by oral testimony or a certificate. For criminal cases, subparagraph (B) encompasses the requirements of *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), by incorporating an approved notice and demand procedure. See also *Conners v. State*, 92 So.3d 676 (Miss. 2012). The *Melendez-Diaz* Court declared that, consistent with the Confrontation Clause, the prosecutor may introduce a testimonial certificate against an accused who is given advance notice and does not timely demand the presence of the official who prepared the certificate.

**(11) Records of Religious Organizations and (12) Marriage, Baptismal, and Similar Certificates.** M.C.A. § 13-1-103 (repealed effective July 1, 1991) formerly provided for the admission of marriage certificates. However, Rules 803(11) and (20) go much further. The records of a religious organization are admissible under Rule 803(11) to show statements of personal and family history. Much of what is admissible might also be admissible under the business records exception.

**(13) Family Records.** This rule is an extension of existing Mississippi law. The Mississippi court has indicated it will recognize statements of personal or family relationship contained in the family Bible. *See Tisdale v. Jefferson Standard Life Insurance Co.,* 244 Miss. 839, 147 So. 2d 122 (1962).

**(14) Records and Documents Affecting an Interest in Property.** Because of the nature of title documents, they might conceivably be treated as public records. The Mississippi court has long recognized their admissibility. *See* , for instance, *Doe v. McCaleb,* 3 Miss (2 Howard) 756 (1838); *DeLashmet v. McClellen,* 152 Miss. 781, 118 So. 904 (1928).

**(15) Statements in Documents Affecting an Interest in Property.** Rule 803(15) provides that statements of fact in land documents constitute a hearsay exception. The circumstances under which land documents are made supply the hearsay exception guarantees of reliability and trustworthiness. The rule provides for the exclusion of statements when they fail to comply with the guarantee of trustworthiness. At any rate, many of these documents would be admissible under the conventional ancient document rule.

**(16) Statements in Ancient Documents.** The ancient documents rule is a traditionally recognized exception in Mississippi. The exception is limited to statements in documents prepared before January 1, 1998, due to the risk that the exception could otherwise be used as a vehicle to admit vast amounts of unreliable electronically stored information (ESI). Given the exponential development and growth of electronic information since 1998, the hearsay exception for ancient documents had become a possible open door for large amounts of unreliable ESL as no showing of reliability needs to be made to qualify under the exception.

In certain cases – such as cases involving latent diseases and environmental damage – parties must rely on hardcopy documents from the past. The ancient documents exception remains available in such cases for documents prepared before 1998. The need to admit old hardcopy documents produced after January 1, 1998, should decrease, because reliable ESI is likely to be available and can be offered under a reliability-based hearsay exception. Rule 803(6) may be used for many of these ESI documents, especially given its flexible standards on which witnesses might be qualified to provide an adequate foundation. And Rule 803(24) can be used to admit old documents upon a showing of reliability – which will often (though not always) be found by circumstances such as that the document was prepared with no litigation motive in mind, close in time to the relevant events. The limitation of the ancient documents exception is not intended to raise an inference that 20-year-old documents are, as a class, unreliable, or that they should somehow not qualify for admissibility under Rule 803(24). Finally, many old documents can be admitted for the non-hearsay purpose of proving notice, or as party-opponent statements.

The limitation of the ancient documents hearsay exception is not intended to have any effect on authentication of ancient documents. The possibility of authenticating an old document under Rule 901(b)(8) – or under any ground available for any other document – remains unchanged.

A party will often offer hardcopy that is derived from ESL A good deal of old information in hardcopy has been digitized or will be so in the future. Under Rule 803(16), a document is "prepared" when the statement proffered was recorded in that document. For example, if a hardcopy document is prepared in 1995, and a party seeks to admit a scanned copy of that document, the date of preparation is 1995 even though the scan was made long after that – the subsequent scan does not alter the document. The relevant point is the date on which the information is recorded, not when the information is prepared for trial. However, if the content of the document is itself altered after the cutoff date, then the hearsay exception would not apply to statements that were added in the alteration.

**(17) Market Reports, Commercial Publications.** This rule, for the most part, codifies existing practice. Mississippi has previously recognized an exception for mortality tables and market reports. *See Tucker v. Donald,* 60 Miss. 460 (1882) and *Yazoo & M.V.R. Co. v. M. Levy & Sons,* 141 Miss 199, 106 So. 525 (1925). The extension to existing practice is in the area of commercial publications. However, the guarantees of trustworthiness for mortality tables and market reports is similar, if not identical, to that for commercial publication. The public, in each case, relies on the publication.

**(18) Learned Treatise.** Rule 803(18) differs significantly from pre-rule Mississippi practice. It allows statements in learned treatises to be admitted as substantive evidence. This is a departure from Mississippi law which only provided for impeachment use of treatises. *Tucker v. Donald,* 60 Miss. 460 (1882); *Catholic Diocese of Natchez-Jackson v. Jaquith,* 224 So. 2d 216 (Miss. 1969). However, under the rule the statements are only admissible after (1) the witness testifies that the treatise is reliable, (2) another expert so testifies, or (3) the court takes judicial notice. Even then the treatise may not be used substantively unless the witness relied upon it in his testimony on direct examination or the witness was questioned about it on cross-examination. The rule explicitly states that the statements may not be given to the jury as exhibits; they may only be read to the jury. To submit the treatise to the jury would be to give its written statements more emphasis than the oral testimony presented to the jury.

**(19) Reputation Concerning Personal or Family History.** This rule is akin to the common law exception relating to family pedigree, although the rule is broader. For instance, a non-familial associate of a person may testify about the personal or family history of that person. The Mississippi court, however, has been moving towards this principle. *See Hathaway v. North,* 190 Miss 697, 1 So. 2d 490 (1941). The rule as stated is a recognition that knowledge of a person's history extends throughout his sphere, to family, friends, and community. This reputation evidence may be used for substantive evidence.

**(20) Reputation Concerning Boundaries or General History.** This rule codifies existing Mississippi law. *See,*for example, *Nixon v. Porter,* 34 Miss. 697 (1858).

**(21) Reputation as to Character.** This exception is concerned only with the hearsay aspect of reputation evidence. The exception is, in effect, a reiteration in the context of hearsay of Rule 405(a). Limitations upon admissibility based on other grounds are in Rules 404 and 608.

**(22) Judgment of Previous Conviction.** Rule 803(22) is a significant departure from traditional Mississippi practice. Past Mississippi practice has been to exclude judgments of convictions as substantive evidence of the facts which sustain it. *Gholson v. Smith,* 210 Miss. 28, 48 So. 2d 603 (1950). Under 803(22), however, evidence of a judgment of guilty in a felony-grade case is admissible as substantive evidence of any fact essential to uphold the judgment. It is not available where the judgment is based on a plea of nolo contendere or on a misdemeanor conviction. The theory for the exclusion of the misdemeanor conviction is based on practicality. Motivation to defend a misdemeanor charge is often minimal.

The exception does not include evidence of the conviction of a third person, offered against the accused in a criminal case, to prove any fact essential to uphold the judgment.

**(23) Judgment as to Personal, Family or General History, or Boundaries.** This rule is similar to Rule 803(22). It is related to Rules 803(19) and (20) which admit reputation evidence as hearsay exceptions.

**(24) Other Exceptions.** The rule reflects the realization that the law is not stagnant. As the FRE Advisory Committee Note indicates, it would be presumptuous to assume that the contemporary legal community has enumerated every single hearsay exception which possible could exist. The exceptions are not a closed system, and Rule 803(24) and its counterpart Rule 804(b)(5) allow for the future development of the law when the guarantees of reliability and trustworthiness can be found. While these two rules allow for judicial discretion, they do not permit an unfettered discretion which could ultimately devour the hearsay rule. Before admitting statements under this rule, the judge must make a finding that the statements being offered are sufficiently trustworthy and reliable. *See Cummins v. State,* 515 So. 2d 869 (Miss. 1987). One of the clearest examples of the circumstances meeting the criteria of Rule 803(24) is found in *Dallas County v. Commercial Union Assur. Co.,* 286 F.2d 388 (5th Cir. 1961).

**(25) Tender Years Exception.** Some factors that the court should examine to determine if there is sufficient indicia of reliability are (1) whether there is an apparent motive on declarant's part to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; (5) the timing of the declarations; (6) the relationship between the declarant and the witness; (7) the possibility of the declarant's faulty recollection is remote; (8) certainty that the statements were made; (9) the credibility of the person testifying about the statements; (10) the age or maturity of the declarant; (11) whether suggestive techniques were used in eliciting the statement; and (12) whether the declarant's age, knowledge, and experience make it unlikely that the declarant fabricated. Corroborating evidence may not be used as an indicia of reliability. *Smith v. State,* 925 So. 2d 825, 837 (Miss. 2006); *Hennington v. State,* 702 So. 2d 403, 415 (Miss. 1997). A finding that there is a substantial indicia of reliability should be made on the record.

Mississippi's pre-rule tender years exception did not define "tender years." *See Williams v. State,* 427 So. 2d 100 (Miss. 1983). Many jurisdictions limit their analogous exceptions to declarants under the age of fourteen years. However, the exception should not be necessarily limited to a specific chronological age. In appropriate cases, the exception might apply when the declarant is chronologically older than fourteen years, but the declarant has a mental age less than fourteen years.

Corroboration required for admissibility under MRE 803(25)(B)(ii) need not be eyewitness testimony or physical evidence, but may include confessions, doctors' reports, inappropriate conduct by the child, and other appropriate expert testimony.

When any of the hearsay exceptions in Rule 803 are applied in a criminal case, the rights of the defendant under the Confrontations Clauses of Federal and State Constitutions must be respected. *Crawford v. Washington,* 124 S. Ct. 1354 (2004) (The confrontation clause forbids "admission of testimonial statements of a witness who did not appear at trial unless [the witness is] unavailable to testify, and the defendant had had a prior opportunity for cross-examination."); *Davis v. Washington,* 126 S. Ct. 2266 (2006) (Among other things, prior testimony, depositions, affidavits, and confessions are testimonial, as are other statements to police if "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."). *See also Osborne v. State,* 942 So. 2d 193 (Miss. Ct. App. 2006) (applying Rule 803(25) in light of *Crawford* and finding video of child's statements produced at the direction of the district attorney testimonial but no confrontation clause violation because child testified and was subject to cross-examination); *Bell v. State,* 928 So. 2d 951 (Miss. 2006) (child's statements to police testimonial and therefore improperly admitted under 803(2)); *Hobgoodv. State,* 926 So. 2d 847 (Miss. 2006) (applying Rule 803(25) in light of *Crawford* and finding statements by children to family members and health care providers not testimonial but similar statements to police testimonial); *Foley v. State,* 914 So. 2d 677 (Miss. 2005) (statements made as part of "neutral medical evaluations" not testimonial and properly admitted under 803(4) and 803(25)). (Amended effective July 1, 2009; "Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling; amended effective July 1, 2020.)

## JUDICIAL DECISIONS

### ANALYSIS

Business records.
Child's hearsay statements of abuse.
Co-conspirator.
Commercial publications.
Consistency of child's statement.
Excited utterances.
Learned treatise.
Medical treatment.
Necessity.
Police reports.

Present sense impression.
Public records and reports.
Recorded recollection.
Regularly conducted activity.
State of mind.
Tender years exception.
Then-existing mental condition.
Trustworthiness.
Illustrative cases.

**Business records.**

Trial court did not err in defendant's trial for embezzlement by allowing a warranty manager for a trucking company to testify about the data the manager used to compile a spreadsheet on defendant's repair orders for the company or by admitting electronic payments and truck stop receipts into evidence. The information and data the manager obtained from an electronic payment service system belonged to the trucking company, while the electronic payments and truck stop receipts were properly authenticated by the general manager for the truck stop. Russell v. State, — So. 3d —, 2021 Miss. App. LEXIS 57 (Miss. Ct. App. Feb. 2, 2021), cert. denied, 321 So. 3d 564, 2021 Miss. LEXIS 205 (Miss. 2021).

Because an equipment rental company established the foundation requirements necessary to admit bid summaries and invoices under the business records exception to the hearsay rule, the chancellor did not abuse her discretion by allowing those documents into evidence. M & R Builders, LLC v. Williams Equip. & Supply Co., 281 So. 3d 320, 2019 Miss. App. LEXIS 393 (Miss. Ct. App. 2019).

Circuit court did not abuse its discretion in admitting memoranda of billable-charge invoicing documentation, as they were created in the regular course of business by employees of appellee; the employee explained that he created memoranda of billable charges based on information from project managers, and while he was not on site visually inspecting the project, it was not necessary to call all participants who made the record. Roberts Contr., Inc. v. Mersino Dewatering Inc., 270 So. 3d 994, 2018 Miss. App. LEXIS 474 (Miss. Ct. App. 2018).

Trial court did not abuse its discretion by excluding the telephone records from evidence when offered through a deputy's testimony where the records were hearsay and to have been admitted as records of regularly conducted activity they would have needed a sponsoring witness or to be self-authenticated. Parvin v. State, 212 So. 3d 863, 2016 Miss. App. LEXIS 101 (Miss. Ct. App. 2016), cert. denied, 2017 Miss. LEXIS 95 (Miss. Mar. 9, 2017), cert. denied, — U.S. —, 138 S. Ct. 140, 199 L. Ed. 2d 36, 2017 U.S. LEXIS 5483 (U.S. 2017).

Appellant had 20 days from the date of March 28, 2014 to appeal to the circuit court, but she filed her appeal on August 18, 2014, over four months late; the copy of the decision dated March 28, with the line stating "date mailed March 28," and resent to appellant on July 29, was admissible evidence of mailing under the business-records hearsay exception, and as appellant offered no proof of good cause other than her own statement that she never received the March 28 decision, which was not enough, her appeal was properly dismissed as untimely. Smith v. Miss. Dep't of Empl. Sec., 212 So. 3d 860, 2016 Miss. App. LEXIS 33 (Miss. Ct. App. 2016).

Admission of an uncertified Radar Unit Certification as a business record, with the arresting officer as the custodian, violated defendant's right to confront the person who performed the radar calibration since the officer did not have knowledge of the contents of the Radar Unit Certification and was unable to testify as to its accuracy. Freeman v. State, 121 So. 3d 888, 2013 Miss. LEXIS 312 (Miss. 2013).

As appellee did not call a custodian of the record of DNA test results to testify, and did not notify appellant under Miss. R. Evid. 902(11)(C)(i) of her intent to offer the DNA results as a self-authenticating business record under Miss. R. Evid. 803(6), the trial court erred in admitting them. Ivy v. Ivy (In re Estate of Ivy), 121 So. 3d 226, 2012 Miss. App. LEXIS 816 (Miss. Ct. App. 2012), cert. denied, 121 So. 3d 918, 2013 Miss. LEXIS 487 (Miss. 2013).

At trial, the director of medical records for a center, stated that she served as the custodian of all center records, and testified as to the authenticity of the husband's center records; she also testified as to the center's regular practice of maintaining their medical records. The chancellor and the parties were already aware of the records since the guardian ad litem used the records to compile her report for the court, and since the husband's records were available to both parties; therefore, there was no abuse of discretion in the chancellor's admission of the records, as they fell within Miss. R. Evid. 803(6) and were properly authenticated. Jones v. Jones, 43 So. 3d 465, 2009 Miss. App. LEXIS 946 (Miss. Ct. App. 2009), cert. denied, 49 So. 3d 106, 2010 Miss. LEXIS 463 (Miss. 2010).

Pursuant to Miss. R. Evid. 803(6), while the trial judge abused discretion in allowing a store receipt to be admitted into evidence without a proper foundation as no one from the store authenticated the receipt, that error was harmless because defendant's friend testified that he drove defendant to that store, that he went into the store with defendant, that they purchased a television, and that defendant used a credit card to pay for it; thus, defendant was not prejudiced by the receipt from the store being admitted into evidence. Smith v. State, 984 So. 2d 295, 2007 Miss. App. LEXIS 643 (Miss. Ct. App. 2007).

Inadmissible evidence cannot contribute to a legally sufficient evidentiary basis for a verdict, and therefore in a case involving breach of contract, computer generated invoices did not meet the standard for admission under Miss. R. Evid. 803(6) where there was no explanation of how they were created or testimony that the reprints were created at or near the time that the charges were incurred for the sale or lease of large equipment; as such, the trial court did not err by removing this evidence when it considered a motion for judgment notwithstanding the verdict. H & E Equip. Servs., LLC v. Floyd, 959 So. 2d 578, 2007 Miss. App. LEXIS 428 (Miss. Ct. App. 2007).

Defendant's robbery conviction was proper pursuant to Miss. R. Evid. 803(6) because police radio logs were admissible as a business records exception to the hearsay rule, since radio logs were records of regularly conducted business activity. Cabrere v. State, 920 So. 2d 1062, 2006 Miss. App. LEXIS 100 (Miss. Ct. App. 2006).

In a child support case, medical evidence presented by a father to show that he was unable to work due to a injuries suffered in a childhood accident was not accepted by a chancery court because it constituted hearsay; a third document was not accepted because there was no testimony of a custodian under Miss. R. Civ. 803(6), and the document was not self-authenticated under Miss. R. Evid. 902(11).Davison v. Miss. Dep't of Human Servs., 938 So. 2d 912, 2006 Miss. App. LEXIS 716 (Miss. Ct. App. 2006).

Trial court erred in admitting medical records based solely on the wife's testimony, but the error was harmless as the evidence in the medical records was cumulative to other evidence. Fulton v. Fulton, 918 So. 2d 877, 2006 Miss. App. LEXIS 22 (Miss. Ct. App. 2006).

The testimony of a pediatrician, regarding his notes made from conversations with other treating physicians, could not be considered plain error where defense counsel failed to timely object on the basis that the testimony was hearsay. Additionally, the medical records included in the pediatrician's testimony would have otherwise been admissible under Miss. R. Evid. 803(6), as they would have been presumed reliable since they were kept in the ordinary course of business. McClain v. State, 929 So. 2d 946, 2005 Miss. App. LEXIS 602 (Miss. Ct. App. 2005), cert. denied, 929 So. 2d 923, 2006 Miss. LEXIS 294 (Miss. 2006).

In an action concerning underinsured motorist benefits, the witness testified she was an employee of the insurer with the knowledge of the contents of the computer-generated document, its preparation, and how to access the documents from storage on her computer. The witness testified to the contents of the document in question, which recorded every transaction on the insurance policy, and to exactly how each number on the page came to be, and she further testified as to how the computer system functioned; the record reflected that each of the subject entries were done in the course of regular business with the insurer and all the requirements for admission of said document under Miss. R. Evid. 803(6) and 901(b) were met. Ferguson v. Snell, 905 So. 2d 516, 2004 Miss. LEXIS 1488 (Miss. 2004).

Trial court did not abuse its discretion in excluding a memorandum from the corporation offered by an individual as the memo did not come in as a business record, since the individual's witness never testified that it was made at or near the time by, or from information transmitted by, a person with knowledge; that it was kept in the course of regularly conducted business activity; and that it was the regular practice of that business activity to make the memorandum. Welsh v. Mounger, 883 So. 2d 46, 2004 Miss. LEXIS 781 (Miss. 2004).

In a prosecution for timber theft, settlement sheets showing the value of the timber were improperly authenticated by an investigator who had not prepared them; however, as there was also competent testimony on the same issue, the error was harmless. Chisolm v. State, 856 So. 2d 681, 2003 Miss. App. LEXIS 868 (Miss. Ct. App. 2003).

Public safety department printout of defendant's driving record was admissible under Miss. R. Evid. 803(8) after having been certified as correct by the signature of the custodian of the records, and because the record was under seal, it was self-authenticated pursuant to Miss. R. Evid. 902(1); this printout met requirement of Miss. Code Ann. § 63-11-30(2)(c) for evidence of two prior driving-under-the-influence convictions of defendant, and no prejudice resulted from the admission of the corroborating justice court record in this regard. Doolie v. State, 856 So. 2d 669, 2003 Miss. App. LEXIS 642 (Miss. Ct. App. 2003).

In a wrongful death/product liability case, an accident investigation report was admissible as a business record because the report was generated in the regular course of business. Yale Materials Handling Corp. v. Brandon, 2002 Miss. LEXIS 180 (Miss. May 23, 2002), dismissed, op. withdrawn, 2003 Miss. LEXIS 21 (Miss. Jan. 16, 2003).

Under subsection (6), the reliability of the information in business records was determined by the competence of the compiler of the information and not the extent of the consumer's reliance on information received from another source. Harveston v. State, 798 So. 2d 638, 2001 Miss. App. LEXIS 439 (Miss. Ct. App. 2001).

In a prosecution for murder arising from an armed robbery of a business, it was error to allow an investigator to testify from a business ledger that indicated that money was missing from the business, notwithstanding that the custodian of the record was the murder victim, as the proper witness to authenticate the ledger was the victim's daughter, who was involved to some extent in the business and was familiar with how the business was run. Flowers v. State, 773 So. 2d 309, 2000 Miss. LEXIS 266 (Miss. 2000).

The proper foundation for a business record was shown where (1) the record – a ledger – was found in a store in which several murdered victims were found, (2) the custodian of the records was unavailable as she was one of the murder victims, and (3) the investigator who discovered the record at the scene and the victim's daughter testified as to the record. Flowers v. State, 2000 Miss. LEXIS 116 (Miss. May 11, 2000), op. withdrawn, sub. op., 773 So. 2d 309, 2000 Miss. LEXIS 266 (Miss. 2000).

In a personal injury action arising from a motor vehicle accident, a letter from the plaintiff's deceased treating physician to the plaintiff's attorney expressing an opinion that the plaintiff was permanently disabled as a result of the accident was not admissible under subsection (6) since the letter was prepared in anticipation of litigation and was not a record of regularly conducted activities. Gilbert v. Ireland, 758 So. 2d 1050, 2000 Miss. App. LEXIS 114 (Miss. Ct. App. 2000).

In a prosecution for defrauding the state government and uttering forgery, the court erroneously permitted a state investigator to testify as to the contents of insurance investigative reports as he was not involved in preparing the insurance files, did not work directly for the insurance companies, and did not even know the adjusters. Logan v. State, 1999 Miss. App. LEXIS 182 (Miss. Ct. App. Apr. 20, 1999), rev'd, 2000 Miss. LEXIS 128 (Miss. May 25, 2000).

A certificate of calibration of an intoxilyzer is admissible under the business records exception to the hearsay rule. Harkins v. State, 735 So. 2d 317, 1999 Miss. LEXIS 129 (Miss. 1999).

**Child's hearsay statements of abuse.**

Youth court erred in disregarding the Mississippi Rules of Evidence because to admit the hearsay statements of the child, the youth court had to determine whether the testimony fell within any of the hearsay exceptions. D.T. v. Hinds Cnty. Youth Court (In re J.T.), 188 So. 3d 1192, 2016 Miss. LEXIS 165 (Miss. 2016).

Child's best interests are served when adjudication decisions are based upon reliable evidence; the Mississippi Rules of Evidence, including subsections (24) and (25), have been crafted to facilitate that endeavor and have afforded trial judges substantial discretion where it serves that purpose. D.T. v. Hinds Cnty. Youth Court (In re J.T.), 188 So. 3d 1192, 2016 Miss. LEXIS 165 (Miss. 2016).

Trial court did not err in allowing testimony of the victim, given that her statements were properly found to be reliable; nothing indicated that the child had a reason to lie, plus four people heard her statements, which were made within two months of the incident and within a short period of time. Whittle v. State, 182 So. 3d 1285, 2015 Miss. App. LEXIS 669 (Miss. Ct. App. 2015).

In a statutory rape case, there was no abuse of discretion in a trial court's admission of an eight-year-old victim's out-of-court statements to three witnesses under the tender years hearsay exception of Miss. R. Evid. 803(25) because the statements were reliable, consistent, and spontaneous, and the three witnesses were credible. Furthermore, there was a lack of evidence disputing that the child was particularly likely to be telling the truth when the contested statements were made. Bridgeman v. State, 58 So. 3d 1208, 2010 Miss. App. LEXIS 593 (Miss. Ct. App. 2010).

Statements of a child sex abuse victim were admissible under Miss. R. Evid. 803(25) because the victim was under the age of twelve such that the presumption of tender years existed and because the defendant failed to make a contemporaneous objection to the admission of testimony of the victim's social worker or school counselor. Derouen v. State, 994 So. 2d 748, 2008 Miss. LEXIS 587 (Miss. 2008).

Circuit court did not err by admitting the victim's mother's testimony that the victim told her that defendant tried to rape her under the hearsay exception of Miss. R. Evid. 803(25), and therefore defendant's motion for a new trial was properly denied, because the circuit court did not err when it weighed the reliability factors, as: (1) no witness testified that the victim had a boyfriend and therefore a motive to lie; (2) the fact that the victim made her statement to her mother did not render the statement, without more, unreliable; (3) the victim's statement came after her mother asked her what was wrong; and (4) there was no indication that the mother provoked the statement or that it was the product of suggestion. Foxworth v. State, 982 So. 2d 453, 2007 Miss. App. LEXIS 751 (Miss. Ct. App. 2007), cert. denied, 981 So. 2d 298, 2008 Miss. LEXIS 241 (Miss. 2008).

In a criminal prosecution for sexual battery, the trial court did not commit reversible error in failing to conduct a Miss. R. Evid. 803(25) hearing outside of the presence of the jury to determine the admissibility of statements the child victim made to witnesses for the State. The error was not raised at trial and the statements, if hearsay, would fit within one of the hearsay exceptions. Perry v. State, 904 So. 2d 1122, 2004 Miss. App. LEXIS 974 (Miss. Ct. App. 2004).

**Co-conspirator.**

Under Miss. R. Evid. 803(d)(2)(E), any statements made between co-conspirators in the course of the furtherance of the conspiracy had the necessary guarantee of trustworthiness the court required to address the right to confrontation. Bush v. State, 895 So. 2d 836, 2005 Miss. LEXIS 93 (Miss. 2005).

**Commercial publications.**

Use of printed labels on pre-packaged, unopened, over-the-counter medications to prove defendant's possession of pseudoephedrine with knowledge that it would be used to manufacture a controlled substance, in violation of Miss. Code Ann. § 41-29-313(2)(c), was proper because the ingredients listed were sufficiently trustworthy for admission into evidence as a hearsay exception within the purview of Miss. R. Evid. 803(17) and thus overcome defendant's hearsay and Sixth Amendment Confrontation Clause objections. Burchfield v. State, 892 So. 2d 191, 2004 Miss. LEXIS 1346 (Miss. 2004).

Testimony as to an estimate of the market share of the plaintiff's share of revenue from a gas well was admissible under subsection (17) where the testimony was based on the witness' recollection of market reports in a newspaper. TXG Intrastate Pipeline Co. v. Grossnickle, 716 So. 2d 991, 1997 Miss. LEXIS 512 (Miss. 1997).

**Consistency of child's statement.**

Defendant's murder conviction was appropriate because the trial judge was within his discretion in determining that the victim's four-year-old brother was competent to testify against defendant and other testimony was properly admitted under Miss. R. Evid. 803(24) as showing the consistency of the brother's account. Osborne v. State, 942 So. 2d 193, 2006 Miss. App. LEXIS 134 (Miss. Ct. App.), cert. denied, 942 So. 2d 164, 2006 Miss. LEXIS 714 (Miss. 2006).

**Excited utterances.**

In a case in which defendant was convicted of driving under the influence, the sergeant's testimony that two motorists advised him that the truck that defendant was in was weaving in the roadway was not hearsay and constituted an excited utterance because, while the motorists did not witness the actual accident, they clearly were under the stress of assisting defendant's rescue from a wrecked, burning truck immediately after seeing him weaving on the highway. Burke v. State, 256 So. 3d 637, 2018 Miss. App. LEXIS 200 (Miss. Ct. App.), cert. denied, 256 So. 3d 594, 2018 Miss. LEXIS 451 (Miss. 2018).

Trial court did not abuse its discretion in admitting a witness's statements as excited utterances because the witness was standing right next to the victim when he was shot twice, and the witness's statement was made within approximately ten minutes of the shooting; the statement was unsolicited, and when a detective was asked if he could tell whether the witness was visibly upset, he testified, "Yes, he was." Harris v. State, 242 So. 3d 181, 2017 Miss. App. LEXIS 579 (Miss. Ct. App. 2017).

Defendant's conversation with his brother, as relayed by a detective at trial, was not hearsay within hearsay because defendant's conversation with his brother was excepted from the hearsay rule as a statement against interest; and the brother's conversation with the detective was admissible under the excited-utterance exception to the hearsay rule as defendant's early-morning phone call awakened and startled his brother, and the brother spoke to the detective within a relatively short time of his conversation with defendant. Further, there was no evidence that the testimony was unduly prejudicial as the testimony was probative to present the jury with a complete account of the facts of the case. Affleck v. State, 210 So. 3d 1067, 2015 Miss. App. LEXIS 675 (Miss. Ct. App. 2015), cert. denied, 203 So. 3d 598, 2016 Miss. LEXIS 388 (Miss. 2016), cert. denied, 2016 Miss. LEXIS 391 (Miss. Sept. 15, 2016), cert. denied, 580 U.S. 1128, 137 S. Ct. 1091, 197 L. Ed. 2d 201, 2017 U.S. LEXIS 1278 (U.S. 2017).

Trial court did not err in admitting a digital recording of the victim's 911 call under the excited utterance exception to the hearsay rule, as the victim had just been robbed at gunpoint and immediately relayed the details during the call. Harris v. State, 174 So. 3d 314, 2015 Miss. App. LEXIS 428 (Miss. Ct. App. 2015).

Trial court did not abuse its discretion by admitting into evidence the victim's statement to a friend during a phone conversation relating that she was in the closet because it was an excited utterance, as the friend testified that the victim had sounded upset during conversation and the victim was shot to death in the closet moments later. Holliman v. State, 178 So. 3d 689, 2015 Miss. LEXIS 470 (Miss. 2015).

Hearsay statements of a murder victim's wife were properly admitted as excited utterances, as they were made 10 to 20 minutes after the shooting, and the witness to whom they were made testified that the wife seemed to be in shock and was visibly "shaken up." Barron v. State, 130 So. 3d 531, 2013 Miss. App. LEXIS 314 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 61 (Miss. 2014).

During defendant's trial for capital murder arising from the death of his girlfriend's son, the trial court did not err by admitting the daughter's hearsay statement to her mother that defendant beat the victim with a stick until the child stopped moving; while the statement was made two hours after the incident, the child spent the great majority of the time following the incident in the presence of the perpetrator and appeared to still be under great stress when she made the statement. The statement qualified as an excited utterance under Miss. R. Evid. 803(2). Eubanks v. State, 28 So. 3d 607, 2009 Miss. App. LEXIS 303 (Miss. Ct. App. 2009), cert. denied, 27 So. 3d 404, 2010 Miss. LEXIS 83 (Miss. 2010).

Trial court did not err by admitting into evidence statements defendant's girlfriend made to witnesses who responded to the accident scene shortly after the wreck implicating defendant as excited utterances under Miss. R. Evid. 803(2) because the statements were made shortly after the trauma of the wreck in which the girlfriend sustained injuries and after searching for and finding her small daughter seriously injured. Harris v. State, 979 So. 2d 721, 2008 Miss. App. LEXIS 197 (Miss. Ct. App. 2008).

Defendant's conviction was proper pursuant to Miss. R. Evid. 803(2) because the transcript of the 911 call fell within the excited utterance exception to the hearsay rule since it related to the events that were unfolding as it was made. Cabrere v. State, 920 So. 2d 1062, 2006 Miss. App. LEXIS 100 (Miss. Ct. App. 2006).

Social worker was properly allowed to testify as to statements made by the victim in a child-fondling case because Miss. R. Evid. 803(25) applied, and considering the social worker's testimony at the preliminary hearing and the trial court's review of the videotape of the interview, the victim's statements at the interview bore substantial indicia of reliability. Further, defendant's right to confrontation was not violated because the victim testified at trial and defendant cross-examined her. Elkins v. State, 918 So. 2d 828, 2005 Miss. App. LEXIS 483 (Miss. Ct. App. 2005), cert. denied, 921 So. 2d 1279, 2006 Miss. LEXIS 26 (Miss. 2006), cert. denied, 547 U.S. 1194, 126 S. Ct. 2865, 165 L. Ed. 2d 898, 2006 U.S. LEXIS 4564 (U.S. 2006).

In a criminal prosecution for aggravated assault, an officer's testimony as to the victim's statement at the crime scene that defendant was a shooter was hearsay. However, the excited utterance exception applied; the victim was still under the stress of the situation when he made the statement. Bankston v. State, 907 So. 2d 966, 2005 Miss. App. LEXIS 80 (Miss. Ct. App. 2005).

Confession made three days after the murder was improperly considered an excited utterance. Brooks v. State, 903 So. 2d 691, 2005 Miss. LEXIS 191 (Miss. 2005).

In a murder case, the trial court did not err in denying defendant's motion to bar the hearsay statement attributed to his mother, confessing to another witness what defendant had done and repeated by the other witness, as there was sufficient testimony to show that the mother was upset and hysterical; therefore, it was an admissible excited utterance. Brooks v. State, 905 So. 2d 678, 2004 Miss. App. LEXIS 616 (Miss. Ct. App. 2004), rev'd, 903 So. 2d 691, 2005 Miss. LEXIS 191 (Miss. 2005).

Trial court did not err in admitting statements that a victim made to a relative shortly after a sexual assault as excited utterances because the evidence showed that the statements were made immediately after the victim was released, and the relative testified that the victim was in a state of shock when the statements were made. McCoy v. State, 878 So. 2d 167, 2004 Miss. App. LEXIS 53 (Miss. Ct. App.), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 910 (Miss. 2004).

Circuit court did not abuse its discretion in finding that the witness's hearsay statement was admissible where the victim was anxious and admitted that he was scared; therefore the statement was an excited utterance under Miss. R. Evid. 803(2). Cox v. State, 849 So. 2d 1257, 2003 Miss. LEXIS 337 (Miss. 2003).

Victim's statement to a sheriff's deputy at the hospital shortly after her rape by defendant after he had merely asked her what was wrong was properly admitted as an excited utterance, especially where she was clearly still under the stress of the situation. Mapp v. State, 843 So. 2d 742, 2003 Miss. App. LEXIS 347 (Miss. Ct. App. 2003).

Trial court did not abuse its discretion in refusing to allow statements by witnesses to police to be admitted into defendant's robbery and assault trial as excited utterances. Davis v. State, 850 So. 2d 1136, 2002 Miss. App. LEXIS 250 (Miss. Ct. App. 2002), cert. denied, 837 So. 2d 771, 2003 Miss. LEXIS 218 (Miss. 2003), cert. denied, 540 U.S. 828, 124 S. Ct. 57, 157 L. Ed. 2d 53, 2003 U.S. LEXIS 6136 (U.S. 2003).

Statements of a 104-year-old rape victim made to neighbors immediately after the crime was committed were admissible under Miss. R. Evid. 803(2) as excited utterances. Ward v. State, 821 So. 2d 894, 2002 Miss. App. LEXIS 406 (Miss. Ct. App. 2002).

An excited utterance is a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition; Miss. R. Evid. 803(2); spontaneity is the key with this exception; statements are not excited utterances if there was nothing "excited" about them. Randall v. State, 806 So. 2d 185, 2001 Miss. LEXIS 243 (Miss. 2001), overruled in part, Ambrose v. State, 254 So. 3d 77, 2018 Miss. LEXIS 326 (Miss. 2018).

In a divorce proceeding, it was error for the court to exclude testimony by the wife regarding statements by the parties' nine-year-old daughter about her fears and stomach pains; such testimony was admissible under the exceptions for present sense impression, excited utterance, and then-existing mental, emotional, or physical conditions. Holladay v. Holladay, 776 So. 2d 662, 2000 Miss. LEXIS 194 (Miss. 2000).

In a murder prosecution, although it was proper for a witness to testify to statements made by the victim that he might be dying and that he wanted to tell his daughter that he loved her, it was improper for the witness to testify that an unidentified bystander, who was aiding the victim, told her that the victim then identified "Rodney" as his assailant, and her testimony that those who were giving aid to the victim were "excited" did not cure the error. Jones v. State, 763 So. 2d 210, 2000 Miss. App. LEXIS 304 (Miss. Ct. App. 2000).

In a prosecution for the kidnapping of a seven year old child, his statements to his mother immediately after the events constituted excited utterances where he was visibly upset and was crying. Lacking v. State, 775 So. 2d 731, 2000 Miss. App. LEXIS 131 (Miss. Ct. App. 2000).

In a prosecution for murder and aggravated assault arising from the stabbing death of one victim and stabbing of her four year child, a statement in which the child identified the defendant as the assailant was properly admitted as an excited utterance, notwithstanding that the statement was not made until several hours after the assault, where the statement was the first thing the child said to his great grandmother after she discovered him bleeding and in an apparent state of shock. Barnett v. State, 757 So. 2d 323, 2000 Miss. App. LEXIS 136 (Miss. Ct. App. 2000).

In a prosecution for armed robbery, the trial court properly allowed the introduction of evidence that the victim identified the defendant as his assailant about 30 minutes after being beaten with a metal pipe where he was able to drive to city hall and report the crime and informed the dispatcher of the crime immediately upon his arrival. Hampton v. State, 755 So. 2d 1241, 2000 Miss. App. LEXIS 20 (Miss. Ct. App. 2000).

In a prosecution for kidnapping and of touching a child for lustful purposes, statements made by the young victim to his mother shortly after the incident were admissible under the exception for excited utterances where the statements were made immediately after the incident at issue while the victim was visibly upset and crying. Lacking v. State, 1999 Miss. App. LEXIS 610 (Miss. Ct. App. Nov. 9, 1999), op. withdrawn, sub. op., 775 So. 2d 731, 2000 Miss. App. LEXIS 131 (Miss. Ct. App. 2000).

Where a police officer never testified as to witnesses' apparent state of mind, their being flustered or excited or otherwise under the stress of the event, the court could not conclude that the statements of the witnesses were properly admitted as excited utterances. Edwards v. State, 736 So. 2d 475, 1998 Miss. App. LEXIS 1130 (Miss. Ct. App. 1998).

In a prosecution for murder during the commission of arson, it was error for the court to permit testimony as an excited utterance where there was no evidence in the record to ascertain at what point after the fire the statement was made. Smith v. State, 733 So. 2d 793, 1999 Miss. LEXIS 85 (Miss. 1999).

Statements by witnesses to a police officer that they saw the defendant running were not excited utterances since the police officer never testified as to the witnesses' apparent state of mind, their being flustered or excited or otherwise under the stress of the event. Edwards v. State, 736 So. 2d 475, 1998 Miss. App. LEXIS 1130 (Miss. Ct. App. 1998).

In a prosecution for murder, the court properly permitted the introduction into evidence of a statement by the defendant's brother that his sister shoot his wife; such statement constituted an excited utterance where it was made during a 911 emergency call and was repeated to the first officer on the scene; the fact that the defendant's brother did not witness the shooting did not require a contrary result, as he heard the gunshot and was obviously traumatized when he discovered the victim's body. Carter v. State, 722 So. 2d 1258, 1998 Miss. LEXIS 564 (Miss. 1998).

In a prosecution for conspiracy, sexual battery, and rape, the court did not err when it allowed the 13 year old victim's mother to testify that, when asked if anything had happened to her before she returned home, the victim replied "yes, mama, and it hurted," since the victim was quite agitated at the time of the statement and spoke out of the traumatic events to which she had been subjected only a short time before. Simmons v. State, 722 So. 2d 666, 1998 Miss. LEXIS 538 (Miss. 1998).

A statement made by a witness to the effect that he was very angry was not an excited utterance since the statement was made about one hour after the events at issue and, therefore, the witness was not impeded in his capacity for reflection. Owens v. State, 716 So. 2d 534, 1998 Miss. LEXIS 99 (Miss. 1998).

Transcript and tape of 911 emergency call made by victim during shooting were properly admitted under excited utterance exception to the hearsay rule. Clark v. State, 693 So. 2d 927, 1997 Miss. LEXIS 162 (Miss. 1997).

Rape victim's statement to her sister, made less than 24 hours after assault, was admissible as either a statement offered to rebut a charge of recent fabrication or improper motive, or as an excited utterance. Heflin v. State, 643 So. 2d 512, 1994 Miss. LEXIS 470 (Miss. 1994), overruled, Owens v. State, 666 So. 2d 814, 1995 Miss. LEXIS 625 (Miss. 1995).

Hearsay statements of murder victim's retarded 18-year-old son, that defendant was responsible for attack on his mother, were admissible under either present sense impression or excited utterance exceptions to the hearsay rule. Marks v. State, 532 So. 2d 976, 1988 Miss. LEXIS 425 (Miss. 1988).

Statements by alleged child sexual abuse victim did not qualify as excited utterances because the child did not report the incident until two weeks later, when questioned by her babysitter. Mitchell v. State, 539 So. 2d 1366, 1989 Miss. LEXIS 141 (Miss. 1989), overruled in part, Derouen v. State, 994 So. 2d 748, 2008 Miss. LEXIS 587 (Miss. 2008).

**Learned treatise.**

Granting of a directed verdict in favor of a physician provider, a physician, and a medical center, in a claim for medical malpractice was appropriate pursuant to Miss. R. Evid. 803(18) because neither a doctor or any other expert witness testified that the journal in question was a reliable authority. Thus, neither the journal, nor the article contained within it, was established as a reliable authority.

Hartel v. Pruett, 998 So. 2d 979, 2008 Miss. LEXIS 578 (Miss. 2008).

Trial court erred by allowing the parents' attorney to cross-examine two defense witnesses using an encyclopedia summary page printed from a university website and a textbook chapter under the learned treatises exception of Miss. R. Evid. 803(18) because the encyclopedia summary and textbook were not established as reliable authorities by either of the parents' two experts, the parents did not offer an expert to establish either article's authority, and the trial court did not take judicial notice of either article's authority. Bullock v. Lott, 964 So. 2d 1119, 2007 Miss. LEXIS 521 (Miss. 2007).

**Medical treatment.**

In a sexual battery case, the seven-year-old victim's mental health and medical records were properly excluded because the records briefly alluding to the facts that the victim's parents neglected her and her brother and abused drugs were irrelevant; notes from counseling sessions did not suggest that the victim fabricated her allegations against defendant in order to manipulate anyone; and the relevant statements were not made by the victim or her grandmother to the counselor for the purpose of diagnosis or treatment. McCammon v. State, 299 So. 3d 873, 2020 Miss. App. LEXIS 28 (Miss. Ct. App.), cert. denied, 299 So. 3d 794, 2020 Miss. LEXIS 297 (Miss. 2020).

Trial court did not err in defendant's trial for statutory rape, sexual battery of a minor child, and gratification of lust by allowing testimony from a registered nurse who treated the alleged victim as the nurse read the medical history from the victim's medical records. Whittaker v. State, 269 So. 3d 1226, 2018 Miss. App. LEXIS 409 (Miss. Ct. App. 2018).

Admission of the victim's recorded interview with a forensic interviewer did not prejudice defendant because he was a member of the household when the victim made her initial complaint to the authorities; a mere technicality of defendant having to move out of the family home did not prohibit the application of the rule. Dandass v. State, 233 So. 3d 856, 2017 Miss. App. LEXIS 247 (Miss. Ct. App. 2017), cert. denied, 2017 Miss. LEXIS 517 (Miss. Dec. 7, 2017).

Circuit court did not abuse its discretion in defendant's trial for sexual battery when it allowed a nurse's testimony regarding statements the minor victim made during a medical examination of the victim because the victim's statements as to the identity of defendant were pertinent to the nurse's treatment of the victim, based on the nurse's concern regarding the potential for further inappropriate contact between the defendant and the victim. Grant v. State, 198 So. 3d 400, 2016 Miss. App. LEXIS 139 (Miss. Ct. App. 2016).

Youth court did not abuse its discretion in excluding a psychological report because although the report contained some statementsthat could fall within the medical diagnosis or treatment exception to the hearsay rule, it also included the psychologist's impressions of the child and opinions regarding her mental health and credibility, which did not fit within the exception; because the mother failed to subpoena the psychologist, he did not testify and was not subject to cross-examination. Lewis v. Jackson Cnty. Youth Court (In the Interest of E.G.), 191 So. 3d 763, 2016 Miss. App. LEXIS 178 (Miss. Ct. App. 2016).

Two letters that were allegedly from a psychiatrist and a therapist who had treated the husband were prepared for the divorce case and were not statements made for the purpose of medical diagnosis or treatment; thus, they were not admissible under the medical diagnosis or treatment exception to the hearsay rule. Williams v. Williams, 179 So. 3d 1242, 2015 Miss. App. LEXIS 592 (Miss. Ct. App. 2015).

It was not an abuse of discretion to deny a motion in limine to exclude entries found in a consulting physician's clinic notes where he had examined the patient and prepared the notes in the context of offering advice and a second opinion for her ongoing medical problems, the clinic notes were medical records, the consultative note and statement regarding the first physician's prior treatment and evaluation were generated during the course of the consulting physician's examination, and thus, they were admissible under Miss. R. Evid. 803(4) and (6). Marie v. North, 180 So. 3d 624, 2015 Miss. LEXIS 518 (Miss. 2015).

Defendant waived his claim that the victims' video-recorded statements, which identified him as the perpetrator of the crime, constituted inadmissible hearsay because defendant withdrew his motion in limine by conceding that the statements were made for the purposes of diagnosis and treatment and, therefore, were admissible as nonhearsay statements; the audio records of the statements were marked, entered into evidence, and played for the jury without any objection from defense counsel. Cook v. State, 161 So. 3d 1057, 2015 Miss. LEXIS 192 (Miss. 2015).

Trial court was within its discretion to admit a doctor's testimony regarding the forensic investigation he conducted on the victim and statements the victim made during the interview because the interview was crucial to determine if the victim needed further medical assistance, and defendant was the victim's half-brother who lived in the same household. Mitchum v. State, 164 So. 3d 477, 2014 Miss. App. LEXIS 514 (Miss. Ct. App. 2014), cert. denied, 163 So. 3d 301, 2015 Miss. LEXIS 244 (Miss. 2015).

Admission of the doctor's testimony that, based on his expertise and education, the victim's behavior was consistent with other children that had been sexually abused was not an abuse of discretion, as it was within the scope of his expert-witness designation. Carpenter v. State, 132 So. 3d 1053, 2013 Miss. App. LEXIS 551 (Miss. Ct. App. 2013), cert. denied, 132 So. 3d 579, 2014 Miss. LEXIS 142 (Miss. 2014).

Because the Mississippi Department of Human Services requested that the doctor interview the child victim to determine whether she had been sexually abused and to determine the best course of treatment for her, including isolating her from her abuser if he was a member of her household, the doctor's interview was admissible as a hearsay exception. Carpenter v. State, 132 So. 3d 1053, 2013 Miss. App. LEXIS 551 (Miss. Ct. App. 2013), cert. denied, 132 So. 3d 579, 2014 Miss. LEXIS 142 (Miss. 2014).

In defendant's trial on a charge of statutory rape wherein the victim was defendant's fourteen-year-old daughter, the trial court properly admitted, under Miss. R. Evid. 803(4), hearsay statements during the testimony of the nurse who examined the victim because statements made by the victim and her mother for the purpose of the victim receiving medical treatment were admissible and statements identifying defendant as the abuser were reasonably pertinent to treatment and relied upon in diagnosis and treatment. Pittman v. State, 109 So. 3d 599, 2013 Miss. App. LEXIS 63 (Miss. Ct. App. 2013).

Trial court did not abuse its discretion in admitting the hearsay statements of the victim's mother through a doctor because the mother's statements fell within the medical-diagnosis exception to the hearsay rule found in Rule 803(4); although the mother was not in a patient-physician relationship with the doctor, she told the doctor about defendant's sexual abuse for purposes of the victim's medical diagnosis. Webb v. State, 113 So. 3d 592, 2012 Miss. App. LEXIS 818 (Miss. Ct. App. 2012), cert. denied, 121 So. 3d 918, 2013 Miss. LEXIS 494 (Miss. 2013).

Defendant's conviction for fondling a child for the purpose of gratifying his lust was appropriate because although Miss. R. Evid. 803(4) and (6) were broad enough to encompass the reports compiled by the school nurse following her interview with the victim, the circuit court did not abuse its discretion in excluding the reports since they related to the victim's accusations against her stepfather, not defendant. Furthermore, the circuit court's decision to exclude the reports did not prejudice or adversely affect defendant, especially since the circuit court permitted the school nurse to testify regarding her interview with the victim. Walker v. State, 55 So. 3d 212, 2011 Miss. App. LEXIS 92 (Miss. Ct. App. 2011).

Testimony of a hospital social worker as to a victim's statements was properly admitted under Miss. R. Evid. 803(4), as the circumstances surrounding the statements indicated substantial trustworthiness; the statements were made after a violent crime victim had just been brought into the hospital and were made in the company of a nurse and a police officer. Cox v. State, 66 So. 3d 182, 2010 Miss. App. LEXIS 669 (Miss. Ct. App. 2010), cert. denied, 65 So. 3d 310, 2011 Miss. LEXIS 350 (Miss. 2011).

Statements contained in the abuse record were made for the purpose of medical diagnosis and treatment, and the report was relied upon by a hospital in treating defendant's child; further, because the vast majority of the abuse record was cumulative of other evidence presented at trial, any error that resulted from admission of the abuse record was harmless. Anthony v. State, 23 So. 3d 611, 2009 Miss. App. LEXIS 930 (Miss. Ct. App. 2009).

Statements to doctors and therapists by a parent of an injured child qualify as statements for the purpose of medical diagnosis or treatment; the fact that information obtained via a medical history comes from the patient's mother does not affect the admissibility of the statements therein. Anthony v. State, 23 So. 3d 611, 2009 Miss. App. LEXIS 930 (Miss. Ct. App. 2009).

Scope of Miss. R. Evid. 803(4) includes the identification of the purported abuser under the theory that a part of the treatment of an abused child includes reasonable efforts to eliminate the abuser's access to the child. Anthony v. State, 23 So. 3d 611, 2009 Miss. App. LEXIS 930 (Miss. Ct. App. 2009).

Miss. R. Evid. 803(4) applies to statements made to non-medical personnel, including psychologists; this exception also allows for the admission of statements which relate to the source or cause of the medical problem. Anthony v. State, 23 So. 3d 611, 2009 Miss. App. LEXIS 930 (Miss. Ct. App. 2009).

Denial of workers' compensation benefits to an employee was inappropriate because the employee reported to the emergency room nurse and his physical therapist that he experienced pain and numbness after lifting a heavy desk at work and the medical records showed credence to the veracity the employee's testimony, Miss. R. Evid. 803(4). The employee met his burden of proving by a preponderance of evidence that he experienced an injury during the scope and course of his employment, and that the accident was causally connected to his claimed disability. Short v. Wilson Meat House, LLC, 37 So. 3d 50, 2009 Miss. App. LEXIS 333 (Miss. Ct. App. 2009), rev'd, 36 So. 3d 1247, 2010 Miss. LEXIS 310 (Miss. 2010).

Finding in favor of a psychiatrist in a negligence action after the decedent killed herself was proper, in part because the personal representative had argued that statements did not meet the trustworthiness requirements of Miss. R. Evid. 803(4). However, the representative failed to provide the supreme court with any directions as to the specific testimony at issue; without support from the record, the supreme court was not required to rule upon the merits of the representative's argument. Young v. Guild, 7 So. 3d 251, 2009 Miss. LEXIS 193 (Miss. 2009).

Hearsay testimony identifying a perpetrator in a child sexual abuse case is admissible under Miss. R. Evid. 803(4) regardless of whether he or she is a member of the child's immediate household. The overriding question making the inquiry necessary is "Will the perpetrator have access to the child in the future that would allow the sexual abuse to continue?" Valmain v. State, 5 So. 3d 1079, 2009 Miss. LEXIS 142 (Miss. 2009).

Nothing in the plain language of Miss. R. Evid. 803(4) restricts its application to statements made by a patient to a treating physician. To the contrary, Rule 803(4) casts its net wider than the patient-physician relationship. Valmain v. State, 5 So. 3d 1079, 2009 Miss. LEXIS 142 (Miss. 2009).

During defendant's trial for sexual battery of a child, the court did not abuse its discretion under Miss. R. Evid. 803(4) in admitting the mother's statements to the nurse who was examining her child; because defendant would have access to the victim in the future that would allow the sexual abuse to continue, the identification of defendant was admissible under Rule 803(4). Valmain v. State, 5 So. 3d 1079, 2009 Miss. LEXIS 142 (Miss. 2009).

Court did not err by admitting testimony of a forensic interviewer that consisted of the victim identifying her sexual assailant as her father because the purpose of the interview was to ascertain if the victim needed further medical attention and to judge whether her claims were credible. The victim's statement to the interviewer was one that a physician would rely upon in providing medical care and therapy, and the interviewer never stated that the victim was telling the truth. Branch v. State, 998 So. 2d 411, 2008 Miss. LEXIS 545 (Miss. 2008).

Under Miss. R. Evid. 803(4), the admission of the nurse's statement reading parts of the victim's medical records into evidence was harmless and did not require reversal of defendant's sexual battery conviction because (1) defendant never disputed that he broke into the victim's home while carrying a knife or that he had intercourse with the victim; (2) the victim testified at trial as to all the facts contained in the nurse's statement; (3) the jury listened to the 9-1-1 recording on which the victim repeatedly screamed "please don't stab me" as defendant entered her bedroom and heard the struggle that ensued between defendant and the victim; and (4) there was overwhelming evidence that the intercourse was not consensual in the form of the victim's testimony, the 9-1-1 recording, and the cuts and scratches on the victim's body from defendant's knife. Goldman v. State, 9 So. 3d 394, 2008 Miss. App. LEXIS 525 (Miss. Ct. App. 2008), cert. denied, 12 So. 3d 531, 2009 Miss. LEXIS 222 (Miss. 2009).

Victim's doctor's testimony was relevant and admissible as it pertained to the victim's diagnosis and treatment where it was clear that the doctor's testimony related solely to issues consistent with the victim's treatment; the statement that "her mother's ex-boyfriend was sexually abusing her" was the type of information doctors relied upon to diagnose and treat patients under these circumstances. Morgan v. State, 995 So. 2d 812, 2008 Miss. App. LEXIS 351 (Miss. Ct. App.), cert. denied, 999 So. 2d 374, 2008 Miss. LEXIS 661 (Miss. 2008).

Defendant's murder conviction was appropriate pursuant to Miss. R. Evid. 803(4) where a doctor's testimony was appropriately admitted. The purpose of the doctor's session with the victim's brother was relevant to her treatment and recommendation that the brother seek counseling and therapy for the trauma that he suffered as a result of witnessing the victim's death. Osborne v. State, 942 So. 2d 193, 2006 Miss. App. LEXIS 134 (Miss. Ct. App.), cert. denied, 942 So. 2d 164, 2006 Miss. LEXIS 714 (Miss. 2006).

In a child custody case, a social worker was properly determined to be an expert witness under Miss. R. Evid. 702 based on her education and experience, and the social worker was allowed to testify regarding her therapy sessions with the child under Miss. R. Evid. 803(4). Giannaris v. Giannaris, 962 So. 2d 574, 2006 Miss. App. LEXIS 668 (Miss. Ct. App. 2006), rev'd, 960 So. 2d 462, 2007 Miss. LEXIS 399 (Miss. 2007).

Trial court had not erred by allowing the statements of 5 year-old rape victim to be brought before the jury through the testimony of medical professionals who examined or interviewed her because the statements to doctors were admissible under Miss. R. Evid. 803(4) as statements made for the purposes of medical treatment, and thus an exception to the hearsay rule of exclusion. Foley v. State, 914 So. 2d 677, 2005 Miss. LEXIS 586 (Miss. 2005).

Trial court had not erred by allowing the statements of 5 year-old rape victim to be brought before the jury through the testimony of medical professionals who examined or interviewed her because the statements to doctors were statements made for the purposes of medical treatment, and thus an exception to the hearsay rule of exclusion. And, the statements were made as apart of neutral medical evaluations and thus were not testimonial and defendant's confrontation clause violation argument was without merit. Foley v. State, 914 So. 2d 677, 2005 Miss. LEXIS 586 (Miss. 2005).

The testimony of a pediatrician, regarding his notes made from conversations with other treating physicians, could not be considered plain error where defense counsel failed to timely object on the basis that the testimony was hearsay. Additionally, Miss. R. Evid. 803(4) stated that the rule eliminated any distinction made between narrative statements made to a treating physician and those made to an examining physician who was retained for use as an expert witness in litigation and permitted statements made both for treating and diagnostic purposes, the statements made to the pediatrician by the other treating physicians were admissible. McClain v. State, 929 So. 2d 946, 2005 Miss. App. LEXIS 602 (Miss. Ct. App. 2005), cert. denied, 929 So. 2d 923, 2006 Miss. LEXIS 294 (Miss. 2006).

Trial court did not err in admitting doctor's testimony about statements the victim made to him during her examination, in which she described the assault, as the statements were made in the course of treatment and were the type of statements a doctor reasonably relied on during the course of treatment. Davis v. State, 878 So. 2d 1020, 2004 Miss. App. LEXIS 246 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 964 (Miss. 2004), cert. denied, 543 U.S. 1051, 125 S. Ct. 880, 160 L. Ed. 2d 773, 2005 U.S. LEXIS 474 (U.S. 2005).

Trial court was held to have committed no error where medical record evidence of one of the victim's statements to a doctor that his fellow victim went on a "rampage" was not made for treatment purposes, under Miss. R. Evid. 803(4), and thus was inadmissible hearsay. Jones v. State, 856 So. 2d 285, 2003 Miss. LEXIS 363 (Miss. 2003).

Physician was contacted to evaluate a victim for possible sexual abuse; because the physician's actions were for the purposes of diagnosis and treatment, her testimony was relevant and admissible under subsection (4). Taylor v. State, 836 So. 2d 774, 2002 Miss. App. LEXIS 319 (Miss. Ct. App. 2002), cert. denied, 835 So. 2d 952, 2003 Miss. LEXIS 719 (Miss. 2003).

Subsection (4) allows statements made for the purpose of diagnosis or treatment to be introduced into evidence; where statements taken by a doctor from children were used by the doctor in his diagnosis and treatment as directed by the trial court, the requirements of the exception were met. B.R.C. v. State (In the Interest of S.C.), 795 So. 2d 526, 2001 Miss. LEXIS 244 (Miss. 2001).

Scope of Rule 803(4) includes the identification of a purported child abuser under the theory that a part of the treatment of a sexually abused child includes reasonable efforts to eliminate the abuser's access to the child. Rowlett v. State, 791 So. 2d 319, 2001 Miss. App. LEXIS 300 (Miss. Ct. App. 2001), cert. dismissed, 947 So. 2d 960, 2007 Miss. LEXIS 46 (Miss. 2007).

Before admitting evidence that fell under the medical diagnosis hearsay exception pursuant to subsection(4), a two-part test had to be met: the declarant's motive in making the statement had to be consistent with the purposes of promoting treatment, and the content of the statement had to be such as was reasonably relied on by a physician in treatment. Rice v. State, 815 So. 2d 1227, 2001 Miss. App. LEXIS 481 (Miss. Ct. App. 2001).

In a prosecution for sexual battery of a 10-year-old child, three physicians were properly permitted to testify regarding out-of-court statements made by the victim, including the identification of the defendant as the perpetrator, where (1) the physicians relied on the child's statements regarding the sexual battery she suffered at the hands of the defendant, (2) the child had come into contact with the defendant before the incident at issue as shown by her testimony that she had seen him hanging around her neighborhood, and (3) the child's mother knew who the defendant was and stated that she had seen him many times smoking cigarettes in the area of their home. Marshall v. State, 812 So. 2d 1068, 2001 Miss. App. LEXIS 131 (Miss. Ct. App. 2001).

A physician's testimony regarding statements made by a four-year-old child during diagnosis and treatment did not lack the requisite trustworthiness notwithstanding the trial judge's expressed concern as to the physician's note-taking during interviews with the victim, as opposed to the more practical and trustworthy practice of audio or audiovisual recording. Moore v. State, 773 So. 2d 984, 2000 Miss. App. LEXIS 576 (Miss. Ct. App. 2000).

In a prosecution for conspiracy, sexual battery, and rape, the court did not err when it allowed a physician to testify about statements made by the 11 and 13 year old victims during his examinations of them, since such statements were elicited by the physician in order to determine the proper course of medical treatment to pursue. Simmons v. State, 722 So. 2d 666, 1998 Miss. LEXIS 538 (Miss. 1998).

Doctor's statement regarding child's identification of defendant as her abuser was properly admitted as a statement made for the purpose of medical treatment. Eakes v. State, 665 So. 2d 852, 1995 Miss. LEXIS 555 (Miss. 1995).

Statements made by child sexual abuse victims to physicians identifying immediate household members as perpetrators are admissible as this information is used to promote treatment by the immediate removal of the child from the household; however, hearsay statements pertaining to non-household members are not admissible because this information does not promote medical treatment. Jones v. State, 606 So. 2d 1051, 1992 Miss. LEXIS 442 (Miss. 1992); Hennington v. State, 702 So. 2d 403, 1997 Miss. LEXIS 637 (Miss. 1997).

Before admitting evidence pursuant to subdivision (4) of this rule, a two-part test must be met: declarant's motive in making statement must be consistent with purposes of promoting treatment, and content of statement must be such as is reasonably relied on by a physician in treatment. Doe v. Doe, 644 So. 2d 1199, 1994 Miss. LEXIS 528 (Miss. 1994).

**Necessity.**

Although the trial court failed to make an on-the-record finding that the hearsay evidence was more probative on the point for which was it offered than any other evidence, the error was harmless because there was overwhelming evidence to support the jury's finding that defendant was guilty of the charged crimes. Robinson v. State, 248 So. 3d 892, 2018 Miss. App. LEXIS 240 (Miss. Ct. App. 2018), cert. denied, 263 So. 3d 665, 2019 Miss. LEXIS 91 (Miss. 2019).

**Police reports.**

In a case in which defendant was convicted for failure to register as a sex offender, the trial court was right to exclude a police report as hearsay but still allow a detective's testimony about the address defendant gave him. Durr v. State, 186 So. 3d 903, 2015 Miss. App. LEXIS 468 (Miss. Ct. App. 2015).

The court properly refused to allow the introduction into evidence of a police report regarding an assault allegedly committed by the defendant where it was obvious that the defendant sought to introduce the report for the sole purpose of using improper hearsay statements contained therein to contradict testimony provided at trial. Bingham v. State, 723 So. 2d 1189, 1998 Miss. App. LEXIS 977 (Miss. Ct. App. 1998).

**Present sense impression.**

Present-sense-impression exception to the hearsay rule did not apply to a defense witness's testimony regarding the victim's statement because the victim made the statement in response to the witness's question; the witness stated that he asked the victim and defendant what they were doing, to which the victim replied they were smoking marijuana. Scott v. State, 231 So. 3d 1024, 2016 Miss. App. LEXIS 404 (Miss. Ct. App. 2016), aff'd, 231 So. 3d 995, 2017 Miss. LEXIS 440 (Miss. 2017).

Witness's testimony that the victim once told her that defendant was following her was admissible under an exception to the hearsay rule as she was testifying regarding the victim's present sense impression because the witness's testimony indicated that the victim identified defendant while he was looking at him; and she testified that the victim and defendant had worked together in the past, so they knew each other. Ellis v. State, 196 So. 3d 1029, 2015 Miss. App. LEXIS 680 (Miss. Ct. App. 2015), cert. denied, 202 So. 3d 613, 2016 Miss. LEXIS 316 (Miss. 2016).

Trial court did not abuse its discretion by admitting into evidence the victim's statement to her sister that she was leaving defendant because it was evidence of the victim's existing state of mind and intent as she removed clothing from her closet and put it in her car. The victim's statement to a friend that she wanted a divorce also described her state of mind and intent at the time she made her statement. Holliman v. State, 178 So. 3d 689, 2015 Miss. LEXIS 470 (Miss. 2015).

Text message which the murder victim sent to a friend about one hour before the victim's death, in which the victim asked the friend to come save the victim, and a telephone conversation which the victim had with neighbors shortly before the victim's death, in which the victim was upset and crying because defendant was being mean to the victim, were admissible into evidence as present sense impressions or then-existing mental or emotional state exceptions to the hearsay rule. Kuebler v. State, 205 So. 3d 623, 2015 Miss. App. LEXIS 461 (Miss. Ct. App. 2015), rev'd, 204 So. 3d 1220, 2016 Miss. LEXIS 462 (Miss. 2016).

Circuit court did not abuse its discretion in admitting a witness's testimony regarding how he learned the identity of the man he saw running as either a present-sense impression or an excited utterance because there was a brief amount of time between the shooting and the declarant's statement to the witness and the other bystanders. McKnight v. State, 187 So. 3d 635, 2015 Miss. App. LEXIS 276 (Miss. Ct. App. 2015), cert. denied, 188 So. 3d 575, 2016 Miss. LEXIS 142 (Miss. 2016).

Trial court's exclusion of the victim's letters and the text message to the defendant cannot be said to have been an abuse of discretion because they were inadmissible hearsay because the declarant, the victim, testified as a witness at trial and, thus, she was not unavailable as a witness under any of the applicable unavailability definitions for a statement against interest or present-sense impression. Kirk v. State, 160 So. 3d 685, 2015 Miss. LEXIS 68 (Miss. 2015).

In defendant's trial on a charge of armed robbery, the trial court's admission of a police officer's testimony, regarding the victim's description of the perpetrator, as hearsay under the present sense impression, Miss. R. Evid. 803(1), was harmless error because the victim testified before the officer and described the man who had robbed her store, so the jury had already heard the evidence, the jury also viewed surveillance footage allowing them to see what the perpetrator was wearing, and, as such, the impact of the statement was so insignificant that it could not have contributed to the guilty verdict in any meaningful way. Lewis v. State, 110 So. 3d 814, 2013 Miss. App. LEXIS 105 (Miss. Ct. App. 2013), cert. denied, 131 So. 3d 577, 2014 Miss. LEXIS 22 (Miss. 2014).

Defendant's murder conviction for the killing of his grandmother was proper because her account of what happened was properly presented as a dying declaration under Mississippi Rule of Civil Procedure 804(b)(2) and as a present-sense impression under Mississippi Rule of Civil Procedure 803(1). The first thing that the grandmother told the officer when he arrived at her home was that defendant had shot her; thinking that she would die and wanting whoever found her and defendant's grandfather to know who had killed them, the grandmother scrawled writings in her own blood in the hallway leading to the stairwell. Sanders v. State, 63 So. 3d 554, 2010 Miss. App. LEXIS 130 (Miss. Ct. App. 2010), aff'd, 63 So. 3d 497, 2011 Miss. LEXIS 193 (Miss. 2011).

Admission of testimony by a child's mother was improper under Miss. R. Evid. 803(25) because there was no hearing conducted; moreover, it was inadmissible under Miss. R. Evid. 803(1), (2) because the child made the statement to the mother long after alleged sexual abuse. However, the error was harmless where the evidence came in through Miss. R. Evid. 803(4) due to an examination by a doctor. Pierce v. State, 2 So. 3d 641, 2008 Miss. App. LEXIS 90 (Miss. Ct. App. 2008), cert. denied, 999 So. 2d 1280, 2009 Miss. LEXIS 93 (Miss. 2009), cert. denied, 558 U.S. 846, 130 S. Ct. 113, 175 L. Ed. 2d 74, 2009 U.S. LEXIS 5318 (U.S. 2009).

Defendant's conviction was proper pursuant to Miss. R. Evid. 803(1) because the 911 call to the emergency operator fell within the present sense impression to the hearsay rule since the events leading up to the call were sufficiently contemporaneous to fit within the exception. Cabrere v. State, 920 So. 2d 1062, 2006 Miss. App. LEXIS 100 (Miss. Ct. App. 2006).

Where defendant was charged with aggravated assault, an eyewitness to the shooting was permitted to testify that the declarant told her that defendant had a gun, and immediately after the declarant made the statement, she jumped out of the car and ran for shelter; the hearsay statement was admissible as both an excited utterance and a present sense impression under Miss. R. Evid. 803(1), (2). Wheeler v. State, 943 So. 2d 106, 2006

Miss. App. LEXIS 866 (Miss. Ct. App. 2006).

Finding against the heir in her wrongful death action was proper where statements made by the decedent regarding what the physician instructed him to do were rightfully excluded. The statements did not fall under Miss. R. Evid. 803(1) because they were not made while the decedent was perceiving the event or immediately thereafter. Richardson ex rel. Wrongful Death Heirs of Richardson v. DeRouen, 920 So. 2d 1044, 2006 Miss. App. LEXIS 84 (Miss. Ct. App. 2006).

Trial judge properly denied defendant's motion in limine, ruling that the eyewitness statement was both a present sense impression and an excited utterance, and therefore, an exception to the hearsay rule of Miss. R. Evid. 803(1) and 803(2); at most, there were only seconds between the time the eyewitness's observation of defendant's actions and his relaying of what he saw to the police; the out-of-court statement was spontaneous and made only seconds after the events. Ward v. State, 881 So. 2d 316, 2004 Miss. App. LEXIS 868 (Miss. Ct. App. 2004).

Where defendant was prosecuted after a controlled drug buy involving an informant and other officers, defendant was not prejudiced as the result of the admission of one officer's statement on the audiotape where that officer did not testify at trial. Defendant was able to cross-examine each and every witness the State offered, and there was no violation of defendant's constitutional rights of confrontation and cross-examination; further, the statement itself was not the incriminating evidence, it was not offered to prove the truth of the matter asserted, it qualified as a present sense impression, and it was not inadmissible hearsay. Burton v. State, 875 So. 2d 1120, 2004 Miss. App. LEXIS 600 (Miss. Ct. App. 2004).

Statements made to a 911 operator by the owner of a trailer where defendant had just murdered her husband relating events that had occurred while the owner was asleep in the trailer or repeated statements made to the owner by defendant, were hearsay statements under Miss. R. Evid. 801(c) that did not fall within the Miss. R. Evid. 803(1) present sense exception to the hearsay rule; as the owner was asleep when the murder took place, his statements to the 911 operator were not made while he was perceiving the occurence of the murder or immediately thereafter. Moore v. State, 859 So. 2d 379, 2003 Miss. LEXIS 654 (Miss. 2003).

Trial court did not abuse its discretion in denying defendant's motion for continuance where no manifest injustice resulted from the denial; defendant did not present any evidence that he was unable to call a witness at a trial which lasted three weeks. Cox v. State, 849 So. 2d 1257, 2003 Miss. LEXIS 337 (Miss. 2003).

Circuit court did not abuse its discretion in finding that the witness's hearsay statement was admissible, as the victim contemporaneously related the event to the witness; therefore the statement was a present sense impression under Miss. R.Evid. 803(1). Cox v. State, 849 So. 2d 1257, 2003 Miss. LEXIS 337 (Miss. 2003).

In a divorce proceeding, it was error for the court to exclude testimony by the wife regarding statements by the parties's nine-year-old daughter about her fears and stomach pains; such testimony was admissible under the exceptions for present sense impression, excited utterance, and then existing mental, emotional, or physical conditions. Holladay v. Holladay, 776 So. 2d 662, 2000 Miss. LEXIS 194 (Miss. 2000).

In a prosecution for possession of cocaine and possession of marijuana, a narcotics investigator was properly permitted to testify that he picked up a baggy found on the ground below the defendant's truck door and sarcastically asked a rhetorical question similar to "who does this belong to" or "what is this" and that the defendant's four-year-old son promptly blurted out, "It belongs to my daddy;" it was unlikely that the child responded with an answer other than the truth, and the statement was admissible as a present sense impression. Mills v. State, 763 So. 2d 924, 2000 Miss. App. LEXIS 337 (Miss. Ct. App. 2000).

In a prosecution for kidnapping and of touching a child for lustful purposes, statements made by the young victim to his mother shortly after the incident could not be admitted under the exception for present sense impression as that exception requires a spontaneous statement and it appeared that some of the statements were prompted by questions posed by the victim's mother. Lacking v. State, 1999 Miss. App. LEXIS 610 (Miss. Ct. App. Nov. 9, 1999), op. withdrawn, sub. op., 775 So. 2d 731, 2000 Miss. App. LEXIS 131 (Miss. Ct. App. 2000).

The present sense impression rule requires a spontaneous statement, not one in response to a question; thus, for a witness to give a response to an officer's question is by definition not "spontaneous," no matter how soon it is made after the event that is the focus of the questioning. Edwards v. State, 736 So. 2d 475, 1998 Miss. App. LEXIS 1130 (Miss. Ct. App. 1998).

In a prosecution for conspiracy, sexual battery, and rape, the court did not err when it allowed the 13 year old victim's mother to testify that, when asked if anything had happened to her before she returned home, the victim replied "yes, mama, and it hurted," since the victim was quite agitated at the time of the statement and spoke out of the traumatic events to which she had been subjected only a short time before. Simmons v. State, 722 So. 2d 666, 1998 Miss. LEXIS 538 (Miss. 1998).

Transcript and tape of 911 emergency call made by victim during shooting were properly admitted under present sense impression exception to the hearsay rule. Clark v. State, 693 So. 2d 927, 1997 Miss. LEXIS 162 (Miss. 1997).

**Public records and reports.**

Lease was properly admitted and authenticated because as a public document under seal, duly recorded in the county board of supervisors' minutes and registered in the chancery court, the lease was both self-authenticated and non-excluded hearsay. Linde Health Care Staffing v. Claiborne County Hosp., 198 So. 3d 318, 2016 Miss. LEXIS 320 (Miss. 2016).

Youth court did not abuse its discretion by refusing to admit a psychological report because it did not fit the public record or report exception to the hearsay rule; the report was not from a public office or agency but from a private psychologist, and the report reflected the psychologist's opinions but contained few, if any, significant factual findings. Lewis v. Jackson Cnty. Youth Court (In the Interest of E.G.), 191 So. 3d 763, 2016 Miss. App. LEXIS 178 (Miss. Ct. App. 2016).

In a capital murder trial, the introduction of the victim's death certificate into evidence was proper under Miss. R. Evid. 803(9) and the authenticity of the death certificate was established by Miss. R. Evid. 902(4). Any failure to redact the time of injury from the certificate was unimportant in relation to everything else the jury considered on the issue in question. Birkhead v. State, 57 So. 3d 1223, 2011 Miss. LEXIS 99 (Miss. 2011).

Defendant's capital murder conviction was appropriate because his right to confrontation was not violated by the admission of the victim's death certificate into evidence. The death certificate was admissible as a public record under Miss. R. Evid. 902(4) and, while the trial court erred in allowing the death certificate into evidence showing the purported time of injury under Miss. R. Evid. 803(9), the error was harmless because witnesses testified that they could not be positive of the time of injury or the time of death. Birkhead v. State, 2009 Miss. LEXIS 73 (Miss. Feb. 19, 2009), op. withdrawn, sub. op., 57 So. 3d 1223, 2011 Miss. LEXIS 99 (Miss. 2011).

Trial court did not abuse its discretion by admitting into evidence during sentencing defendant's prior Texas conviction of second-degree robbery because it was relevant for the sentencing jury, consistent with Miss. Unif. Cir. & Cty. R. 10.04(B)(1), to consider; in addition, the documentation of the prior conviction and sentence was properly certified and authenticated according to the Acts of Congress, and therefore was admissible under Miss. R. Evid. 803(8) as an exception to the hearsay rule. Taggart v. State, 957 So. 2d 981, 2007 Miss. LEXIS 330 (Miss. 2007).

National Crime Information Center (NCIC) is a database of information provided by other law enforcement agencies, and as such those working for the NCIC and the NCIC itself do not observe those matters reported upon within their reports, and furthermore there is an issue of trustworthiness when one organization seeks to introduce records in its possession that were actually prepared by another; therefore, the NCIC report could not fall under the public records and reports exception. Singleton v. State, 948 So. 2d 465, 2007 Miss. App. LEXIS 52 (Miss. Ct. App. 2007).

There is no statutory provision mandating that Mississippi's justice courts obtain and record individuals' address information as either an activity of the justice court or as to matters observed pursuant to duty imposed by law as to which matters there was a duty to report; therefore, a computer printout of a justice court record containing defendant's address would not fall under Miss. R. Evid. 803(8), and would be inadmissible hearsay. Singleton v. State, 948 So. 2d 465, 2007 Miss. App. LEXIS 52 (Miss. Ct. App. 2007).

Information contained in the National Crime Information Center (NCIC) report and the justice court's computer print out containing his address was not a statement by defendant, and thus would not qualify as a prior inconsistent statement; therefore, as the two documents in question did not fall under either Miss. R. Evid. 803(8) or Miss. R. Evid. 613(b), the trial court erred in admitting them over defendant's objections, but the errors did not warrant reversal because they did not prejudice defendant. Singleton v. State, 948 So. 2d 465, 2007 Miss. App. LEXIS 52 (Miss. Ct. App. 2007).

State can use a self-authenticating certificate from a prison records custodian to overcome the presumption that an inmate timely filed a notice of appeal. Jewell v. State, 946 So. 2d 810, 2006 Miss. App. LEXIS 688 (Miss. Ct. App. 2006), cert. denied, 947 So. 2d 960, 2007 Miss. LEXIS 56 (Miss. 2007).

Trial court was within its sound discretion in finding that a disclaimer rendered an accident report untrustworthy as a public record and, therefore, was not excepted from the hearsay rule. Miss. R. Evid. 803(8). Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564, 2003 Miss. App. LEXIS 752 (Miss. Ct. App. 2003), aff'd in part and rev'd in part, 2005 Miss. LEXIS 21 (Miss. Jan. 13, 2005), aff'd in part and rev'd in part, 904 So. 2d 1077, 2005 Miss. LEXIS 247 (Miss. 2005).

Investigator properly testified about the contents of a crime laboratory report under Miss. R. Evid. 803(8). Brown v. State, 890 So. 2d 901, 2004 Miss. LEXIS 1104 (Miss. 2004), cert. denied, 544 U.S. 981, 125 S. Ct. 1842, 161 L. Ed. 2d 735, 2005 U.S. LEXIS 3424 (U.S. 2005).

Defendant's confrontation rights were not violated, even though defendant was unable to question the expert who performed the actual analysis on the substance found in defendant's home as required by Miss. R. Evid. 803(6), because another witness who was charged with verifying the results did testify, and the witness was capable of testifying to the test results and the chain of custody. Mooneyham v. State, 842 So. 2d 579, 2002 Miss. App. LEXIS 472 (Miss. Ct. App. 2002), cert. denied, 2003 Miss. App. LEXIS 394 (Miss. Ct. App. Feb. 27, 2003), cert. denied, 837 So. 2d 771, 2003 Miss. LEXIS 223 (Miss. 2003).

A birth certificate, which stated that a jazz musician who died in 1938 was the father of the appellee, was properly introduced into evidence in a proceeding in which the appellee claimed a share of the musician's estate as it contained sufficient indicia of trustworthiness. Harris v. Johnson (In re Estate of Johnson), 767 So. 2d 181, 2000 Miss. LEXIS 151 (Miss. 2000), cert. denied, 532 U.S. 959, 121 S. Ct. 1489, 149 L. Ed. 2d 376, 2001 U.S. LEXIS 2752 (U.S. 2001).

Computer generated records of the defendant's prior incarceration fell within the public records exception to the hearsay rule and were admissible as data compilations under subsection (8). Ficklin v. State, 758 So. 2d 457, 2000 Miss. App. LEXIS 133 (Miss. Ct. App. 2000).

The proponent need not give notice to the other party of the intent to offer computer printouts admitted into evidence under subsection (8). Ficklin v. State, 758 So. 2d 457, 2000 Miss. App. LEXIS 133 (Miss. Ct. App. 2000).

**Recorded recollection.**

During defendant's trial for aggravated DUI, the trial court did not err under

Miss. R. Evid. 803(5) in finding that a proper evidentiary foundation had been laid when it allowed a nurse to read from a form that was required to be completed by a medical official who drew a blood sample; the nurse's memory was completely exhausted and the nurse was unable to testify in any respect regarding the drawing of defendant's blood. Harness v. State, 58 So. 3d 12, 2009 Miss. App. LEXIS 262 (Miss. Ct. App. 2009), rev'd, 2010 Miss. LEXIS 270 (Miss. May 27, 2010), aff'd, 58 So. 3d 1, 2011 Miss. LEXIS 59 (Miss. 2011).

Facts surrounding a victim's statements did not satisfy the requirements for admittance under the recorded recollection rule because although the victim claimed he did not remember what the statements said during direct examination by the State, it was obvious that prior to admitting the statements, the trial court knew that the victim fully remembered the statements and explained to the trial court why he told the police that defendant shot him. Smith v. State, 25 So. 3d 313, 2008 Miss. App. LEXIS 614 (Miss. Ct. App. 2008), rev'd, 25 So. 3d 264, 2009 Miss. LEXIS 546 (Miss. 2009).

Defendant's conviction for possession marijuana with the intent to distribute was proper even though the trial court did improperly permit the State to introduce evidence forbidden by Miss. R. Evid. 803(5) because the appellate court was unable to say that the trial court's decision prejudiced defendant's case. Foster v. State, 928 So. 2d 873, 2005 Miss. App. LEXIS 733 (Miss. Ct. App. 2005), cert. denied, 929 So. 2d 923, 2006 Miss. LEXIS 309 (Miss. 2006).

Trial court did not err in refusing defense counsel's request to have victim's earlier statement read at trial as defendant had failed to demonstrate that the victim's recollection was insufficient to allow him to testify fully and accurately. Davis v. State, 850 So. 2d 1136, 2002 Miss. App. LEXIS 250 (Miss. Ct. App. 2002), cert. denied, 837 So. 2d 771, 2003 Miss. LEXIS 218 (Miss. 2003), cert. denied, 540 U.S. 828, 124 S. Ct. 57, 157 L. Ed. 2d 53, 2003 U.S. LEXIS 6136 (U.S. 2003).

**Regularly conducted activity.**

Defendant's conviction for fondling a child for the purpose of gratifying his lust was appropriate because although Miss. R. Evid. 803(4) and (6) were broad enough to encompass the reports compiled by the school nurse following her interview with the victim, the circuit court did not abuse its discretion in excluding the reports since they related to the victim's accusations against her stepfather, not defendant. Furthermore, the circuit court's decision to exclude the reports did not prejudice or adversely affect defendant, especially since the circuit court permitted the school nurse to testify regarding her interview with the victim. Walker v. State, 55 So. 3d 212, 2011 Miss. App. LEXIS 92 (Miss. Ct. App. 2011).

Defendant's convictions for two counts of capital murder and one count of robbery were appropriate because the contents of an actual trace run by the ATF were most likely admissible under Miss. R. Evid. 803(6). Therefore, any error in allowing a detective to testify regarding the result of the trace was harmless. Minter v. State, 64 So. 3d 518, 2011 Miss. App. LEXIS 17 (Miss. Ct. App.), cert. denied, 63 So. 3d 1229, 2011 Miss. LEXIS 322 (Miss. 2011).

Car dealership's former business manager's affidavit did not present a meritorious defense to the default judgment since the cancellation worksheet was inadmissible hearsay pursuant to Miss. R. Evid. 802; the manager failed to qualify the cancellation worksheet as an exception to the hearsay rule pursuant to Miss. R. Evid. 803(6), or authenticate the worksheet pursuant to Miss. R. Evid. 902; and because the dealership failed to assert a meritorious defense, its motion to set aside default judgment under Miss. R. Civ. P. 60(b)(6) was properly denied. Greater Canton Ford Mercury, Inc. v. Lane, 997 So. 2d 198, 2008 Miss. LEXIS 517 (Miss. 2008).

It is not necessary to call or to account for all participants who made a record; thus, admitting both an incident report as well as the testimony of the author of the report is unnecessary. Kroger Co. v. Scott, 809 So. 2d 679, 2001 Miss. App. LEXIS 230 (Miss. Ct. App. 2001).

An affidavit by a child support enforcement officer regarding contacts with the defendant father was a special document prepared in anticipation of litigation and, therefore, was not admissible under Rule 803(6); the fact that certain information contained in the affidavit was obtained from other records that perhaps could qualify for admissibility under the business records exception to the hearsay rule did not transform the affidavit itself into a business record. Mississippi State Dep't of Human Servs. v. Fargo, 771 So. 2d 935, 2000 Miss. App. LEXIS 261 (Miss. Ct. App. 2000).

In a prosecution for defrauding the Mississippi Department of Public Safety and the Mississippi Tax Commission and uttering forgery arising from the defendant's operation of a business rebuilding salvaged trucks, the court properly allowed a senior special agent with the National Insurance Crime Bureau to testify from insurance investigative files prepared by adjusters from various insurance companies which were members of the the bureau. Logan v. State, 2000 Miss. LEXIS 128 (Miss. May 25, 2000), op. withdrawn, sub. op., 773 So. 2d 338, 2000 Miss. LEXIS 267 (Miss. 2000).

A univiersity police night supervisor was a qualified witness under subsection (6) of this rule where (1) he was present at the time that the victim came in to report the theft of his automobile, (2) he took the victim's oral complaint and then instructed another officer to prepare a written offense report, and (3) just prior to the time the victim appeared to report the theft of his automobile, the supervisor had spoken with a deputy about the possible theft of the very same vehicle and had performed a check of the campus parking decal to determine ownership. Hurt v. State, 757 So. 2d 1102, 2000 Miss. App. LEXIS 220 (Miss. Ct. App. 2000).

Information identifying the location of a particular residence as being within a particular jurisdiction according to official 911 records is admissible under subsection (6) of this rule. Hester v. State, 753 So. 2d 463, 1999 Miss. App. LEXIS 669 (Miss. Ct. App. 1999).

In an action in which a casino patron claimed that she won a jackpot while playing a slot machine, a written report made by a casino employee was properly admitted into evidence where (1) the employee was acting in the course of a regularly conducted activity when she made her report, (2) she made the report as required by casino policy and at the request of her superior, and (3) there was nothing to suggest untrustworthiness other than the plaintiff's allegation that the casino employee moved a reel on the slot machine. Mississippi Gaming Comm'n v. Freeman, 747 So. 2d 231, 1999 Miss. LEXIS 205 (Miss. 1999).

Where the only evidence of defendant's age came from the testimony of detective who obtained this information from defendant in an interview, this statement was not admissible under hearsay exception for records of regularly conducted activity, since although detective obtained defendant's age during regular course of investigation, the source was defendant, who was not himself routinely engaged in regularly conducted activity. Fisher v. State, 690 So. 2d 268, 1997 Miss. LEXIS 150 (Miss. 1997).

Although the coroner's autopsy report was erroneously admitted through the testimony of the County Medical Examiner, who had not personally conducted autopsy, error was harmless where it was established beyond reasonable doubt by evidence other than autopsy report that victim's cause of death was a gunshot wound inflicted by defendant and his gun. Gossett v. State, 660 So. 2d 1285, 1995 Miss. LEXIS 393 (Miss. 1995).

Custodian of crime lab records may introduce laboratory reports, except where defendant objects that his Sixth Amendment right to confront person who prepared the test is being violated, in which case defendant is entitled to have person who conducted the test appear and testify in person. Kettle v. State, 641 So. 2d 746, 1994 Miss. LEXIS 346 (Miss. 1994).

Statements of individual who turned guns over to FBI agent, although contained in FBI report, were not admissible under hearsay exception for records of a regularly conducted activity. Minnick v. State, 551 So. 2d 77, 1988 Miss. LEXIS 612 (Miss. 1988), rev'd, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489, 1990 U.S. LEXIS 6118 (U.S. 1990), overruled, Willie v. State, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

Letter written by physician to plaintiff's attorney, describing plaintiff's complaints and symptoms, as well as physician's diagnosis and treatment, was obviously prepared in anticipation of litigation rather than in course of regularly conducted business activity, and thus it was not admissible under business records exception to hearsay rule. Jones v. Hatchett, 504 So. 2d 198, 1987 Miss. LEXIS 2392 (Miss. 1987).

**State of mind.**

Wills contained the decedent's then-existing state of mind and were used to show his intent, which directly implicated the exception. Quinn v. Quinn, 278 So. 3d 1160, 2019 Miss. App. LEXIS 57 (Miss. Ct. App. 2019).

Although appellant contended that an individual's testimony regarding statements made by the decedent, which was obviously hearsay, was evidence of the decedent's intent, plan, and design regarding the boundary of appellant's property and that of the decedent's estate, and was admissible under the hearsay exception for state of mind evidence, the individual's testimony was actually either ambiguous as to when the statements were made, or he described the decedent speaking about her intent in the past tense; thus, the chancellor acted within her discretion in refusing to admit the proffered testimony as a statement of memory or belief regarding the boundary, which was not admissible under the hearsay exception. Russell v. Byrd (In re Estate of Wylie), 226 So. 3d 114, 2017 Miss. App. LEXIS 462 (Miss. Ct. App. 2017).

Murder victim's discussions with a family member and a close friend on the eve and morning of the victim's death regarding the victim's intent to stop financing defendant, who was the victim's stepgrandchild, were relevant for the jury to review and were admissible. Jones v. State, 179 So. 3d 1193, 2015 Miss. App. LEXIS 343 (Miss. Ct. App. 2015), cert. denied, 181 So. 3d 1010, 2016 Miss. LEXIS 14 (Miss. 2016).

Text message which the murder victim sent to a friend about one hour before the victim's death, in which the victim asked the friend to come save the victim, and a telephone conversation which the victim had with neighbors shortly before the victim's death, in which the victim was upset and crying because defendant was being mean to the victim, were admissible into evidence as present sense impressions or then-existing mental or emotional state exceptions to the hearsay rule. Kuebler v. State, 205 So. 3d 623, 2015 Miss. App. LEXIS 461 (Miss. Ct. App. 2015), rev'd, 204 So. 3d 1220, 2016 Miss. LEXIS 462 (Miss. 2016).

Witness's testimony that the victim had an issue with defendant's son and appeared to be afraid was permissible, but the victim's statement to the witness that defendant would do something to him was inadmissible hearsay as it was merely the victim's statement of belief as to a speculative future event and not evidence of the witness's existing state of mind; however, the hearsay statement was harmless error because there was ample evidence to support the verdict without the witness's statement. McKnight v. State, 187 So. 3d 635, 2015 Miss. App. LEXIS 276 (Miss. Ct. App. 2015), cert. denied, 188 So. 3d 575, 2016 Miss. LEXIS 142 (Miss. 2016).

Statements that witness overheard a victim make while the witness was on the phone with the victim were properly admitted as they established the victim's state of mind communicated as she experienced the events leading up to a collision. In addition, testimony for an eyewitness regarding the victim being fearful of defendant was not hearsay as the witness never testified regarding what the victim actually told her. Nichols v. State, 27 So. 3d 433, 2009 Miss. App. LEXIS 473 (Miss. Ct. App. 2009), cert. denied, 27 So. 3d 404, 2010 Miss. LEXIS 70 (Miss. 2010), cert. denied, 562 U.S. 849, 131 S. Ct. 97, 178 L. Ed. 2d 61, 2010 U.S. LEXIS 5836 (U.S. 2010).

Miss. R. Evid. 803(3) allowed the admission of the testimony of a decedent's hospital roommate in a medical malpractice suit because her statements concerning the decedent's condition in the hosipital related to the decedent's then-existing condition. Univ. of Miss. Med. Ctr. v. Johnson, 977 So. 2d 1145, 2007 Miss. App. LEXIS 345 (Miss. Ct. App. 2007).

Defendant's murder conviction was proper where statements made by the victim prior to her murder were admissible pursuant to Miss. R. Evid. 803(3) because the statements were more probative on the point for which they were offered by the proponent than any other evidence which the proponent could procure through reasonable efforts, the statements had a high degree of trustworthiness, and the defense was given reasonable notice as to the State's intent to offer them at trial. Dendy v. State, 931 So. 2d 608, 2005 Miss. App. LEXIS 855 (Miss. Ct. App. 2005), cert. denied, 933 So. 2d 303, 2006 Miss. LEXIS 346 (Miss. 2006).

Letter with handwritten calculations showing the husband's pre-marital individual retirement account balance was properly admitted under Miss. R. Evid. 803(24) because there was an indicia of reliability and there was no other evidence on that point. Barnett v. Barnett, 908 So. 2d 833, 2005 Miss. App. LEXIS 531 (Miss. Ct. App. 2005).

Trial court did not err in determining that the victim, who was 13 at the time of trial, was a child of tender years pursuant to Miss. R. Evid. 803(25), because a hearing was conducted outside of the jury that indicated the victim's mental and emotional age was less than 13. Allred v. State, 908 So. 2d 889, 2005 Miss. App. LEXIS 549 (Miss. Ct. App. 2005).

**Tender years exception.**

In the sexual battery case of the seven-year-old victim, trial judge did not err by allowing the outcry witness to testify regarding hearsay statements made by the victim based on the tender years exception because the trial judge found that the victim had no motive to lie; the victim was generally a good child who had experienced a troubled home life; defendant did not identify any specific inconsistencies between the victim's initial disclosure to the outcry witness and her later statements; the victim's statement to the outcry witness was relatively spontaneous; defendant failed to identify any misrepresentations by the outcry witness; and the outcry witness did not use suggestive techniques with the victim. McCammon v. State, 299 So. 3d 873, 2020 Miss. App. LEXIS 28 (Miss. Ct. App.), cert. denied, 299 So. 3d 794, 2020 Miss. LEXIS 297 (Miss. 2020).

Trial court properly sentenced defendant to seven years after a jury convicted him of fondling an 11-year-old child because the victim's statements were properly admitted under the tender-years hearsay exception where defendant admitted that she was a child of tender years, the court made an on-the-record finding of reliability and specifically addressed the applicable factors, and, while the victim's trial testimony differed from the statements she had made a year before, the jury heard her testimony both live and by video and resolved any conflicts in favor of the State, and her testimony was corroborated by her mother, the friend's mother, and the note the victim wrote prior to being questioned by anyone at all. Crawford v. State, 282 So. 3d 1230, 2019 Miss. App. LEXIS 487 (Miss. Ct. App. 2019).

Admission of the victim's statements without a tender-years determination was harmless error because the victim testified at trial, and there was other evidence supporting a finding of guilt against defendant; despite the victim not testifying at the hearing regarding her statements, the trial court had sufficient evidence of the time, content, and circumstances of her out-of-court statements to support its finding of reliability. Austin v. State, 282 So. 3d 545, 2019 Miss. App. LEXIS 297 (Miss. Ct. App. 2019).

Trial court erred in failing to make a tender-years determination because the victim was twelve years old at the time she made her statements to her mother and underwent her forensic interview, so the tender-years presumption did not apply; the trial court, therefore, was required to make a finding, on the record, regarding whether Amy was of tender years, but its order contained no factual findings as to the victim's mental and emotional age, and no such findings were made on the record. Austin v. State, 282 So. 3d 545, 2019 Miss. App. LEXIS 297 (Miss. Ct. App. 2019).

Trial court's order admitting the victim's testimony under the tender-years exception was an "on-the-record" factual determination because while the trial court did not make its findings and rulings during the pre-trial hearing, the trial court issued an order with its findings prior to trial. Marion v. State, 281 So. 3d 174, 2019 Miss. App. LEXIS 91 (Miss. Ct. App. 2019).

Trial court properly admitted the victim's hearsay statements prior to the start of trial, thus giving defendant ample time to prepare his defense, because there was no abuse of discretion with its decision to admit the statements through the tender-years exception; evidence within the record supported the trial court's finding that the out-of-court statements bore a substantial indicia of reliability and were supported by corroborative evidence. Marion v. State, 281 So. 3d 174, 2019 Miss. App. LEXIS 91 (Miss. Ct. App. 2019).

Circuit court did not abuse its discretion in admitting the child's statements under the tender-years exception; the forensic investigator explained that the child demonstrated the ability to correct misstatements and communicated her statements with certainty, plus despite her aunt's comment that the perpetrator must have been the aunt's husband, the child had already disclosed that she was touched at her aunt's house and she had already described the person. Herbert v. State, 281 So. 3d 851, 2019 Miss. App. LEXIS 19 (Miss. Ct. App. 2019).

Because the record in a sexual battery case supported the trial judge's ruling that the tender-years exception applied, the judge did not abuse his discretion by allowing other witnesses to testify about the victim's description of defendant's sex act. Blake v. State, 256 So. 3d 1161, 2018 Miss. LEXIS 404 (Miss. 2018).

Absent a contemporaneous objection, the trial court was not required to hold a tender-years hearing, nor make factual findings related to whether the tender-years exception applied to the alleged sexual abuse victim. Furthermore, there was no plain error in the unopposed admission of hearsay statements because it appeared that defendant's attorney did not object to the statements as counsel wanted to use the apparent inconsistencies between the statements to attack the alleged victim's credibility. Graham v. State, 264 So. 3d 819, 2018 Miss. App. LEXIS 487 (Miss. Ct. App. 2018), cert. denied, 263 So. 3d 667, 2019 Miss. LEXIS 81 (Miss. 2019).

Trial court's admission of statements of child abuse without a tender-years hearing was harmless error because the victim testified to her sexual abuse in detail, there was there was no objection to the admission of her forensic interview, there was DNA evidence of defendant sperm in her vagina. Friday v. State, 217 So. 3d 759, 2017 Miss. App. LEXIS 86 (Miss. Ct. App. 2017).

In a prosecution of defendant for sexual battery and touching a child for lustful purposes, the trial court did not abuse its discretion in allowing testimony under the tender-years exception to the hearsay rule. Nelson v. State, 222 So. 3d 318, 2017 Miss. App. LEXIS 183 (Miss. Ct. App. 2017).

Phrase "child of tender years" is not an indication that a chronological age is the exclusive factor for analyzing the applicability of the tender-years exception. The mental and emotional age of a victim must be taken into account. Russell v. State, 203 So. 3d 750, 2016 Miss. App. LEXIS 714 (Miss. Ct. App. 2016).

Defendant was properly convicted of sexual battery of a mentally defective person because the circuit court properly considered the victim's mental, emotional, and chronological age; a doctor, the victim, and her aunt testified, and those witnesses, in addition to the circuit court's firsthand observations of the victim, provided an ample basis for a determination that she should have been considered a child declarant, thereby allowing for invocation of the tender-years exception. Russell v. State, 203 So. 3d 750, 2016 Miss. App. LEXIS 714 (Miss. Ct. App. 2016).

In a case in which a jury found defendant guilty of four counts of touching a child for lustful purposes, the trial court did not abuse its discretion by admitting into evidence the molestation victims' pretrial statements under the tender years exception to the hearsay rule. The record reflected that the trial court rendered sufficient findings on the record to conclude that the time, content, and circumstances of the pretrial statements provided substantial indicia of reliability. Mason v. State, 203 So. 3d 732, 2016 Miss. App. LEXIS 715 (Miss. Ct. App. 2016).

Trial court did not err in admitting a video recording of a forensic interview with the victim into evidence under the tenders years exception to the hearsay rule, because, while the victim was 13 years old at the time she made the statement, the victim's mental and emotional age was found to be that of a child of tender years. Walker v. State, 197 So. 3d 914, 2016 Miss. App. LEXIS 459 (Miss. Ct. App. 2016).

Defendant was procedurally barred from arguing that the testimony from a forensic interview and child sexual abuse expert, who interviewed the victim, and from a psychologist, who conducted sessions with the victim, was erroneously admitted under the tender-years hearsay exception because defendant did not object to the admission of the testimony during a pretrial competency hearing for the victim or at defendant's trial for fondling defendant's stepchild. Justice v. State, 192 So. 3d 1096, 2016 Miss. App. LEXIS 317 (Miss. Ct. App. 2016).

In a case where defendant was convicted of molestation of a child, the trial court did not abuse its discretion in allowing the victim's grandmother to testify as to the victim's statement to her regarding the molestation pursuant to the tender-years hearsay exception because the victim's statement to the mother regarding the molestation was made within a short time after the child was in a place where the child felt safe or felt unencumbered by any threats by anyone and the child was able to give an unsolicited response; the victim repeated that statement to her grandmother; the victim had a close relationship with her grandmother; and there was no reason for the victim to fabricate testimony. Tubbs v. State, 185 So. 3d 363, 2016 Miss. LEXIS 76 (Miss. 2016).

While the victim was 13 years old, the trial court did not err in ruling that the tender years exception, as the victim was taken from his mother's home at age 13, had lived in at least four different foster homes, and would probably have been behind other children mentally and emotionally who had grown up in a stable home, and the trial court found the statement spontaneous and reliable. Case v. State, 187 So. 3d 177, 2015 Miss. App. LEXIS 513 (Miss. Ct. App. 2015).

Trial court did not abuse its discretion in ruling that statements the victims made to their great-grandmother were admissible under the tender years exception because it analyzed the indicia-of-reliability factors and found that the statements were spontaneous; nothing in the record suggested that the statements were based on a motive of either victim to lie, and both victims testified that they understood the difference between lying and telling the truth. Cook v. State, 161 So. 3d 1057, 2015 Miss. LEXIS 192 (Miss. 2015).

Trial court did not abuse its discretion in ruling that statements a victims made to an interviewer were admissible under the tender years exception because it thoroughly analyzed the indicia-of-reliability factors; nothing in the video of the interview indicated that the victim's statements were obtained by means of suggestive techniques, and the interviewer testified at the tender-years hearing that she had no connection or relationship with the victim that would have impacted her partiality. Cook v. State, 161 So. 3d 1057, 2015 Miss. LEXIS 192 (Miss. 2015).

Trial court did not abuse its discretion, under the tender-years exception, in allowing into evidence statements made by a child molestation victim to the child's parent, a police officer, and a forensic interviewer concerning the abuse because the court conducted a hearing, in which the witnesses testified, to determine whether the child's statements to them provided substantial indicia of reliability. Harris v. State, 165 So. 3d 473, 2015 Miss. App. LEXIS 162 (Miss. Ct. App. 2015).

While a trial court erred in failing to make an on-the-record determination whether the fourteen-year-old victim, who testified as to the sexual abuse that was committed against the victim, was of tender years and if the tender-years exception was applicable, the trial court's error did not warrant reversal because the weight of the evidence against defendant was sufficient to outweigh the harm done by allowing admission of the evidence. Nunnery v. State, 126 So. 3d 105, 2013 Miss. App. LEXIS 764 (Miss. Ct. App. 2013).

In a sexual-battery case, the trial court did not err in allowing an employee of the

Mississippi Department of Human Services to testify about the victim's statements to her because the victim was of tender years when she made the statement, as she was 12 years old; the victim's statements to the employee had substantial indicia of reliability; and the victim testified at trial. Pickett v. State, 143 So. 3d 596, 2013 Miss. App. LEXIS 761 (Miss. Ct. App. 2013), cert. denied, 141 So. 3d 947, 2014 Miss. LEXIS 374 (Miss. 2014).

Because the circuit court clearly made an affirmative on-the-record finding of reliability concerning the victim's statements, the admission of the victim's recorded interview into evidence was not an abuse of discretion. Carpenter v. State, 132 So. 3d 1053, 2013 Miss. App. LEXIS 551 (Miss. Ct. App. 2013), cert. denied, 132 So. 3d 579, 2014 Miss. LEXIS 142 (Miss. 2014).

Trial court did not abuse its discretion in admitting the victim's statements under the tender-years exception to the hearsay rule, Miss. R. Evid. 803(25) because the trial court noted that because of the victim's young age, as well as the spontaneity and consistency of her statements,, her statements were reliable. Brown v. State, 119 So. 3d 1079, 2013 Miss. App. LEXIS 131 (Miss. Ct. App. 2013).

Because the victim had to testify to satisfy Miss. R. Evid. 803(25), her testimony qualified, rather than disqualified, the other witnesses' hearsay testimony for admission through the tender-years exception; the fact that the corroborative witnesses' testimony was cumulative to the victim's testimony actually contributed to the harmlessness of its admission. Webb v. State, 113 So. 3d 592, 2012 Miss. App. LEXIS 818 (Miss. Ct. App. 2012), cert. denied, 121 So. 3d 918, 2013 Miss. LEXIS 494 (Miss. 2013).

Even if the trial court erred in admitting additional witnesses' testimony without first considering it in a separate hearing, such error harmless because even without the tender-years witnesses whose testimony was not proffered, there was strong evidence against defendant. Webb v. State, 113 So. 3d 592, 2012 Miss. App. LEXIS 818 (Miss. Ct. App. 2012), cert. denied, 121 So. 3d 918, 2013 Miss. LEXIS 494 (Miss. 2013).

Trial court, through evidence presented at the pretrial hearing, had sufficient evidence to admit the victim's statements to all the witnesses through the tender-years exception of the hearsay rule, Miss. R. Evid. 803(25) because the trial court made the overall finding that the victim was particularly likely to be telling the truth about defendant sexually abusing her, and the finding was on the record; because the trial court supported his finding with substantial evidence, it did not abuse its discretion in finding the victim's statements to the corroborating witnesses were reliable. Webb v. State, 113 So. 3d 592, 2012 Miss. App. LEXIS 818 (Miss. Ct. App. 2012), cert. denied, 121 So. 3d 918, 2013 Miss. LEXIS 494 (Miss. 2013).

Because the trial court considered the victim's age at the time she made all statements about the abuse, the requirement of a case-specific determination of tender years was met; after listening to the testimony and watching the Mississippi Child Advocacy Center video-recorded interview of the victim, the trial court made the on-the-record finding that the victim's mental and emotional age at the time she reported defendant's abusive acts was one of tender years, and the trial court supported its findings with substantial evidence. Webb v. State, 113 So. 3d 592, 2012 Miss. App. LEXIS 818 (Miss. Ct. App. 2012), cert. denied, 121 So. 3d 918, 2013 Miss. LEXIS 494 (Miss. 2013).

Trial court erred in allowing a forensic psychologist to testify about a child's statement that defendant had put his mouth on the child's penis, as the trial court made no finding as to the reliability of the hearsay statement and did not conduct a hearing outside the presence of the jury as required by Miss. R. Evid. 803(25). Rogers v. State, 95 So. 3d 623, 2012 Miss. LEXIS 399 (Miss. 2012).

Defendant's conviction for sexual battery against his four-year-old daughter was proper, in part under Miss. R. Evid. 803(25) because the trial judge made an on-the-record determination that the factors favored admissibility of the victim daughter's statements and noted that she had no motive to lie; further, the witnesses testified that the daughter was truthful, more than one person had heard the statements, the statements were spontaneous and were made shortly after the incident, the daughter had made the statements with certainty, there was no evidence that suggestive techniques were used, and, although the daughter was very young, it would have been difficult for her to fabricate such a story. Williams v. State, 35 So. 3d 480, 2010 Miss. LEXIS 169 (Miss. 2010).

Because defendant could have recalled the victim after the admission of the Miss. R. Evid. 803(25) testimony but chose not to do so, the admission of this hearsay evidence did not violate his Sixth Amendment, U.S. Const. Amend. VI, right to confront his accuser. Caldwell v. State, 6 So. 3d 1076, 2009 Miss. LEXIS 75 (Miss. 2009).

In defendant's trial for statutory rape, the trial court did not abuse its discretion in allowing the victim's hearsay testimony under the "tender years" exception of Miss. R. Evid 803(25). The trial court weighed its concerns with the victim's credibility against the other circumstances and found substantial indicia of reliability in her hearsay statements, and the reviewing court could not state with a definite and firm conviction that the trial court reached the wrong result pursuant to Miss. R. Evid. 103(a). Grimes v. State, 1 So. 3d 951, 2009 Miss. App. LEXIS 32 (Miss. Ct. App. 2009).

Defendant's conviction for sexual battery of child under the age of 14 was appropriate because the child victim testified at trial and was subject to cross-examination, and defendant did not challenge the reliability of her statement. Instead, he argued that there was a prejudicial overuse of the tender years exception under Miss. R. Evid. 803(25); however, there was no objection to the repetition of the victim's statement at trial and there was no plain error since most of the witnesses discussed the victim's statement only as it related to the true purpose of their testimony. Carter v. State, 996 So. 2d 112, 2008 Miss. App. LEXIS 445 (Miss. Ct. App. 2008), cert. denied, 999 So. 2d 374, 2009 Miss. LEXIS 43 (Miss. 2009).

During defendant's criminal trial for sexual battery, the trial court did not err by admitting hearsay testimony from three witnesses concerning the child-victim's statements of sexual abuse under the tender years exception of Miss. R. Evid. 803(25). The trial judge determined that the time, content, and circumstances of the victim's statements provided substantial indicia of reliability. Smith v. State, 989 So. 2d 973, 2008 Miss. App. LEXIS 255 (Miss. Ct. App. 2008).

During defendant's criminal trial for sexual battery, the trial court did not err by admitting the child-victim's responses during her forensic interview under the tender years exception of Miss. R. Evid. 803(25). Smith v. State, 989 So. 2d 973, 2008 Miss. App. LEXIS 255 (Miss. Ct. App. 2008).

In a sexual battery and touching of a child for lustful purposes case, admission of the out-of-court statements of the four-year-old child victim was proper under the tender years exception of Miss. R. Evid. 803(25) as the statements bore substantial indicia of reliability, and the trial court followed the proper procedure in its determination. Bishop v. State, 982 So. 2d 371, 2008 Miss. LEXIS 137 (Miss. 2008).

Defendant's conviction for fondling his seven-year-old daughter was appropriate, in part pursuant to Miss. R. Evid. 803(25) because the trial judge viewed the video in question and determined that the child's statement was sufficiently reliable. The appellate court found that the record supported the trial judge's ruling; accordingly, there was no error in the admission of the interview conducted between the clinical director and the child. Golden v. State, 984 So. 2d 1026, 2008 Miss. App. LEXIS 91 (Miss. Ct. App. 2008).

In a case involving defendant's sexual battery and fondling of his stepdaughters, a trial court did not err by allowing hearsay evidence under Miss. R. Evid. 803(25) because a trial court heard testimony from the stepdaughters and other witnesses, considered the factors under Rule 803, and relied on the girls' mental and emotional ages. The trial court ultimately determined that the exception only applied to one of the girls. Palmer v. State, 986 So. 2d 328, 2007 Miss. App. LEXIS 737 (Miss. Ct. App. 2007), cert. denied, 987 So. 2d 451, 2008 Miss. LEXIS 567 (Miss. 2008).

At trial for fondling and sexual battery, it was not error to allowing the child victim's mother to testify as to statements that the victim made to her under Miss. R. Evid. 803(25), as the trial court found in a hearing conducted outside the jury's presence that the statements had substantial indicia of reliability, and the victim himself testified at the proceedings. Hodgin v. State, 964 So. 2d 492, 2007 Miss. LEXIS 406 (Miss. 2007).

Changing of physical and legal custody of the parties' son from the mother to the father was proper even though the chancellor erred by citing Miss. R. Evid. 803(25) as the basis for allowing the step-grandmother's testimony regarding the son's identification of the mother's new husband, as the person who took the photographs at issue since the chancellor failed to find that the son was unavailable pursuant to Rule 803(25)(b)(2); even without the son's statement identifying the new husband as the photographer, the photographs themselves as well as the step-grandmother's impression that the son was upset about them clearly supported the chancellor's conclusion that those photographs were inappropriate and indicative of conditions in the custodial home that were adverse to the son's best interests. C.A.M.F. v. J.B.M., 972 So. 2d 656, 2007 Miss. App. LEXIS 289 (Miss. Ct. App. 2007), cert. denied, 973 So. 2d 244, 2008 Miss. LEXIS 33 (Miss. 2008).

Although a ten-year-old victim's testimony was inconsistent about the exact dates and the places in the house where alleged sexual abuse occurred, a trial court found sufficient indicia of reliability and properly admitted evidence of her statement to her mother, a social worker, and a criminal investigator under the tender years exception in Miss. R. Evid. 803(25); moreover, it properly weighed the 12 factors, the victim was of a tender age at the time and had no apparent motive to lie, the timing of the statement was right after the last incident, no one had a faulty recollection, the victim was of a sufficient age to know between right and wrong, she had not accused anyone else, and she was of sufficient age to know that the alleged abuse involved incidents of inappropriate touching. Pryer v. State, 958 So. 2d 818, 2007 Miss. App. LEXIS 122 (Miss. Ct. App. 2007).

Trial court did not abuse its discretion in admitting a child victim's video statement under Miss. R. Evid. 803(25) where the taped statement was of an interview between the victim and her counselor and the victim's statements were responses to open-ended questions. Penny v. State, 960 So. 2d 533, 2006 Miss. App. LEXIS 909 (Miss. Ct. App. 2006), cert. denied, 959 So. 2d 1051, 2007 Miss. LEXIS 384 (Miss. 2007), cert. denied, 959 So. 2d 1051, 2007 Miss. LEXIS 386 (Miss. 2007).

Defendant's conviction for sexual battery in violation of Miss. Code Ann. § 97-3-95 was proper because, without more, the victim's use of the "I have a friend" approach in a letter, did not cast doubt on her credibility, and thus the appellate court was unable to find reversible error in permitting testimony under Miss. R. Evid. 803(25). Larson v. State, 957 So. 2d 1005, 2006 Miss. App. LEXIS 814 (Miss. Ct. App. 2006), cert. denied, 958 So. 2d 1232, 2007 Miss. LEXIS 318 (Miss. 2007).

For the tender years hearsay exception in Miss. R. Evid. 803(25) to apply, the child must be of tender years, and there is a rebuttable presumption that children under 12 years of age are within their tender years; the child's age at the time of the statement, rather than her age at trial, is the relevant age used to determine if the tender years exception applies. Klauk v. State, 940 So. 2d 954, 2006 Miss. App. LEXIS 780 (Miss. Ct. App. 2006).

While a trial court erred in admitting hearsay testimony under the tender years exception, pursuant to Miss. R. Evid. 803(25), without first finding, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provided a substantial indicia of reliability, the error was harmless where the victim testified that defendant touched her between her legs, both on the outside and inside of her clothing, on several occasions, detailing the place and circumstances of the incidents. Klauk v. State, 940 So. 2d 954, 2006 Miss. App. LEXIS 780 (Miss. Ct. App. 2006).

Trial court had not erred by allowing the statements of 5 year-old rape victim to be brought before the jury through the testimony of medical professionals who examined or interviewed her because the victim's statements were squarely within the tender years exception to hearsay as provided by Miss. R. Evid. 803(25). There was no doubt that the overwhelming physical evidence of abuse to the child's person corroborated the statements by her alleging sexual abuse and her comments, spontaneously made to a number of professionals trained to detect abuse and its effects, showed an overwhelming sense of adult knowledge of sexual topics of which children in their earliest years should have no knowledge. Foley v. State, 914 So. 2d 677, 2005 Miss. LEXIS 586 (Miss. 2005).

Defendant's conviction for statutory rape in violation of Miss. Code Ann. § 97-3-65(1)(b) was proper where the circuit court did not err in admitting hearsay testimony of the victim into evidence under Miss. R. Evid. 803(25), the "tender years exception," because it appeared that the victim knew the difference in truth and imagination. Further, the record showed that the State established all of the elements of the statutory rape charge. Withers v. State, 907 So. 2d 342, 2005 Miss. LEXIS 439 (Miss. 2005).

During defendant's trial for sexual battery of a child, the court did not err in admitting the child's hearsay statements pursuant to Miss. R. Evid. 803(25) concerning the cause of the child's injuries; the judge conducted the required hearing outside the presence of the jury, accepted testimony and made extensive findings as to the factors required for ascertaining the veracity of the declarant's testimony. Renfrow v. State, 882 So. 2d 800, 2004 Miss. App. LEXIS 919 (Miss. Ct. App. 2004).

Where defendant was accused of raping his girlfriend's 10-year-old daughter, the trial judge did not err in admitting statements pursuant to Miss. R. Evid. 803(25), the tender years exception, because although the minor victim was 12 years of age at the time of trial, she was 10 years old when the incident occurred; the judge conducted the required hearing, out of the jury's presence; and the judge accepted testimony and made extensive findings on the factors necessary to ascertain the veracity of the declarant's testimony. Sanderson v. State, 872 So. 2d 735, 2004 Miss. App. LEXIS 441 (Miss. Ct. App. 2004).

Trial court did not err in admitting the statements the victim had made to her school counselor shortly after the assault as the victim was nine when the statements were made and were admissible under the tender years hearsay exception in Miss. R. Evid. 803(25). Davis v. State, 878 So. 2d 1020, 2004 Miss. App. LEXIS 246 (Miss. Ct. App. 2004), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 964 (Miss. 2004), cert. denied, 543 U.S. 1051, 125 S. Ct. 880, 160 L. Ed. 2d 773, 2005 U.S. LEXIS 474 (U.S. 2005).

Trial judge did not abuse his discretion in permitting a child victim's hearsay testimony under Miss. R. Evid. 803(25) where the judge evaluated the testimony under the seven so-called Wright factors for evaluating substantial indicia of reliability. Those factors include: (1) whether there is an apparent motive on declarant's part to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; (5) the timing of the declarations; (6) the relationship between the declarant and the witness; (7) the possibility of the declarant's faulty recollection is remote; (8) certainty that the statements were made; (9) the credibility of the person testifying about the statements; (10) the age or maturity of the declarant; (11) whether suggestive techniques were used in eliciting the statement; and (12) whether the declarant's age, knowledge, and experience make it unlikely that the declarant fabricated. Renfrow v. State, 863 So. 2d 1047, 2004 Miss. App. LEXIS 36 (Miss. Ct. App.), op. withdrawn, sub. op., 882 So. 2d 800, 2004 Miss. App. LEXIS 919 (Miss. Ct. App. 2004).

Hearsay evidence, including statements made by the child victim, were properly admitted where the trial court made extensive findings as to the factors necessary to ascertain the veracity of the child's testimony, the trial court did conduct a hearing outside the presence of the jury with regard to the victim and each witness that would be testifying under the exception, and made extensive findings of fact and conclusions of law. Wright v. State,

859 So. 2d 1028, 2003 Miss. App. LEXIS 1079 (Miss. Ct. App. 2003).

In a case where defendant father and defendant adopted son were convicted of conspiracy to commit sexual battery, sexual battery, and contributing to the delinquency of a minor, because the trial judge had previously heard argument, outside the presence of the jury, on the reliability of the child victim's statements, which described sexual contact with defendant father and the victim had previously testified regarding the statement, although perhaps cumulative, allowing defendant father's other son to testify to the victim's statement was not erroneous under Miss. R. Evid. 803(25) and 801(d)(1)(B), especially since the son had solicited the statement from the victim, and defense attorneys had attacked the victim's credibility; thus, Miss. R. Evid. 404(b) was not violated. King v. State, 857 So. 2d 702, 2003 Miss. LEXIS 450 (Miss. 2003).

Where a grandmother sought temporary custody of her minor grandchild based on the child's allegedly having been sexually abused, the child testified, and both sides presented expert testimony to provide the chancellor with knowledge regarding the factors set forth in Miss. R. Evid. 803(25), the chancellor's error, if any, in admitting such expert testimony was harmless. E. J. M. v. A. J. M., 846 So. 2d 289, 2003 Miss. App. LEXIS 397 (Miss. Ct. App. 2003).

While pursuant to Miss. R. Evid. 803(25) the judge should have made findings at the initial pretrial presentation of defendant's motion in limine that he subsequently made during the trial outside of the jury's presence, there was no error or resulting prejudice because the judge was well aware that he was to conduct a hearing. Byars v. State, 835 So. 2d 965, 2003 Miss. App. LEXIS 215 (Miss. Ct. App. 2003).

Trial judge did not abuse his discretion in permitting the child's victim testimony under Miss. R. Evid. 803(25) where the judge found that the child was 11 at the time of the assault and was able to convey with specificity the details of the assaults; the child was permitted to merely repeat the account to her mother, this was not an act of telling her mother what happened was a corroboration. Byars v. State, 835 So. 2d 965, 2003 Miss. App. LEXIS 215 (Miss. Ct. App. 2003).

Under subsection (25), the trial court did not err in finding the child victim to be of tender years, as the child was unable to express herself clearly about the alleged molestation; the trial court expressly ruled on the teacher's testimony and indicia of reliability, finding that there was no motive to lie, her character was not in dispute, the statements were spontaneous, the teacher and the victim had a teacher-child relationship, and her testimony was credible. Shirley v. State, 843 So. 2d 47, 2002 Miss. App. LEXIS 464 (Miss. Ct. App. 2002), cert. denied, 842 So. 2d 578, 2003 Miss. App. LEXIS 413 (Miss. Ct. App. 2003).

In defendant's trial for sexually abusing a young boy, the trial court erred in permitting testimony from the father and counselor of a young girl, who alleged defendant had sexually molested her prior to the incident for which defendant was accused, because the alleged incident with the girl had occurred more than a year before the alleged incident with the boy. Earnest v. State, 805 So. 2d 599, 2002 Miss. App. LEXIS 2 (Miss. Ct. App. 2002).

Testimony by a child of tender years, was admissible where judge correctly considered the credibility and age of the person testifying, and whether suggestive techniques were used. B.R.C. v. State (In the Interest of S.C.), 795 So. 2d 526, 2001 Miss. LEXIS 244 (Miss. 2001).

Hearsay testimony of a child victim's account of her sexual abuse by her stepfather was properly admitted, since the trial judge made a full and adequate inquiry into the factors set forth in this rule; that the record did not contain his findings was harmless error. Rowlett v. State, 791 So. 2d 319, 2001 Miss. App. LEXIS 300 (Miss. Ct. App. 2001), cert. dismissed, 947 So. 2d 960, 2007 Miss. LEXIS 46 (Miss. 2007).

In prosecution for touching, handling, and feeling a child for lustful purposes, admission of 13-year-old victim's hearsay statements to a social worker without a hearing to determine "substantial indicia of reliability" was harmless error because the corroborating evidence, exhibits, and the victim's testimony outweighed any error. Carson v. State, 826 So. 2d 96, 2001 Miss. App. LEXIS 523 (Miss. Ct. App. 2001).

Where defendant was charged with the crime of touching a child for lustful purposes child victim's hearsay statements to an investigator concerning abuse were admissible under Miss. R. Evid. 803(25). Givens v. State, 730 So. 2d 81, 1998 Miss. App. LEXIS 723 (Miss. Ct. App. 1998).

The trial court did not abuse its discretion in determining that the tender years exception applied to allow the introduction of out-of-court statements of a 13-year-old girl in a prosecution for statutory rape. Hayes v. State, 803 So. 2d 473, 2001 Miss. App. LEXIS 125 (Miss. Ct. App. 2001).

The rule does not require written notice of a hearing; it only requires that a hearing be conducted. Hayes v. State, 803 So. 2d 473, 2001 Miss. App. LEXIS 125 (Miss. Ct. App. 2001).

In a prosecution for sexual battery of a 10-year-old child, the out-of-court statements of the child were properly admitted under the tender years exception where (1) the trial judge ascertained that the child had absolutely no reason to lie about what happened to her, (2) the evidence revealed that her statement was the same each time she related it to a new person, and (3) the child used terminology such as "private parts" and "bottom" to tell of the incident, as a child would be likely to do. Marshall v. State, 812 So. 2d 1068, 2001 Miss. App. LEXIS 131 (Miss. Ct. App. 2001).

A statement by a six-year-old child that her two uncles and her dad were "messing with her" was sufficiently spontaneous to be admissible under the tender years exception where the child's aunt testified that she observed the child walking with a limp, that she asked her if anyone was touching her in the wrong way, and the statement was made in response to that question. Bell v. State, 797 So. 2d 945, 2001 Miss. LEXIS 134 (Miss. 2001).

The list of factors to be examined with regard to the tender years exception is not exclusive, and there is no requirement that each factor be listed and discussed separately by the trial judge. Bosarge v. State, 786 So. 2d 426, 2001 Miss. App. LEXIS 227 (Miss. Ct. App. 2001).

In a prosecution for unlawful touching of a minor for lustful purposes, the taped statement made by the minor victim to a police officer was properly admitted into evidence under subsection (25) where the trial court conducted a hearing outside the presence of the jury, specifically received evidence and arguments on the twelve factors relevant to subsection (25), and, after an on-the-record analysis of these factors, ruled that the testimony properly fell under the exception. Lawler v. State, 770 So. 2d 586, 2000 Miss. App. LEXIS 505 (Miss. Ct. App. 2000).

In a termination of parental rights proceeding, the county department of human services failed to show that the children at issue were unavailable and, therefore, their prior statements were not admissible under the tender years exception to the hearsay rule, where the department failed to show that there was no reasonable alternative means of testifying, such as closed-circuit television or videotape deposition, that would eliminate the trauma that would have been caused by in-person testimony in the presence of their parents. J. L. W. W. v. Clarke County Dep't of Human Servs., 759 So. 2d 1183, 2000 Miss. LEXIS 92 (Miss. 2000).

In a prosecution for sexual battery, statements made by the child/victim to her mother and to a police investigator were admissible under the tender years exception to the hearsay rule. Mullins v. State, 757 So. 2d 1027, 2000 Miss. App. LEXIS 128 (Miss. Ct. App. 2000).

In a prosecution for sexual battery, the victim's mother was properly permitted to testify regarding statements made by the victim to her regarding the sexual contact initiated by the defendant, notwithstanding the defendant's assertion that his right of confrontation was thereby violated, since the testimony was proper under subsection (25) of this rule, and because the victim also testified and the defendant cross examined both the victim and her mother. Knight v. State, 751 So. 2d 1144, 1999 Miss. App. LEXIS 501 (Miss. Ct. App. 1999).

In a prosecution for gratification of lust by touching or rubbing a child under the age of fourteen years, the trial court properly admitted out-of-court statements made by the alleged victim recounting her version of the defendant's activities to a DHS case worker, a treating physician, and a licensed social worker where the trial court noted that the child had, in fact, testified at the trial and then engaged in a detailed on-the-record analysis of the twelve factors mentioned in the comment to this rule that bear on the question of whether the time, content, and circumstances of the statement provided substantial indicia of reliability and then concluded, on balance, that the factors weighed in favor of admission of the evidence. Haire v. State, 749 So. 2d 1130, 1999 Miss. App. LEXIS 493 (Miss. Ct. App. 1999).

It is the age of the child at the time of the statement, rather than the age of the child at the time of trial, that is relevant to this exception. McGowan v. State, 742 So. 2d 1183, 1999 Miss. App. LEXIS 334 (Miss. Ct. App. 1999).

There is a rebuttable presumption that a child under 12 is of tender years; where a person is 12 or older, a trial court must make a factual determination as to whether that person is of tender years based on mental age. Veasley v. State, 735 So. 2d 432, 1999 Miss. LEXIS 159 (Miss. 1999).

Trial judge did not err in allowing an experienced, educated social worker to testify regarding children's allegations against defendant, where judge conducted required hearing outside presence of jury, and children testified and were cross-examined thoroughly by defendant. Eakes v. State, 665 So. 2d 852, 1995 Miss. LEXIS 555 (Miss. 1995).

While no mechanical test is available, factors which should be considered in judging reliability of statement under subdivision (25) of this rule are: spontaneity and consistent repetition; mental state of declarant; use of terminology unexpected of a child of similar age; and lack of motive to fabricate. Eakes v. State, 665 So. 2d 852, 1995 Miss. LEXIS 555 (Miss. 1995).

In a prosecution for gratification of lust, the court properly allowed the victim's mother and her teacher to testify to statements made by the victim with regard to sexual conduct by the defendant since there was sufficient evidence of reliability and there was sufficient support in the record for a finding of reliability, notwithstanding the trial court's failure to mention the relevant factors in its determination that the statements were inherently reliable. Jackson v. State, 743 So. 2d 1008, 1999 Miss. App. LEXIS 170 (Miss. Ct. App. 1999).

Chancellor did not err in determining that certain hearsay statements of three-year-old child, implicating father as perpetrator of her sexual abuse, were admissible; chancellor found substantial indicia of reliability, on the record, using factors enumerated within subdivision (25) of this rule, and these findings were supported by substantial credible evidence. Doe v. Doe, 644 So. 2d 1199, 1994 Miss. LEXIS 528 (Miss. 1994).

Finding of substantial indicia of reliability, under subdivision (25) of this rule, is necessary to prevent confrontation clause problems, and reliability is not to be judged in light of other corroborating evidence, or else the confrontation clause may be violated. Doe v. Doe, 644 So. 2d 1199, 1994 Miss. LEXIS 528 (Miss. 1994).

**Then-existing mental condition.**

Trial court erred by allowing a witness to testify to statements made by the deceased victim the week before the murder regarding her intention to evict defendant from her home as the statements did not fall within Miss. R. Evid. 803(3) as the statements did not describe the declarant's then existing mental, emotional, or physical condition, but the error was harmless given the surviving victim's testimony that he saw defendant set fire to the home. McIntosh v. State, 917 So. 2d 78, 2005 Miss. LEXIS 754 (Miss. 2005).

Investigator properly testified that persons he interviewed were both frightened because Miss. R. Evid. 803(3) provides that the then-existing mental or emotional condition of a declarant is not excluded by the hearsay rule. Brown v. State, 890 So. 2d 901, 2004 Miss. LEXIS 1104 (Miss. 2004), cert. denied, 544 U.S. 981, 125 S. Ct. 1842, 161 L. Ed. 2d 735, 2005 U.S. LEXIS 3424 (U.S. 2005).

In a depraved-heart murder case, although the trial court erred in sustaining the prosecution's objection to evidence of the victim's statement showing that he was the aggressor because it was a statement of a then-existing mental condition or state of mind, the error was harmless as the jury had sufficient evidence from eyewitness testimony of the victim's conduct before the fight began. Harris v. State, 861 So. 2d 1003, 2003 Miss. LEXIS 872 (Miss. 2003).

Insufficient evidence pursuant to Miss. R. Evid. 803(3) existed to make the question of undue influence one for the jury; from no one contemporaneously involved as a party in interest, as the attorney, or as a bystander, was there any suggestion that the decedent was unaware of what she was doing or that her personal desires had been overwhelmed by someone else. McClendon v. McClendon (In re Estate of Pigg), 877 So. 2d 406, 2003 Miss. App. LEXIS 851 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 66, 2004 Miss. LEXIS 875 (Miss. 2004).

Because a witness's statement that the witness overheard the victim tell defendants "let's get it on" right before their fight erupted was relevant to show that the victim intended to fight, the statement qualified as a statement of a then-existing mental condition under Miss. R. Evid. 803(3), and the trial court erred in excluding the testimony. Harris v. State, 2003 Miss. LEXIS 80 (Miss. Feb. 20, 2003), op. withdrawn, sub. op., 861 So. 2d 1003, 2003 Miss. LEXIS 872 (Miss. 2003).

In a divorce proceeding, it was error for the court to exclude testimony by the wife regarding statements by the parties' nine-year-old daughter about her fears and stomach pains; such testimony was admissible under the exceptions for present sense impression, excited utterance, and then existing mental, emotional, or physical conditions. Holladay v. Holladay, 776 So. 2d 662, 2000 Miss. LEXIS 194 (Miss. 2000).

In a prosecution for murder, the victim's girlfriend was properly permitted to testify that, on the morning of the crime, the victim told her that he was going to pick up "Jerry," the defendant, on his way to work as such statement was admissible under subsection (3) as proof of his plan or intent to pick "Jerry" up that particular morning. Bogan v. State, 754 So. 2d 1289, 2000 Miss. App. LEXIS 27 (Miss. Ct. App. 2000).

In a personal injury action arising from a motor vehicle accident, a letter from the plaintiff's deceased treating physician to the plaintiff's attorney expressing an opinion that the plaintiff was permanently disabled as a result of the accident was not admissible under subsection (4) since the plaintiff's complaints were not the subject of the letter and it could not be said that the letter was a statement consistent with the purposes of promoting the plaintiff's treatment. Gilbert v. Ireland, 758 So. 2d 1050, 2000 Miss. App. LEXIS 114 (Miss. Ct. App. 2000).

In a prosecution for murder and aggravated assault arising from the stabbing death of one victim and stabbing of her four year old child, the child's treating physician at the emergency room was properly permitted to testify that the child identified the defendant as the assailant pursuant to the exception for statements by young victims of physical abuse not necessarily sexual in nature. Barnett v. State, 757 So. 2d 323, 2000 Miss. App. LEXIS 136 (Miss. Ct. App. 2000).

In a divorce proceeding, it was error for the court to allow the introduction into evidence of a letter from a doctor pertaining to the medical condition of the father, by which the father attempted to show that his disability had no effect on his ability to care for his children, as the letter did not pertain to a diagnosis and was drafted specifically for litigation. Caswell v. Caswell, 763 So. 2d 890, 2000 Miss. App. LEXIS 70 (Miss. Ct. App. 2000).

Decedent's statement to her friend that she was afraid she was going to be beaten by a man with the same first name as defendant should have been admitted to show decedent's then existing mental condition. Parker v. State, 606 So. 2d 1132, 1992 Miss. LEXIS 563 (Miss. 1992), overruled in part, Goff v. State, 14 So. 3d 625, 2009 Miss. LEXIS 273 (Miss. 2009).

**Trustworthiness.**

Trial court's admission of hearsay evidence was not reversible error because there was no abuse of discretion in its determination that the evidence was sufficiently trustworthy and reliable and material. Robinson v. State, 248 So. 3d 892, 2018 Miss. App. LEXIS 240 (Miss. Ct. App. 2018), cert. denied, 263 So. 3d 665, 2019 Miss. LEXIS 91 (Miss. 2019).

Finding against the heir in her wrongful death action was proper where statements made by the decedent regarding what the physician instructed him to do were rightfully excluded. The treatment that the physician provided was located in the medical records and since this was the party to whom the deceased made the statement, there was a lack of trustworthiness; thus, those statements did not fall under Miss. R. Evid. 803(24) or Miss. R. Evid. 804(b)(5). Richardson ex rel. Wrongful Death Heirs of Richardson v. DeRouen, 920 So. 2d 1044, 2006 Miss. App. LEXIS 84 (Miss. Ct. App. 2006).

Regardless of whether the residuum rule was applied or not, there was substantial, credible, corroborated evidence of a claimant's multiple acts of insubordination constituting "misconduct" contained in summaries of personnel records based on personal knowledge which were a proper basis for denying unemployment benefits to the claimant; that testimony revealed that many of the relevant records were based on the personal knowledge of the preparer of the individual complaints against the claimant pursuant to Miss. R. Evid. 803(6) cmt. McClinton v. Miss. Dep't of Empl. Sec., 949 So. 2d 805, 2006 Miss. App. LEXIS 766 (Miss. Ct. App. 2006).

Defendant's capital murder convictions were proper where testimony admitted by one of the decedent's sister involving an insurance scam with defendant was correctly admitted pursuant to Miss. R. Evid. 403, 404(b), and 804(b)(5) because the declarant was unavailable and because the trial court analyzed the five requirements for admission of the hearsay pursuant to Miss. R. Evid. 803(24) and determined that it was trustworthy and material to the case. Rubenstein v. State, 2005 Miss. LEXIS 789 (Miss. Dec. 1, 2005), op. withdrawn, 2006 Miss. LEXIS 424 (Miss. Aug. 10, 2006), sub. op., 941 So. 2d 735, 2006 Miss. LEXIS 411 (Miss. 2006).

Trial court did not abuse its discretion by not requiring an expert to analyze and testify to the chemical analysis of the ingredients in cold medicine as the evidence was properly admitted under Miss. R. Evid. 803(24) as the medicine had a label that was made in normal process of nationwide manufacturing and distribution by an established pharmaceutical company, thus, the label as to the medicine's ingredients had substantial indicia of trustworthiness. Burchfield v. State, 892 So. 2d 248, 2004 Miss. App. LEXIS 538 (Miss. Ct. App.), aff'd, 892 So. 2d 191, 2004 Miss. LEXIS 1346 (Miss. 2004).

Trial court had more than sufficient evidence before it, none of which was contradicted or even impeached during the hearing on a motion in limine regarding child victim's extrajudicial statements on the alleged sexual abuse, to conclude that the child's statements had sufficient indicia of reliability to overcome a hearsay objection and be admitted under Miss. R. Evid. 803(25), including the fact that the child related the events to a social worker without a great deal of prompting or prodding and told what happened in some detail in her own words, and the child was ten years old at the time. Sharp v. State, 862 So. 2d 576, 2004 Miss. App. LEXIS 7 (Miss. Ct. App. 2004).

Trial court properly barred the admission of the county forester's report into evidence where it stated that a fire was caused by a power line as the opinion was given by a person not qualified to offer such an opinion and no showing was made that the statement was trustworthy. Redhead v. Entergy Miss., Inc., 828 So. 2d 801, 2001 Miss. App. LEXIS 421 (Miss. Ct. App. 2001), cert. dismissed, 2002 Miss. App. LEXIS 618 (Miss. Ct. App. Oct. 17, 2002).

**Illustrative cases.**

Because the individual's testimony regarding the boundary of appellant's property and that of the decedent's estate indicated that he only testified to his own personal belief and that it was based on what the decedent had told him, apparently in a private conversation, the statement was not a statement of reputation at all, much less of a general reputation in the community as would be required to admit the testimony under the hearsay exception for reputation evidence relating to boundaries; thus, there was no abuse of discretion in the exclusion of that testimony. Russell v. Byrd (In re Estate of Wylie), 226 So. 3d 114, 2017 Miss. App. LEXIS 462 (Miss. Ct. App. 2017).

Chancellor did not abuse the chancellor's discretion by excluding testimony as hearsay because, although the proponents of the testimony contended that the statements were to show the effect the statements had on the proponents and to explain why they terminated the grandparents' visitation with the proponents' children, the chancellor found that the proponents sought to admit the testimony to convince the chancellor of the truth of the matter asserted rather than to show the effect of the statements on the proponents. Smith v. Martin, 202 So. 3d 263, 2016 Miss. App. LEXIS 110 (Miss. Ct. App. 2016), aff'd, 222 So. 3d 255, 2017 Miss. LEXIS 151 (Miss. 2017).

In a wrongful death case under the Federal Employers' Liability Act, an expert designation constituted improper summary judgment evidence because it was not sworn to upon personal knowledge, and it constituted inadmissible hearsay as it was offered for the truth of matter the asserted and met no hearsay exception; the designation set out the expert's opinions on asbestos in the railroad industry, but it was sworn to and signed by a widow. A supplemental response was improper summary judgment evidence because it was unsworn and never filed; testimony from a coworker was insufficient to create a genuine issue as to the decedent's asbestos exposure because the coworker lacked personal knowledge of whether putty used on the job contained asbestos. Ill. Cent. R.R. Co. v. Jackson, 179 So. 3d 1037, 2015 Miss. LEXIS 588 (Miss. 2015).

Parking lot surveillance videos were admissible because the custodians of the videos testified that their employers maintained the surveillance videos as part of their ongoing businesses and testified as to the regular practices of their employers pertaining to the surveillance-video equipment. Bunch v. State, 123 So. 3d 484, 2013 Miss. App. LEXIS 602 (Miss. Ct. App. 2013).

Evidence was sufficient to convict defendant of violating Miss. Code Ann. § 97-5-33(6) because the child victim identified defendant and testified that defendant approached him and asked to perform a sexual act upon him, and the mother's testimony of the events related to her by the child and their subsequent actions was properly admitted as non-hearsay or as a hearsay exception under Miss. R. Evid. 803(1). Dunn v. State, 111 So. 3d 114, 2013 Miss. App. LEXIS 181 (Miss. Ct. App. 2013).

As appellee did not call a custodian of the record of DNA test results to testify, and did not notify appellant under Miss. R. Evid. 902(11)(C)(i) of her intent to offer the DNA results as a self-authenticating business record under Miss. R. Evid. 803(6), the trial court erred in admitting them. Ivy v. Ivy (In re Estate of Ivy), 121 So. 3d 226, 2012 Miss. App. LEXIS 816 (Miss. Ct. App. 2012), cert. denied, 121 So. 3d 918, 2013 Miss. LEXIS 487 (Miss. 2013).

Affidavit and DNA test results were not admissible under Miss. R. Evid. 803(24), the catch-all exception to the hearsay rule, as there was no evidence that appellee provided appellant with notice of her intent to offer these documents as evidence; mere attachment of the documents to appellee's petition and questioning in a deposition did not suffice for the required notice. Ivy v. Ivy (In re Estate of Ivy), 121 So. 3d 226, 2012 Miss. App. LEXIS 816 (Miss. Ct. App. 2012), cert. denied, 121 So. 3d 918, 2013 Miss. LEXIS 487 (Miss. 2013).

In a rape case, admission under Miss. R. Evid. 803(3) of a witness's testimony that the victim told him she had been raped by defendant was error as the statement did not relate to the execution, revocation, identification, or terms of her will. But, the error was harmless since the properly admitted evidence was more than sufficient to convict. Ben v. State, 96 So. 3d 9, 2011 Miss. App. LEXIS 298 (Miss. Ct. App. 2011), aff'd, 95 So. 3d 1236, 2012 Miss. LEXIS 411 (Miss. 2012).

Trial court did not err in allowing a child rape victim's hearsay statements to be admitted under Miss. R. Evid. 803(25) in defendant's statutory rape trial as the victim was eleven years old when she told her mother and aunt that defendant had been having sexual intercourse with her, the statements were spontaneous and consistently repeated, the victim's mental stated seemed to be one of a person who would not fabricate, the victim seemed to be of the character that would be able to relate things reliably to those she to whom she was speaking, more than one person had heard the statements, her relationships to the witnesses showed reliability, the possibility of a faulty recollection was remote, and the people giving the statements seemed to be credible. Anderson v. State, 62 So. 3d 927, 2011 Miss. LEXIS 194 (Miss. 2011).

In a wrongful death action, there was support that relevant journal entries were as a whole contemporaneous, so the trial court did not commit reversible error in admitting the journal. Mariner Health Care, Inc. v. Estate of Edwards, 964 So. 2d 1138, 2007 Miss. LEXIS 520 (Miss. 2007).

Defendant's conviction for murdering the victim by deliberate design was proper under Miss. R. Evid. 803(3) because the statements that witnesses overheard defendant make to the victim and the victim make to defendant just before the right began were relevant to show that defendant intended to fight and might have been the initial aggressor; thus, the appellate court was unable to find error in the trial court's admission of that testimony. Council v. State, 976 So. 2d 889, 2007 Miss. App. LEXIS 297 (Miss. Ct. App. 2007), cert. dismissed, 977 So. 2d 343, 2008 Miss. LEXIS 74 (Miss. 2008).

Trial court did not abuse its discretion in sustaining the hearsay objection as to whether anyone stated that defendant or his accomplice were attempting to steal a car where defendant argued that the testimony would have constituted a hearsay exception as to the declarant's intent, plan, or motive to do something in the future under Miss. R. Evid. 803(3); however, the exclusion of that testimony was not grounds for reversal because it did not affect any of defendant's substantial rights as it was not necessary to his defense. White v. State, 969 So. 2d 72, 2007 Miss. App. LEXIS 247 (Miss. Ct. App.), cert. denied, 968 So. 2d 948, 2007 Miss. LEXIS 658 (Miss. 2007).

Where the prosecution had established through the victim's friend's testimony that the victim was upset and crying when she made certain statements, and that he had arrived between 30 and 35 minutes from the time the rape occurred, the testimony was admissible under Miss. R. Evid. 803(1), (3). Wright v. State, 958 So. 2d 158, 2007 Miss. LEXIS 202 (Miss.), cert. dismissed, 964 So. 2d 508, 2007 Miss. LEXIS 501 (Miss. 2007).

Defendant's conviction for the sale of cocaine was inappropriate because the state failed to present evidence that identified the people on the tape in question; insufficient evidence of the context of the anonymous declarant's statements was established to enable the appellate court's assessment of the applicability of hearsay exceptions under Miss. R. Evid. 803. Brown v. State, 969 So. 2d 891, 2007 Miss. App. LEXIS 19 (Miss. Ct. App.), rev'd, 969 So. 2d 855, 2007 Miss. LEXIS 680 (Miss. 2007).

Trial court did not err by refusing to admit the defendant's statement to a woman that the victim had threatened to kill him because the statement would serve defendant's argument at trial that his actions were in self-defense and thus were self-serving and properly excluded by the trial judge pursuant to Miss. R. Evid. 803(3) and Miss. R. Evid. 805. Ward v. State, 935 So. 2d 1047, 2005 Miss. App. LEXIS 996 (Miss. Ct. App. 2005), cert. denied, 936 So. 2d 367, 2006 Miss. LEXIS 414 (Miss. 2006).

In a child custody case, the trial court properly excluded an answering machine tape containing a message from tending to show that the mother was considered to be mentally unstable. The tape was inadmissible under Miss. R. Evid. 803(24), because the proponent of the hearsay evidence did not make his intention to offer the evidence known to the other party in advance of the trial. Balius v. Gaines, 95 So. 3d 730, 2012 Miss. App. LEXIS 488 (Miss. Ct. App. 2012).

Court properly disallowed defendant's proffered hearsay testimony because the declarant was not under subpoena to appear at trial and defendant made no efforts to procure his attendance, and a presumption or suspicion that a witness would assert his Fifth Amendment privilege against self-incrimination and refuse to testify was insufficient to declare a witness unavailable. The witness must be called to the stand and there refuse to testify before he became unavailable due to invoking the Fifth Amendment. Cochran v. State, 913 So. 2d 371, 2005 Miss. App. LEXIS 268 (Miss. Ct. App. 2005).

In a murder trial, the trial court properly declined to enter a sua sponte limiting instruction on prior bad acts offered under Miss. R. Evid. 404(b), as the evidence was not offered for that reason, but rather to show the victim's state of mind under Miss. R. Evid. 803 and 804, and the limiting instruction rule was therefore not applicable. Reed v. State, 863 So. 2d 981, 2003 Miss. App. LEXIS 1197 (Miss. Ct. App. 2003).

Because little time passed between the time a defendant's accomplice entered a car and his statement to a witness implicating defendant in a murder, the statement was sufficiently contemporaneous to fit within the present sense impression exception to the hearsay rule and was properly admitted under Miss. R. Evid. 803(1). Wells v. State, 849 So. 2d 1231, 2003 Miss. LEXIS 213 (Miss. 2003).

Witness's testimony about a defendant's accomplice's statement implicating defendant in a murder was admissible as an excited utterance under Miss. R. Evid. 803(2), as the accomplice made the statement while still under the stress of startling events. Wells v. State, 849 So. 2d 1231, 2003 Miss. LEXIS 213 (Miss. 2003).

Testimony by two narcotics agents as to what they heard defendant and a coconspirator say during a drug transaction was admissible because this testimony was not hearsay but rather an admission by a party-opponent under Miss. R. Evid. 801(d)(2)(E); defense counsel had objected numerous times citing the testimony as hearsay not under any exception under Miss. R. Evid. 803. Towner v. State, 837 So. 2d 221, 2003 Miss. App. LEXIS 54 (Miss. Ct. App. 2003).

In a wrongful death action, it was not contested that the decedent had received a copy of the drilling company's handbook which referenced the safety manual, and that both addressed fall protection. The handbook and manual would have shown the decedent's state of mind, and the extent of his exercise of reasonable care, and the trial court abused its discretion by excluding the handbook, manual and accompanying deposition testimony. Crane Co. v. Kitzinger, 2003 Miss. LEXIS 52 (Miss. Jan. 30, 2003), op. withdrawn, sub. op., 860 So. 2d 1196, 2003 Miss. LEXIS 689 (Miss. 2003).

Testimony that a murder victim, while speaking on the phone, told the witness that he saw defendant standing outside his apartment with a gun and that he was frightened was properly admitted as a present sense impression and an excited utterance (Miss. R. Evid. 803(1) and (2), respectively). Cox v. State, 2003 Miss. LEXIS 103 (Miss. Mar. 13, 2003), op. withdrawn, sub. op., 849 So. 2d 1257, 2003 Miss. LEXIS 337 (Miss. 2003).

Trial court did not admit hearsay testimony that did not comply with the provisions of Miss. R. Evid. 804(a) & (b) where the record reflected that when the State questioned the victim's mother as to what the victim told her had happened in a prior altercation between the victim and defendant, the trial court sustained defendant's objection before the mother answered and did not allow the testimony. Simmons v. State, 813 So. 2d 710, 2002 Miss. LEXIS 132 (Miss. 2002).

Co-defendants' written and video statements were not properly admitted under the rule in Seales v. State, 495 So. 2d 475 (Miss. 1986), because they did not contain the necessary "indicia of reliability" required for admissibility; neither defendant testified at trial, and the non-corroborating statements were more self-serving than self-inculpatory. Smith v. State, 754 So. 2d 1159, 2000 Miss. LEXIS 2 (Miss. 2000), overruled in part, 986 So. 2d 290, 2008 Miss. LEXIS 339 (Miss. 2008).

## RESEARCH REFERENCES

**ALR.**

Admissibility of declarant's then-existing mental, emotional, or physical condition, under Rule 803(3) of Uniform Rules of Evidence and similar formulations. 57 A.L.R.5th 141.

Admissibility of ancient documents as hearsay exception under Rule 803(16) of the Uniform Rules of Evidence. 63 A.L.R.5th 331.

Admissibility in state court proceedings of police reports as business records. 111 A.L.R.5th 1.

Admissibility in state court proceedings of police reports under official record exception to hearsay rule. 112 A.L.R.5th 621.

Admissibility, under Rule 803(8)(c) of Federal Rules of Evidence, of "factual findings resulting from investigation made pursuant to authority granted by law". 180 A.L.R. Fed. 61.

Requirements, under Federal Rule of Evidence 807 (Fed. Rules Evid. Rule 807, 28 U.S.C.S.), of notice to adverse party for admission of evidence under residual exception to hearsay rule, where availability of declarant is immaterial. 155 A.L.R. Fed. 409.

When is hearsay statement "excited utterance" admissible under Rule 803(2) of Federal Rules of Evidence. 155 A.L.R. Fed. 583.

When is hearsay statement "present sense impression" admissible under Rule 803(1) of Federal Rules of Evidence. 165 A.L.R. Fed. 491.

When is witness "unavailable" for purposes of admission of evidence under Rule 804 of Federal Rules of Evidence, providing hearsay exception where declarant is unavailable. 174 A.L.R. Fed. 1.

Admissibility of ancient documents as hearsay exception under Rule 803(16) of Federal Rules of Evidence. 186 A.L.R. Fed. 485.

## Rule 804. Exceptions to the rule against hearsay — when the declarant is unavailable as a witness.

(a) *Criteria for being unavailable.* — A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter;

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness;

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant' s attendance, in the case of a hearsay exception under Rule 804(b)(l) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4); or

(6) is a child for whom testifying in the physical presence of the accused is substantially likely to impair the child's emotional or psychological health substantially.

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) *The exceptions.* — The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) *Former testimony.* Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) (B) is now offered against a party who had – or, in a civil case, whose predecessor in interest had – an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) *Statement under the belief of imminent death.* In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) *Statement against interest.* A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant' s claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) *Statement of personal or family history.* A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) *Other exceptions.* A statement not specifically covered by this Rule if:

(A) the statement has equivalent circumstantial guarantees of trustworthiness;

(B) it is offered as evidence of a material fact;

(C) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts;

(D) admitting it will best serve the purposes of these rules and the interests of justice; and

(E) before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

(6) *Statement offered against a party that wrongfully caused the declarant's unavailability.* A statement offered against a party that wrongfully caused – or acquiesced in wrongfully causing – the declarant's unavailability as a witness, and did so intending that result.

**HISTORY: Amended effective March 27, 1991; amended effective July 1, 2009 to add subsection (6); restyled effective July 1, 2016; amended effective July 1, 2020.**

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective March 20, 1995, the Advisory Committee Note to Rules 804(a) and (b)(1) were amended to note the repeal of a statute. 648-651 So. 2d 651 So. 2d XXVI (West Miss. Cas. 1995).

Effective March 27, 1991, Rule 804(a)

was amended to add a sixth definition of unavailability applicable only to child declarants, Rule 804(a)(6). 574-576 So. 2d XXVIII (West Miss. Cas. 1991).

Effective March 1, 1989, the Advisory Committee Note regarding Rule 804(a)(5) was amended to include a statement that this rule does not affect the admissibility of depositions under a civil rule. 536-538 So. 2d XXXII (West Miss. Cas. 1989).

## ADVISORY COMMITTEE NOTE

The language of Rule 804 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. Rule 804(b)(5) has been restructured with additional subparagraphs. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

**(a)** In defining unavailability, the rule lists six situations in which unavailability exists:

(1) When the witness exercises a privilege, the witness is deemed to be unavailable as to the portion of the witness's testimony which is covered by the claimed privilege. The trial court, however, may first make a preliminary determination that the witness has the right to claim the privilege asserted.

(2) When a witness refuses to testify, despite being ordered to do so by the court, the witness is deemed unavailable.

(3) If the witness testifies that the witness has a lack of memory as to the subject matter under inquiry, the witness is deemed to be unavailable.

(4) Death and sickness render a witness unavailable. *See Paulk v. Housing Authority of Tupelo,* 228 So. 2d 871 (Miss. 1969), and *Home Ins. Co. v. Gerlach,* 220 Miss. 732, 71 So. 2d 787 (1954).

(5) Absence of the witness from the hearing accompanied by an inability of the proponent of the evidence to compel the witness's presence is within the definition of unavailability. Nothing in Rule 804, however, affects the admissibility of depositions otherwise admissible under M.R.C.P. 32.

(6) The rationale for this definition of unavailability is based on the recognition of child trauma.

A finding of unavailability and indicia of reliability should be made on the record.

If, however, the proponent of the evidence is responsible for the existence of any of the aforementioned conditions, the condition of unavailability for the purposes of Rule 804 is not satisfied.

**(b)**(1) *Former Testimony.* An essential ingredient of the former testimony exception has always been the unavailability of the declarant.

Rule 804(b)(1) permits the prior testimony to be offered (1) against the party *against* whom it was previously offered or (2) against the party who offered it previously. Thus, the rule equates the direct and redirect examination of one's own witness with the cross-examination of an adversarial witness.

It is not required that the former testimony be in an earlier proceeding of the same case. It is only essential that the party against whom it is directed had a similar motive and an opportunity to develop the testimony on the previous occasion. The rule does not speak in terms of identity of issues. Identity of issues is only important because it bears on motive. Thus, the rule deletes the law common phrase "identity of issues" and substitutes "motive" and "opportunity."

**(b)**(2) *Statement Under Belief of Impending Death.* The rule allows for the dying declaration to be used in homicide cases and in civil actions, but it is not available in non-homicide criminal actions.

**(b)**(3) *Statement Against Interest.* Rule 804(b)(3) expands the common law exception of declaration against interest. Traditionally, courts have recognized two declarations against interest, pecuniary and proprietary. The rule extends the exception to declarations against penal interest on the theory that such declarations are reliable. No reasonable person would make such a statement and invite possible criminal prosecution if the statement were not true.

Subparagraph (b)(3)(B) provides that the corroborating circumstances requirement applies to all declarations against penal interest offered in criminal cases. A unitary approach to declarations against penal interest assures both the prosecution and the accused that the Rule will not be abused and that only reliable hearsay statements will be admitted under the exception. The Rules does not address the use of the corroborating circumstances for declarations against penal interest offered in civil cases.

In assessing whether corroborating circumstances exist. the credibility of the witness who relates the statement is not a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the witness's credibility would usurp the jury's role of determining the credibility of testifying witnesses.

**(b)**(4) *Statement of Personal or Family History.* This rule is similar to Rule 803(19). The distinguishing feature is that the statements under Rule 804(b)(4) are statements made by unavailable declarants concerning their own personal and family history or that of a family member or intimate associate. Rule 803(19) focuses more on reputation.

**(b)** (5) This rule is identical to Rule 803(24) in both language and intent.

**(b)** (6) *Forfeiture by Wrongdoing.* Rule 804(b)(6) provides that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness. This recognizes the need for a prophylactic rule to deal with abhorrent behavior "which strikes at the heart of the system of justice itself." *United States v. Mastrangelo,* 693 F.2d 269, 273 (2d Cir. 1982), cert. denied, 104 S. Ct. 2385(1984). *Davis v. Washington,* 126 S. Ct. 2266, 2280 (2006) ("While defendants have no duty to assist the State in proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system."). Likewise, a party forfeits rights under the Confrontation Clause when misconduct attributable to a party causes a witness's absence. *U.S. v. Carson,* 455 F.3d 336 (C.A.D.C. 2006) (wrongdoing by coconspirators). The wrongdoing need not consist of a criminal act and the rule applies to all parties, including the government.

When any of the hearsay exceptions in Rule 804 are applied in a criminal case, the rights of the defendant under the Confrontations Clauses of Federal and State Constitutions must be respected. *Crawford v. Washington,* 124 S. Ct. 1354 (2004) (The confrontation clause forbids "admission of testimonial statements of a witness who did not appear at trial unless [the witness is] unavailable to testify, and the defendant had had a prior opportunity for cross-examination."); *Davis v. Washington,* 126 S. Ct. 2266 (2006) (Among other things, prior testimony, depositions, affidavits, and confessions are testimonial, as are other statements to police if "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."). *See also Rubenstein v. State,* 941 So. 2d 735 (Miss. 2006) (applying Rule 804(b)(5) in light of *Crawford* and finding statements nontestimonial); *Bell v. State,* 928 So. 2d 951 (Miss. Ct. App. 2006) (applying Rules 804(a)(6) and 803(2) in light of *Crawford* and finding statements testimonial). (Amended effective July 1, 2009, to update citations and add subsection (b)(6); amended effective December 1, 2015, to update subsection (a)(5); "Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended July 1, 2016, to note restyling; amended effective July 1, 2020.)

## JUDICIAL DECISIONS

### ANALYSIS

Circumstantial guarantees of trustworthiness.
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Dying declarations.
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Personal or family history.
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– Against interest.
– Not in error.
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– Found.
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**Circumstantial guarantees of trustworthiness.**

The murder victim's statements to bank employees and to the victim's parent were admissible because (1) defendant had sufficient notice of the testimony; (2) the statements had circumstantial guarantees of trustworthiness; and (3) the statements were probative and material. Batiste v. State, 121 So. 3d 808, 2013 Miss. LEXIS 295 (Miss. 2013), cert. denied, 572 U.S. 1117, 134 S. Ct. 2287, 189 L. Ed. 2d 178, 2014 U.S. LEXIS 3424 (U.S. 2014).

In an armed robbery case, a police officer was properly allowed to testify to what a victim stated even though none of the exceptions under Miss. R. Evid. 804(b)(1)-(4) applied after the witness was found to be unavailable, because Miss. R. Evid. 804(b)(5) applied; a challenge to trustworthiness was rejected since the statement was given to a police officer immediately after the commission of the crime by a person with no apparent reason to lie. Carter v. State, 965 So. 2d 705, 2007 Miss. App. LEXIS 287 (Miss. Ct. App. 2007).

In a matter arising out of a car accident, a trial court determined that a witness was not available because he was deceased; the car's driver argued that the trial court failed to make a determination of trustworthiness about the witness's out-of-court statements, and even though an employee who was driving a truck involved in the accident and his employer should have given longer notice of their intent to use the statement, the driver had taken the statement, and she was in possession of it for years, and the witness's statements were consistent. Etheridge v. Harold Case & Co., 960 So. 2d 474, 2006 Miss. App. LEXIS 623 (Miss. Ct. App. 2006), cert. denied, 959 So. 2d 1051, 2007 Miss. LEXIS 383 (Miss. 2007).

Because there were three different versions of the co-conspirator's statement, there would have been a need for cross-examination at trial, but the co-conspirator invoked the Fifth Amendment. Therefore, the hearsay rule barred admission of the co-conspirator's statement that another perpetrator besides defendant had a handgun in their possession at the time of the murder, due to lack of trustworthiness. Jacobs v. State, 870 So. 2d 1202, 2004 Miss. LEXIS 410 (Miss. 2004).

Guarantee of a statement's trustworthiness must derive from circumstances under which it was made. Jones v. Hatchett, 504 So. 2d 198, 1987 Miss. LEXIS 2392 (Miss. 1987).

Letter written by physician to plaintiff's attorney, describing plaintiff's complaints and symptoms, as well as physician's diagnosis and treatment, was not admissible under residual exception to the hearsay rule; physician was deceased at time of trial, and there were no sufficient circumstantial guarantees of trustworthiness in the letter, where it was written in anticipation of litigation and was precisely the type of unsworn, unconfronted testimony which the hearsay rule prohibited. Jones v. Hatchett, 504 So. 2d 198, 1987 Miss. LEXIS 2392 (Miss. 1987).

**Death.**

Trial court's admission of a statement against defendant by a deceased witness was not in err because the court could reasonably have inferred that defendant killed the witness to prevent the witness from testifying and/or was part of a conspiracy to do so as the State of Tennessee provided surveillance-video evidence showing defendant chasing the witness with a gun mere moments before the witness was shot and killed. Furthermore, a police investigator testified that both defendant and codefendant were suspects in the murder of the witness. Holland v. State, 290 So. 3d 754, 2020 Miss. App. LEXIS 23 (Miss. Ct. App. 2020).

Trial court erred in excluding hearsay statement made by murder victim to her friend on night of murder; defense clearly needed this evidence as it was unavailable from any other source, and there was no reason to doubt trustworthiness of the statement. Parker v. State, 606 So. 2d 1132, 1992 Miss. LEXIS 563 (Miss. 1992), overruled in part, Goff v. State, 14 So. 3d 625, 2009 Miss. LEXIS 273 (Miss. 2009).

Transcript of interview with decedent prior to his death was admissible, where it was the only available evidence of his version of how accident happened, and it was in the interest of justice and to serve purpose of the rules to allow his statement. Motorola Communications & Electronics, Inc. v. Wilkerson, 555 So. 2d 713, 1989 Miss. LEXIS 517 (Miss. 1989).

**Dying declarations.**

In a murder case, a victim's statements were admissible as dying declarations because the victim asked for medical attention, clearly related he could not feel his legs, had labored breathing, and lost a large quantity of blood; also, he died, rendering him unavailable to testify. The victim suffered in extremis, realized the severity of the wounds, and had no hope of recovery. Davis v. State, 158 So. 3d 1190, 2015 Miss. App. LEXIS 63 (Miss. Ct. App. 2015).

Judge did not err in admitting the victim's dying declaration because the officer remained consistent that he believed the victim could understand him and was responding to his questions, and the victim nodded his head "yes" when the officer asked if defendant was the person who shot him. Grindle v. State, 134 So. 3d 330, 2013 Miss. App. LEXIS 535 (Miss. Ct. App. 2013), cert. denied, 133 So. 3d 818, 2014 Miss. LEXIS 163 (Miss. 2014).

Defendant's murder conviction for the killing of his grandmother was proper because her account of what happened was properly presented as a dying declaration under Mississippi Rule of Evidence 804(b)(2) and as a present-sense impression under Mississippi Rule of Evidence 803(1). The first thing that the grandmother told the officer when he arrived at her home was that defendant had shot her; thinking that she would die and wanting whoever found her and defendant's grandfather to know who had killed them, the grandmother scrawled writings in her own blood in the hallway leading to the stairwell. Sanders v. State, 63 So. 3d 554, 2010 Miss. App. LEXIS 130 (Miss. Ct. App. 2010), aff'd, 63 So. 3d 497, 2011 Miss. LEXIS 193 (Miss. 2011).

Circuit court did not err in admitting into evidence a man's statement as a dying declaration under Miss. R. Evid. 804(b)(2) because the record indicated that the man could have known of his impending death and that he had no hope of recovery even if not specifically expressed by him. The man made his statement to a police officer after he was shot and as he was falling in and out of consciousness. Trotter v. State, 9 So. 3d 402, 2008 Miss. App. LEXIS 570 (Miss. Ct. App. 2008).

Record disclosed that the victim repeatedly made the statement, "Please don't let me die" to medical personnel; these statements could certainly be considered as evidence that the victim understood the gravity of his situation and there was no error in the admission of the victim's statement as a dying declaration under Miss. R. Evid. 804(b)(2). Nichols v. State, 965 So. 2d 770, 2007 Miss. App. LEXIS 640 (Miss. Ct. App. 2007).

In a murder prosecution, although it was proper for a witness to testify to statements made by the victim that he might be dying and that he wanted to tell his daughter that he loved her, it was improper for the witness to testify that an unidentified bystander told her that the victim then identified "Rodney" as his assailant. Jones v. State, 763 So. 2d 210, 2000 Miss. App. LEXIS 304 (Miss. Ct. App. 2000).

Statements made by a murder victim that identified his killer constituted dying declarations where the statements were made at various times between the shooting of the victim and his death 29 days later, the victim's condition never improved during that time, the doctors never gave the victim any hope of recovery, and the victim also stated that he knew he would never go home. Morris v. State, 777 So. 2d 16, 2000 Miss. LEXIS 113 (Miss. 2000).

**Former testimony.**

Trial court did not err in admitting a witness's prior testimony because although defendant defended against different charges in the first and second trials, his theory of defense remained essentially the same, and thus, it was in defendant's interest to thoroughly cross-examine the witness concerning his theory of self-defense during the first trial; the rule does not require an identical motive for developing prior testimony, but merely a "similar motive." Newell v. State, 175 So. 3d 1260, 2015 Miss. LEXIS 505 (Miss. 2015).

Appellant claimed that in his wrongful conviction and imprisonment suit under Miss. Code Ann. § 11-44-7(1), the trial court erred in admitting his co-defendant's prior testimony, because appellant's counsel in the criminal trial was ineffective in cross-examining that witness. This claim failed because appellant, in his criminal appeal based on ineffective assistance, never objected to his attorney's cross-examination of this witness. Hymes v. State, 121 So. 3d 938, 2013 Miss. App. LEXIS 272 (Miss. Ct. App. 2013), overruled in part, Edmonds v. State, 234 So. 3d 286, 2017 Miss. LEXIS 269 (Miss. 2017).

Under Miss. R. Evid. 804(b)(1), former testimony was admissible if the party against whom the testimony was now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination, and the declarant had to be unavailable; the trial judge ruled that the son had no opportunity to cross-examine the owners' witness and as a result, the deposition failed to meet the requirements under Miss. R. Evid. 804(b)(1). Gibson v. Wright, 870 So. 2d 1250, 2004 Miss. App. LEXIS 323 (Miss. Ct. App. 2004).

In a capital murder case, the inmate's counsel were not ineffective for failing to challenge the testimony of the county sheriff who was in charge of the investigation of the inmate because (1) the trial court's refusal to admit evidence of the sheriff's conviction seven years after his testimony in the inmate's case was not an abuse of discretion under Miss. R. Evid. 609(a)(1); (2) the sheriff's prior testimony was admissible under Miss. R. Evid. 804; (3) the inmate's confrontation clause rights were not violated because he had been present when the testimony was given and was able to confront the sheriff; and (4) evidence from a civil lawsuit involving one of the sheriff's deputies could have done little harm to the sheriff's credibility. Wilcher v. State, 863 So. 2d 776, 2003 Miss. LEXIS 492 (Miss. 2003), cert. denied, 542 U.S. 942, 124 S. Ct. 2917, 159 L. Ed. 2d 821, 2004 U.S. LEXIS 4678 (U.S. 2004).

In a capital murder case, the trial court did not abuse its discretion in admitting the testimony of a witness, who was pregnant and due to deliver the week of trial, from an earlier trial, because her testimony was not indicative of defendant's guilt and merely set the stage. Howard v. State, 853 So. 2d 781, 2003 Miss. LEXIS 343 (Miss. 2003), cert. denied, 540 U.S. 1197, 124 S. Ct. 1455, 158 L. Ed. 2d 113, 2004 U.S. LEXIS 1327 (U.S. 2004).

Testimony by an unavailable former police officer given at the defendant's first trial was properly admitted into evidence under the former testimony exception to the hearsay rule, especially as the defendant had the same attorney at both trials and this attorney thoroughly cross-examined the officer at the first trial. Naylor v. State, 759 So. 2d 406, 2000 Miss. LEXIS 103 (Miss. 2000).

A survey ordered to be made in earlier litigation could not be admitted as former testimony where the party seeking to introduce the survey neither identified the surveyor and preparer of the plat nor demonstrated that this person was unavailable as a witness and where the opposing party had no opportunity and similar motive to develop the surveyor's testimony by cross examination. Roebuck v. Massey, 741 So. 2d 375, 1999 Miss. App. LEXIS 342 (Miss. Ct. App. 1999).

Trial judge did not err in allowing State to introduce transcript of three witnesses' testimony from guilt phase of defendant's trial; prosecution took adequate steps to obtain unavailable witnesses' attendance at trial, and their testimony fit within the former testimony exception expressed in subdivision (b)(1) of this rule. Russell v. State, 670 So. 2d 816, 1995 Miss. LEXIS 617 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333, 1996 U.S. LEXIS 6884 (U.S. 1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064, 1997 U.S. LEXIS 3537 (U.S. 1997).

**Infirmity.**

The incompetency of a convicted perjurer under the former M.R.E. 601 (b) is an "infirmity" for purposes of determining availability of a witness under M.R.E. 804. Stevenson v. State, 733 So. 2d 177, 1998 Miss. LEXIS 627 (Miss. 1998).

**Notice.**

Defendant's conviction for armed robbery was proper where the exclusion of the statement of a witness who was an in-patient at a rehabilitation facility and deemed an unavailable witness to the police was appropriate because the statement lacked the necessary indicia of trustworthiness, was not probative of a material fact but offered solely for impeachment, and defendant did not comply with the notice requirement found in Miss. R. Evid. 804(b)(5). Peyton v. State, 858 So. 2d 156, 2003 Miss. App. LEXIS 896 (Miss. Ct. App. 2003).

In regard to Miss. R. Evid 804(b)(5)'s notice requirement, when the State is on actual notice, the appellate court will not allow technical violations to override fundamental fairness; where the State does not demonstrate any harm or prejudice resulting from noncompliance with technicalities, fundamental fairness prevails. Randall v. State, 806 So. 2d 185, 2001 Miss. LEXIS 243 (Miss. 2001), overruled in part, Ambrose v. State, 254 So. 3d 77, 2018 Miss. LEXIS 326 (Miss. 2018).

**Other exceptions.**

Finding against the heir in her wrongful death action was proper where statements made by the decedent regarding what the physician instructed him to do were rightfully excluded. The treatment that the physician provided was located in the medical records and since this was the party to whom the deceased made the statement, there was a lack of trustworthiness; thus, those statements did not fall under Miss. R. Evid. 803(24) or Miss. R. Evid. 804(b)(5). Richardson ex rel. Wrongful Death Heirs of Richardson v. DeRouen, 920 So. 2d 1044, 2006 Miss. App. LEXIS 84 (Miss. Ct. App. 2006).

In a prosecution for murder, the trial court did not err when it refused to allow the introduction into evidence of a statement made by a coperpetrator pertaining to cocaine use by the victim, and the victim's criminal record, in order to support the defendant's assertion of self-defense. Thomas v. State, 812 So. 2d 1010, 2001 Miss. App. LEXIS 31 (Miss. Ct. App. 2001).

In a proceeding to determine whether a securities account was a tenancy in common or a joint tenancy and, therefore, whether a portion of the account should pass through the will of one of the owners of the account, an audio tape of the deceased instructing how he wished his assets divided was properly admitted under subdivision (b)(5) of this rule, especially as the party opposing admission admitted that the voice on the tape was that of the decedent and that she was told of the tape's existence by him prior to his death; the audio recorded statements of the decedent were probative of his state of mind on the date of the recording, and they explained his understanding of the joint accounts. Estate of Baker v. Baker, 1999 Miss. LEXIS 262 (Miss. Aug. 19, 1999), op. withdrawn, sub. op., 760 So. 2d 759, 2000 Miss. LEXIS 129 (Miss. 2000).

In a prosecution for the rape of an eight year old child, the catch-all exception of subsection (b)(5) did not permit the introduction into evidence of statements made by the child's aunts that the child had told them that she was being sexually abused by another person, her stepfather, since such statements were irrelevant in determining whether the defendant had raped the child. Taylor v. State, 744 So. 2d 306, 1999 Miss. App. LEXIS 145 (Miss. Ct. App. 1999).

Hearsay testimony, in form of statements made by child sexual abuse victim to police detective, should not have been admitted in absence of findings required by subdivision (b)(5) of this rule. Quimby v. State, 604 So. 2d 741, 1992 Miss. LEXIS 402 (Miss. 1992).

Overriding concern, before a hearsay statement may be admitted under a residual exception, is that it has equivalent guarantees of trustworthiness similar to those of other exceptions. Minnick v. State, 551 So. 2d 77, 1988 Miss. LEXIS 612 (Miss. 1988), rev'd, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489, 1990 U.S.

LEXIS 6118 (U.S. 1990), overruled, Willie v. State, 585 So. 2d 660, 1991 Miss. LEXIS 454 (Miss. 1991).

**Personal or family history.**

A birth certificate, which stated that a jazz musician who died in 1938 was the father of the appellee, was properly introduced into evidence in a proceeding in which the appellee claimed a share of the musician's estate as it contained sufficient indicia of trustworthiness. Harris v. Johnson (In re Estate of Johnson), 767 So. 2d 181, 2000 Miss. LEXIS 151 (Miss. 2000), cert. denied, 532 U.S. 959, 121 S. Ct. 1489, 149 L. Ed. 2d 376, 2001 U.S. LEXIS 2752 (U.S. 2001).

**Physical illness.**

Circuit judge did not err by deciding to declare a police detective unavailable as a witness, because of the detective's serious health issues, and to admit the detective's videotaped deposition testimony. McKenzie v. State, 119 So. 3d 1145, 2013 Miss. App. LEXIS 480 (Miss. Ct. App. 2013).

Trial court erred in allowing a tape recorded statement of an inmate to be played for a jury because the inmate was unavailable due to medical reasons and was not subject to cross-examination. However, the erroneous admission of the statement did not contribute to the verdict and, therefore, the error was harmless in light of all of the other evidence that was offered at trial. Owen v. State, 43 So. 3d 1146, 2010 Miss. App. LEXIS 12 (Miss. Ct. App.), cert. denied, 49 So. 3d 106, 2010 Miss. LEXIS 483 (Miss. 2010).

Witness who was not present at trial due to doctor's appointment did not have an "existing physical illness" and was thus not "unavailable" under subdivision (a)(4) of this rule, where offering party presented no medical witnesses or supporting affidavits. Earl v. State, 672 So. 2d 1240, 1996 Miss. LEXIS 148 (Miss. 1996).

**Residual exception.**

Five conditions must be met before evidence is admissible pursuant to Miss. R. Evid. 804(b)(5): (1) the adverse party must have notice of intended use; (2) the statement must have circumstantial guarantees of trustworthiness; (3) it must be offered as evidence of a material fact; (4) it must be more probative than other evidence; and (5) the purpose of the rules and the interests of justice must be best served by admitting the statement; each condition must be met before the hearsay may properly be admitted. Randall v. State, 806 So. 2d 185, 2001 Miss. LEXIS 243 (Miss. 2001), overruled in part, Ambrose v. State, 254 So. 3d 77, 2018 Miss. LEXIS 326 (Miss. 2018).

Statement possessed sufficient circumstantial guarantees of trustworthiness to allow admission where two witness statements given to police about three hours apart in same evening as events witnessed were the same in substance, nothing in record showed witness had relationship with defendants or State or had particular motive, and statements dovetailed with other evidence offered. Randall v. State, 806 So. 2d 185, 2001 Miss. LEXIS 243 (Miss. 2001), overruled in part, Ambrose v. State, 254 So. 3d 77, 2018 Miss. LEXIS 326 (Miss. 2018).

In determining whether the proffered hearsay has circumstantial guarantees of trustworthiness, need is a proper factor; need, however, must be balanced against the trustworthiness of the evidence. Randall v. State, 806 So. 2d 185, 2001 Miss. LEXIS 243 (Miss. 2001), overruled in part, Ambrose v. State, 254 So. 3d 77, 2018 Miss. LEXIS 326 (Miss. 2018).

**Statement.**

Trial court properly excluded a witness's affidavit as pure hearsay because the witness would not be exposed to further criminal liability at the time he executed his affidavit; the affidavit was executed after the witness had entered a plea of guilty and had been sentenced to probation, and the witness was terminally ill at the time he executed his affidavit, which was at the direction of defendant's counsel. Fontaine v. State, 256 So. 3d 615, 2018 Miss. App. LEXIS 124 (Miss. Ct. App.), cert. denied, 256 So. 3d 593, 2018 Miss. LEXIS 447 (Miss. 2018).

Trial court did not abuse its discretion by excluding in defendant's trial for aiding and abetting in the commission of a murder the post-arrest statement by the murderer that defendant did not hand the murderer the gun that was used to shoot the victim because the statement was inadmissible hearsay as it was neither clearly against the penal interest of the murderer, who pleaded self-defense, nor clearly corroborated by attendant circumstances. Small v. State, 224 So. 3d 1272, 2017 Miss. App. LEXIS 460 (Miss. Ct. App. 2017).

Defendant's conversation with his brother, as relayed by a detective at trial, was not hearsay within hearsay because defendant's conversation with his brother was excepted from the hearsay rule as a statement against interest; and the brother's conversation with the detective was admissible under the excited-utterance exception to the hearsay rule as defendant's early-morning phone call awakened and startled his brother, and the brother spoke to the detective within a relatively short time of his conversation with defendant. Further, there was no evidence that the testimony was unduly prejudicial as the testimony was probative to present the jury with a complete account of the facts of the case. Affleck v. State, 210 So. 3d 1067, 2015 Miss. App. LEXIS 675 (Miss. Ct. App. 2015), cert. denied, 203 So. 3d 598, 2016 Miss. LEXIS 388 (Miss. 2016), cert. denied, 2016 Miss. LEXIS 391 (Miss. Sept. 15, 2016), cert. denied, 580 U.S. 1128, 137 S. Ct. 1091, 197 L. Ed. 2d 201, 2017 U.S. LEXIS 1278 (U.S. 2017).

Because a witness's testimony about defendant's statement that his father had "turned State on him" was not against defendant's interest subjecting him to criminal liability, it was not admissible under the hearsay exception of a statement against interest; however, because the statement was not offered for the truth of the matter asserted, it was not hearsay and was admissible. Thomas v. State, 134 So. 3d 357, 2013 Miss. App. LEXIS 717 (Miss. Ct. App. 2013).

Defendant's capital murder convictions were proper where testimony admitted by one of the decedent's sister involving an insurance scam with defendant was correctly admitted pursuant to Miss. R. Evid. 403, 404(b), and 804(b)(5) because the declarant was unavailable and because the trial court analyzed the five requirements for admission of the hearsay pursuant to Miss. R. Evid. 803(24) and determined that it was trustworthy and material to the case. Rubenstein v. State, 2005 Miss. LEXIS 789 (Miss. Dec. 1, 2005), op. withdrawn, 2006 Miss. LEXIS 424 (Miss. Aug. 10, 2006), sub. op., 941 So. 2d 735, 2006 Miss. LEXIS 411 (Miss. 2006).

**– Against interest.**

Trial court's exclusion of the victim's letters and the text message to the defendant cannot be said to have been an abuse of discretion because they were inadmissible hearsay because the declarant, the victim, testified as a witness at trial and, thus, she was not unavailable as a witness under any of the applicable unavailability definitions for a statement against interest or present-sense impression. Kirk v. State, 160 So. 3d 685, 2015 Miss. LEXIS 68 (Miss. 2015).

In a case where defendant was convicted of the capital murder of a county sheriff, the trial court erred in excluding the statement of the other accused person that he was driving the truck that struck and killed the county sheriff because, had the jury heard the other accused person's statements against his interest and believed them, defendant could not have been found guilty of capital murder. Williams v. State, 174 So. 3d 275, 2014 Miss. App. LEXIS 694 (Miss. Ct. App. 2014), aff'd, 234 So. 3d 1278, 2017 Miss. LEXIS 388 (Miss. 2017).

In a case where defendant was convicted of the capital murder of a county sheriff, the trial court erred in excluding the statement of the other accused person that he was driving the truck that struck and killed the county sheriff because he was unavailable as a witness as he invoked his Fifth Amendment right not to testify; his statement to law enforcement was contrary to his own interest as no person would have admitted to the murder had they not actually killed someone; the statement tended to subject him to criminal liability for a capital-murder conviction; and there was corroborating evidence to indicate the trustworthiness of the statement as a witness put the other accused person behind the wheel of the truck, as did DNA evidence. Williams v.

State, 174 So. 3d 275, 2014 Miss. App. LEXIS 694 (Miss. Ct. App. 2014), aff'd, 234 So. 3d 1278, 2017 Miss. LEXIS 388 (Miss. 2017).

Trial court abused its discretion by excluding letters which a codefendant wrote to codefendant's parent, codefendant's paramour, and defendant because codefendant pleaded codefendant's right to remain silent, due to codefendant's separate legal proceeding, and the letters should have been admitted as they provided exculpatory evidence for defendant and constituted a statement against self-interest, in that they implicated codefendant in the murder of defendant's spouse. Hartfield v. State, 168 So. 3d 1101, 2014 Miss. App. LEXIS 22 (Miss. Ct. App. 2014), rev'd, 161 So. 3d 125, 2015 Miss. LEXIS 125 (Miss. 2015).

Because the coconspirator asserted that she had assisted a plea-bargaining defendant involved in this case with covering up the crime, the coconspirator confessed to some elements of acting as an accessory after the fact, but her confession indicated duress, and if true, this asserted a defense to liability; her letters were nothing more than an attempt to exonerate herself from her pending murder charge and place blame elsewhere, and the fact that she may also have implicated herself in a much lesser crime was of no consequence, her statements were not against her penal interest, and they were not admissible. Hartfield v. State, 161 So. 3d 125, 2015 Miss. LEXIS 125 (Miss. 2015).

Although the trial court did not abuse its discretion by excluding the coconspirator's statements as a statement against interest, the trial court erroneously relied upon evidence adduced at the coconspirator's separate trial in its finding that the statements were not trustworthy, and the trial court should have limited its inquiry to the record in defendant's trial. Hartfield v. State, 161 So. 3d 125, 2015 Miss. LEXIS 125 (Miss. 2015).

First requirement for admissibility as a statement against interest was met because the coconspirator, having invoked her Fifth Amendment rights, was unavailable as a witness. Hartfield v. State, 161 So. 3d 125, 2015 Miss. LEXIS 125 (Miss. 2015).

Rule on statement against interest imposes three requirements for the admission of a statement that tends to expose the declarant to criminal liability and is offered to exculpate the accused: that the declarant is unavailable as a witness, that the statement so far tends to subject the declarant to criminal liability that a reasonable person in his position would not have made the statement unless he believed it to be true, and that corroborating circumstances clearly indicate the trustworthiness of the statement. Hartfield v. State, 161 So. 3d 125, 2015 Miss. LEXIS 125 (Miss. 2015).

In defendant's trial for exploitation of children, defendant's wife was not incompetent to testify against defendant because the privilege under Miss. R. Evid. 601(a)(2) and Miss. R. Evid. 504(d) did not apply, as defendant was being prosecuted for a criminal act against a child. Hood v. State, 17 So. 3d 548, 2009 Miss. LEXIS 379 (Miss. 2009).

Regardless of the availability of defendant's sister as a witness where if called she would invoke her Fifth Amendment privilege in that she was also charged with capital murder along with defendant, it was improper to exclude testimony of her father as inadmissible hearsay under Miss. R. Evid. 804 because the statements were admissible as statements against interest in that they were sufficiently against the sister's penal interest by indicating her intention to murder her husband, they were sufficiently trustworthy, and they were corroborated by other evidence. Edmonds v. State, 955 So. 2d 787, 2007 Miss. LEXIS 349 (Miss.), cert. denied, 552 U.S. 1064, 128 S. Ct. 708, 169 L. Ed. 2d 557, 2007 U.S. LEXIS 12868 (U.S. 2007).

Where defendant confessed to participating in the wife's plan to murder her husband, she invoked the Fifth Amendment and therefore was an unavailable witness at trial; however, the trial court erred by excluding hearsay statements from her father that "she asked him for a pistol and said that she was tired of her husband beating her up and beating her kids up and that her husband had several hundred thousand dollars in life insurance that would go to her if he were dead," as Miss. R. Evid. 804(b)(3) provided that her statements against penal interest could not be excluded as hearsay. Edmonds v. State, 2007 Miss. LEXIS 7 (Miss. Jan. 4, 2007), op. withdrawn, sub. op., 955 So. 2d 787, 2007 Miss. LEXIS 349 (Miss. 2007).

In a murder case, the trial court did not err in denying defendant's motion to bar the hearsay statement attributed to his mother as defendant's confession to his mother was a statement against interest; thus, it was properly allowed into evidence. Brooks v. State, 905 So. 2d 678, 2004 Miss. App. LEXIS 616 (Miss. Ct. App. 2004), rev'd, 903 So. 2d 691, 2005 Miss. LEXIS 191 (Miss. 2005).

Declarant's statement was a declaration against interest, not an admission against interest, because declarant was not a party to the suit; however, because plaintiffs in a wrongful death/product liability action did not show that the declarant was unavailable to testify at trial, the declaration against interest constituted inadmissible hearsay, but it's admission was harmless error. Yale Materials Handling Corp. v. Brandon, 2002 Miss. LEXIS 180 (Miss. May 23, 2002), dismissed, op. withdrawn, 2003 Miss. LEXIS 21 (Miss. Jan. 16, 2003).

A statement of the codefendant was not admissible under subsection (b)(3), notwithstanding the codefendant's invocation of his right to remain silent when called as a witness by the defendant, where the statement was a claim of self-defense, rather than a statement against interest. Robinson v. State, 758 So. 2d 480, 2000 Miss. App. LEXIS 162 (Miss. Ct. App. 2000).

A witness could not testify to a statement against interest by the defendant's coperpetrator where he was never subpoenaed to appear and testify during the trial by either side; it was not enough to presume or suspicion that he would assert his Fifth Amendment privilege against self-incrimination and refuse to testify. Slater v. State, 731 So. 2d 1115, 1999 Miss. LEXIS 12 (Miss. 1999).

In a murder prosecution, the court did not in excluding an incriminating statement by the codefendant where the statement was the result of a custodial interrogation, the codefendant was mildly retarded, and the codefendant made another inconsistent statement a few days later. Dabney v. State, 717 So. 2d 733, 1998 Miss. LEXIS 344 (Miss. 1998).

Invoking privilege against self-incrimination makes a witness unavailable, and any hearsay statements from another witness about what the unavailable witness said may fall within hearsay exception of subdivision (b)(3) of this rule; when a witness invokes his Fifth Amendment right, however, making neither a denial nor an admission, such responses are not the proper subject for impeachment. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 19 (Miss.), op. withdrawn, sub. op., 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss. 1996).

Although informant's statement to defendant's attorney tended to expose informant to criminal liability, it was offered to exculpate defendant, and the statement was inadmissible where informant was a convicted perjurer and there was nothing to clearly indicate the trustworthiness of the statement. Turner v. State, 673 So. 2d 382, 1996 Miss. LEXIS 149 (Miss. 1996).

Co-defendant's statement that he alone had killed the victims was properly excluded in guilt phase of defendant's trial; co-defendant's motivation did not appear to be to absolve defendant of guilt, where he placed blame for murders on defendant within framework of the same statement, and inconsistencies in co-defendant's statement justified trial judge's finding the statement untrustworthy. Carr v. State, 655 So. 2d 824, 1995 Miss. LEXIS 56 (Miss. 1995), cert. denied, 516 U.S. 1077, 116 S. Ct. 783, 133 L. Ed. 2d 734, 1996 U.S. LEXIS 547 (U.S. 1996).

Statement exposing declarant to prosecution, and exculpating defendant, was inadmissible hearsay, where there was no showing of corroborating circumstances indicating statement to be trustworthy, declarant was under subpoena and there was no attempt to attach him, or show that he was unavailable as a witness, defense claimed another witness was present when declarant made statement and no effort was made to call her as a witness, and declarant on another occasion denied any involvement in the slay-ing. Thorson v. State, 653 So. 2d 876, 1994 Miss. LEXIS 600 (Miss. 1994).

Resolution adopted by city redevelopment authority, stating that it found fair market value of property to be $865,000, should have been allowed into evidence in eminent domain proceeding as a statement against interest under subdivision (b)(3) of this rule. Morley v. Jackson Redevelopment Auth., 632 So. 2d 1284, 1994 Miss. LEXIS 75 (Miss. 1994).

**– Not in error.**

Defendant's armed robbery conviction was proper where admitted hearsay evidence was not in error because the same information was obtained from another witness and was properly admitted as a statement against interest pursuant to Miss. R. Evid. 804(b)(3). Brown v. State, 868 So. 2d 1027, 2003 Miss. App. LEXIS 1118 (Miss. Ct. App. 2003), cert. denied, 868 So. 2d 345, 2004 Miss. LEXIS 312 (Miss. 2004).

**Unavailability.**

Circuit court did not err at defendant's retrial in excluding the transcript of the former trial testimony of a witness, in lieu of calling the witness to testify, because it was undisputed that the witness was available to testify. Friston v. State, 243 So. 3d 198, 2017 Miss. App. LEXIS 444 (Miss. Ct. App. 2017), cert. denied, 246 So. 3d 71, 2018 Miss. LEXIS 230 (Miss. 2018).

Circuit court did not abuse its discretion when it held that the forensic pathologist was unavailable to testify and allowed the pathologist to testify by video deposition because, although the pathologist testified that he recovered two bullets from the victim's body, he did not opine as to their class characteristics or the likelihood that they were fired from defendant's pistol; and cross-examining the pathologist regarding the testimony of an expert witness in the field of firearm and tool-mark identification would not have aided defendant. Ellis v. State, 196 So. 3d 1029, 2015 Miss. App. LEXIS 680 (Miss. Ct. App. 2015), cert. denied, 202 So. 3d 613, 2016 Miss. LEXIS 316 (Miss. 2016).

Trial court did not abuse its discretion in concluding that the State made a diligent effort to procure a witness's attendance at trial or in admitting his testimony under this rule, as an officer made contact with the witness's parents, who refused to reveal his location and staked out a child-care facility the witness was reported running in an effort to procure his attendance. Ames v. State, 191 So. 3d 746, 2015 Miss. App. LEXIS 516 (Miss. Ct. App. 2015), cert. denied, 202 So. 3d 207, 2016 Miss. LEXIS 214 (Miss. 2016).

Trial court committed no error when it held that the State established a witness's unavailability under Miss. R. Evid. 804(a)(5) because the State made reasonable and diligent efforts to locate the witness; the State had its criminal investigator testify on his efforts to locate the witness. Thomas v. State, 178 So. 3d 771, 2012 Miss. App. LEXIS 605 (Miss. Ct. App. 2012), aff'd in part, 126 So. 3d 877, 2013 Miss. LEXIS 528 (Miss. 2013).

In a suit brought against a water park for injuries a patron sustained while on a water slide, the trial court did not err in excluding the testimony of the patron's mother regarding her discussion the day after the accident with an unidentified employee of the water park. The conversation did not qualify as a statement against interest under Miss. R. Evid. 804(b)(3) as there was no evidence that the employee was unavailable, in that there was no evidence that the mother tried to procure the attendance of the employee who made the statement. Boyd v. Magic Golf, 52 So. 3d 455, 2011 Miss. App. LEXIS 36 (Miss. Ct. App. 2011).

While a prior inconsistent statement of a testifying witness can be used to impeach the witness's credibility, it is not admissible as substantive evidence of the defendant's guilt; the fact that shooting victim changed his testimony after trial, after having unequivocally identifying the shooter in a statement to police, did not lead to the conclusion that he had suffered memory loss so as to be deemed "unavailable" within the meaning of Miss. R. Evid. 804. Smith v. State, 25 So. 3d 264, 2009 Miss. LEXIS 546 (Miss. 2009).

Reversal is required in the interest of justice when the prosecution is permitted to introduce an out-of-court hearsay statement for the truth asserted therein as a result of its main witness's professed loss of memory on direct examination; but, when cross-examined, the witness's responses indicate that his loss of memory is entirely fabricated. Not only was defendant entitle to a new trial after a victim's prior statements were improperly admitted as a result of the victim's memory loss seeming to disappear during cross-examination thereby making the victim available again but admission of the victim's statements also violated defendant's rights under the Confrontation Clause as defendant did not have an opportunity to cross-examine the victim about his accusations. Smith v. State, 25 So. 3d 313, 2008 Miss. App. LEXIS 614 (Miss. Ct. App. 2008), rev'd, 25 So. 3d 264, 2009 Miss. LEXIS 546 (Miss. 2009).

Affidavits from the resident's treating physicians, which altered their deposition testimony, clearly were not furnished to the corporation sufficiently in advance of the trial to provide the corporation with a fair opportunity to prepare to meet the affidavits, nor did they afford the corporation notice of their intention to offer the statement and the particulars of the affidavits, Miss. R. Evid. 804(b)(5); the resident attempted, several days into trial, to use affidavits to tailor the doctors' deposition testimony, thereby adversely affecting a substantial right of the corporation to have sufficient advance notice of the information contained in the affidavits before trial. E.I. DuPont de Nemours & Co. v. Strong, 968 So. 2d 410, 2007 Miss. LEXIS 574 (Miss. 2007).

Defendant's conviction for the sale of marijuana within a correctional facility was appropriate because the circuit court did not err in not granting defendant's motion to admit prior testimony of an unavailable witness under Miss. R. Evid. 804(a)(5) and (b)(1), because, although the witness was deemed to have been "unavailable" under R. 804(a)(5) the most harmful and significant portion of a probationer's prior testimony was that defendant's client told the probationer to lie to an officer; if defendant's investigators attempted to testify that the probationer told them that the client told him to lie, that testimony would have been hearsay within hearsay, which was inadmissible under Miss. R. Evid. 805. Jackson v. State, 962 So. 2d 649, 2007 Miss. App. LEXIS 104 (Miss. Ct. App.), cert. denied, 962 So. 2d 38, 2007 Miss. LEXIS 434 (Miss. 2007).

Defendant's conviction for the sale of cocaine was inappropriate because the state failed to present evidence that identified the people on the tape in question; as the declarants were anonymous, the appellate court was unable to assess the applicability of any hearsay exceptions dependant upon the declarant's unavailability as set forth in Miss. R. Evid. 804. Brown v. State, 969 So. 2d 891, 2007 Miss. App. LEXIS 19 (Miss. Ct. App.), rev'd, 969 So. 2d 855, 2007 Miss. LEXIS 680 (Miss. 2007).

Statement by defendant's father that defendant's half-sister wanted to kill her husband, the victim, was not admissible under Miss. R. Evid. 804(b)(3) because it was never proven that the half-sister was unavailable as she was never called to the stand. Furthermore, the statement was not against her penal interest because she had not taken any overt act toward accomplishing the murder. Edmonds v. State, 2006 Miss. App. LEXIS 88 (Miss. Ct. App. Jan. 31, 2006), op. withdrawn, sub. op., modified, 955 So. 2d 864, 2006 Miss. App. LEXIS 311 (Miss. Ct. App. 2006).

Where defendant was convicted of possession of cocaine with intent to sell, the trial court had not erred by refusing to admit into evidence the guilty plea hearing transcript of the defendant's nephew because of defendant's lack of effort to secure his nephew's attendance until late afternoon on the first day of trial, thus he was not "unavailable" under Miss. R. Evid. 804(a)(5) and the plea transcript failed to meet the prior testimony hearsay exception contained in rule 804(b)(1). Jones v. State, 912 So. 2d 501, 2005 Miss. App. LEXIS 729 (Miss. Ct. App. 2005).

In a dispute over a construction contract, a trial court did not err in admitting an expert's deposition into evidence because the expert was unavailable due to the fact that the expert was out of state during part of the trial; moreover, the evidence showed that a builder had an opportunity to question the expert about an existing report at the time of the deposition. DiMa Homes, Inc. v. Stuart, 873 So. 2d 140, 2004 Miss. App. LEXIS 418 (Miss. Ct. App. 2004).

A former police officer witness was properly found to be unavailable where (1) officers contacted several law enforcement agencies that the witness was known to have been either employed by or in contact with, (2) those same officers contacted the witness's parents who refused to divulge his location, and (3) the officers also staked out a daycare center that was run by the witness and his wife in the hopes of serving him when he arrived there. Naylor v. State, 759 So. 2d 406, 2000 Miss. LEXIS 103 (Miss. 2000).

**– Child witness.**

In a sexual battery and touching of a child for lustful purposes case, the trial court did not abuse its discretion in finding the four-year-old child victim unavailable to testify in accordance with Miss. R. Evid. 804(a)(6) as the evidence presented regarding the likelihood of trauma if the child were to testify in open court was completely uncontradicted. Bishop v. State, 982 So. 2d 371, 2008 Miss. LEXIS 137 (Miss. 2008).

The trial court properly determined the substantial likelihood that the emotional or psychological health of the children witnesses would have been substantially impaired if they had had to testify in the physical presence of their mother and her boyfriend at their trial for felony child abuse, and that they were unavailable witnesses under Miss. R. Evid. 804(a)(6). Britt v. State, 844 So. 2d 1180, 2003 Miss. App. LEXIS 402 (Miss. Ct. App. 2003).

In a termination of parental rights proceeding, the county department of human services failed to show that the children at issue were unavailable and, therefore, their prior statements were not admissible under the tender years exception to the hearsay rule, where the department failed to show that there was no reasonable alternative means of testifying, such as closed-circuit television or videotape deposition, that would eliminate the trauma that would have been caused by in-person testimony in the presence of their parents. J. L. W. W. v. Clarke County Dep't of Human Servs., 759 So. 2d 1183, 2000 Miss. LEXIS 92 (Miss. 2000).

The procedural requirements of M.R.E. 617 are not incorporated into the "unavailability" analysis of M.R.E. 804(a)(6); thus, whether a party filed a motion under M.R.E. 617 does not affect the determination of whether a child witness was unavailable within the meaning of M.R.E. 804(a)(6). J.L.W.W. v. Clarke County Dep't of Human Servs., 1999 Miss. App. LEXIS 476 (Miss. Ct. App. July 20, 1999), aff'd, 759 So. 2d 1183, 2000 Miss. LEXIS 92 (Miss. 2000).

**– Found.**

Witness's testimony from defendant's first trial was properly admitted under Miss. R. Evid. 804(a)(4) during his second trial, as the State proved that she was "unavailable" to testify due to her mental impairments and loss of memory caused by a stroke. Fulks v. State, 110 So. 3d 764, 2013 Miss. LEXIS 147 (Miss. 2013).

Finding in favor of the patient in his medical malpractice action was improper because the conditions for admissibility under Miss. R. Evid. 804 were satisfied with respect to the patient's mother-in-law's statement to a nurse regarding the legitimacy of the patient's claims. Blake v. Clein, 903 So. 2d 710, 2005 Miss. LEXIS 235 (Miss. 2005).

Trial court did not err in finding child victim unavailable as a witness in child sexual abuse case, where there was no substantiated proof that State was responsible for media coverage or that actions by State caused child to refuse to testify. Hennington v. State, 702 So. 2d 403, 1997 Miss. LEXIS 637 (Miss. 1997).

Where victim in child sexual abuse case was correctly found unavailable as a witness under subdivision (a)(2) of this rule, there was no need for trial court to address his unavailability under subdivision (a)(6). Hennington v. State, 702 So. 2d 403, 1997 Miss. LEXIS 637 (Miss. 1997).

Trial judge's determination that prosecution has employed diligent effort in attempting to obtain attendance of a witness will not be disturbed on appeal unless court finds that trial judge abused his discretion in determining that witness was unavailable. Russell v. State, 670 So. 2d 816, 1995 Miss. LEXIS 617 (Miss. 1995), cert. denied, 519 U.S. 982, 117 S. Ct. 436, 136 L. Ed. 2d 333, 1996 U.S. LEXIS 6884 (U.S. 1996), cert. dismissed, 520 U.S. 1249, 117 S. Ct. 2406, 137 L. Ed. 2d 1064, 1997 U.S. LEXIS 3537 (U.S. 1997).

**– Not found.**

Notations written on photographs were inadmissible hearsay because they were out-of-court written statements offered for the truth of the matter asserted. Moreover, the declarant of the written statements could have been available to testify. Estate of Luster v. Mardi Gras Casino Corp., 121 So. 3d 962, 2013 Miss. App. LEXIS 608 (Miss. Ct. App. 2013).

Court properly disallowed defendant's proffered hearsay testimony because the declarant was not under subpoena to appear at trial and defendant made no efforts to procure his attendance, and a presumption or suspicion that a witness would assert his Fifth Amendment privilege against self-incrimination and refuse to testify was insufficient to declare a witness unavailable. The witness must be called to the stand and there refuse to testify before he became unavailable due to invoking the Fifth Amendment. Cochran v. State, 913 So. 2d 371, 2005 Miss. App. LEXIS 268 (Miss. Ct. App. 2005).

Testimony of witness in earlier investigatory hearing against attorney was erroneously admitted in later proceeding, where bar counsel neither made a credible showing that witness was unavailable nor showed that she was out of state or located further than 100 miles from hearing site. Emil v. The Mississippi Bar, 690 So. 2d 301, 1997 Miss. LEXIS 3 (Miss. 1997).

**Illustrative cases.**

Trial court did not abuse its discretion by admitting into evidence the victim's statement to a friend that defendant had locked her in a closet during a fight because the statement was trustworthy where the victim's sister testified that she had seen the event occur and the victim made the statement to her friend the day after the fight occurred. Holliman v. State, 178 So. 3d 689, 2015 Miss. LEXIS 470 (Miss. 2015).

Where a son sought to set aside a warranty deed that transferred property from the son's mother to a daughter, the case was properly dismissed for failure to prosecute because, inter alia, (1) there was a significant delay during the litigation, and (2) the daughter was prejudiced because of their mother's intervening death since the purpose of the mother's deposition was not to conduct discovery or elicit testimony for trial. Cox v. Cox, 976 So. 2d 869, 2008 Miss. LEXIS 125 (Miss. 2008).

In defendant's murder trial, a statement by a witness who had died that defendant's half-sister asked to borrow a gun to shoot a dog was properly denied under Miss. R. Evid. 804(b)(5) because another witness testified to virtually the same information. Edmonds v. State, 2006 Miss. App. LEXIS 88 (Miss. Ct. App. Jan. 31, 2006), op. withdrawn, sub. op., modified, 955 So. 2d 864, 2006 Miss. App. LEXIS 311 (Miss. Ct. App. 2006).

Testimony that defendant had a sexual relationship with one of the victims, his step-son's wife, was properly admitted under Miss. R. Evid. 804(b)(5) because the trial court carefully analyzed the five requirements of trustworthiness, materiality, probative value, interests of justice, and notice; furthermore, defendant failed to object on the basis of the Confrontation Clause. Rubenstein v. State, 941 So. 2d 735, 2006 Miss. LEXIS 411 (Miss. 2006).

Trial court did not err in admitting the victim's hearsay statement under the dying declaration exception, Miss. R. Evid. 804(b)(2), because the admission of the statement did not affect a substantial right as provided in Miss. R. Evid. 103(a). Defendant admitted to stabbing the victim, and the only question for the jury was whether the stabbing was done in self-defense. Johnson v. State, 908 So. 2d 758, 2005 Miss. LEXIS 492 (Miss. 2005).

In a murder trial, the trial court properly declined to enter a sua sponte limiting instruction on prior bad acts offered under Miss. R. Evid. 404(b), as the evidence was not offered for that reason, but rather to show the victim's state of mind under Miss. R. Evid. 803 and 804, and the limiting instruction rule was therefore not applicable. Reed v. State, 863 So. 2d 981, 2003 Miss. App. LEXIS 1197 (Miss. Ct. App. 2003).

Trial court did not err in admitting the tape-recorded statement of defendant's mother, who was unavailable at the time of trial based on her mental condition, under Miss. R. Evid. 804(b)(5) because (1) the mother was able to give an accurate statement when it was taken and (2) the statement was reliable because she was an eyewitness to the incident where defendant fatally shot defendant's brother, and there was no reason to believe that the mother harbored prejudice against one son or the other; even if it was error for the trial court to have admitted the statement, the error was harmless and there was no violation of the Confrontation Clause under U.S. Const. amend. VI, Miss. Const. art. 3, § 26 because the evidence proved convincingly that defendant's conviction of manslaughter was proper. Thornton v. State, 841 So. 2d 170, 2003 Miss. App. LEXIS 76 (Miss. Ct. App. 2003).

In a family dispute pertaining to the manner in which a securities account should be divided by the wife and children of a decedent, it was proper for the chancellor to admit into evidence an audiotape of the decedent instructing how he wished his assets to be divided where the wife admitted that the voice on the tape was that of the decedent and that she was told of the tape's existence by her husband prior to his death. In re Estate of Baker v. Baker, 760 So. 2d 759, 2000 Miss. LEXIS 129 (Miss. 2000).

Videotaped hypnotic interview of murder defendant was properly excluded, since tape was being offered to prove truth of the matter asserted– that defendant accidentally shot game warden to death; tape did not qualify as a "prior statement of a witness" under M.R.E. Rule 801, and did not satisfy any hearsay exception in Rule 804. Thibodeaux v. State, 652 So. 2d 153, 1995 Miss. LEXIS 134 (Miss. 1995).

### RESEARCH REFERENCES

**ALR.**

Comment Note: Construction and Application of Supreme Court's Ruling in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177, 63 Fed. R. Evid. Serv. 1077 (2004), with Respect to Confrontation Clause Challenges to Admissibility of Hearsay Statement by Declarant Whom Defendant Had No Opportunity to Cross-Examine. 30 A.L.R.6th 1.

Construction and application of Fed. Rules Evid. Rule 804(b)(6), 28 U.S.C.A., hearsay exception based on unavailable witness' wrongfully procured absence. 193 A.L.R. Fed. 703.

## Rule 805. Hearsay within hearsay.

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

**HISTORY: Restyled effective July 1, 2016.**

### ADVISORY COMMITTEE NOTE

The language of Rule 805 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

This rule relates to multiple hearsay. Each hearsay part must qualify under an exception to be admissible. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

Admissible statements.
Inadmissible statements.

**Admissible statements.**

Defendant's conversation with his brother, as relayed by a detective at trial, was not hearsay within hearsay because defendant's conversation with his brother was excepted from the hearsay rule as a statement against interest; and the brother's conversation with the detective was admissible under the excited-utterance exception to the hearsay rule as defendant's early-morning phone call awakened and startled his brother, and the brother spoke to the detective within a relatively short time of his conversation with defendant. Further, there was no evidence that the testimony was unduly prejudicial as the testimony was probative to present the jury with a complete account of the facts of the case. Affleck v. State, 210 So. 3d 1067, 2015 Miss. App. LEXIS 675 (Miss. Ct. App. 2015), cert. denied, 203 So. 3d 598, 2016 Miss. LEXIS 388 (Miss. 2016), cert. denied, 2016 Miss. LEXIS 391 (Miss. Sept. 15, 2016), cert. denied, 580 U.S. 1128, 137 S. Ct. 1091, 197 L. Ed. 2d 201, 2017 U.S. LEXIS 1278 (U.S. 2017).

**Inadmissible statements.**

There was no error in the trial court's refusal to allow the introduction of evidence about a victim's prior bad acts through testimony from a witness about what he had heard others say, as it was double hearsay under Miss. R. Evid. 801(c) and 805, and defendant failed to establish a hearsay exception that was applicable to the statements. Branch v. State, 118 So. 3d 646, 2013 Miss. App. LEXIS 649 (Miss. Ct. App.), cert. denied, 117 So. 3d 330, 2013 Miss. LEXIS 376 (Miss. 2013).

Defendant's conviction for the sale of marijuana within a correctional facility was appropriate because the circuit court did not err in not granting defendant's motion to admit prior testimony of an unavailable witness under Miss. R. Evid. 804(a)(5) and (b)(1), because, although the witness was deemed to have been "unavailable" under R. 804(a)(5) the most harmful and significant portion of a probationer's prior testimony was that defendant's client told the probationer to lie to an officer; if defendant's investigators attempted to testify that the probationer told them that the client told him to lie, that testimony would have been hearsay within hearsay, which was inadmissible under Miss. R. Evid. 805. Jackson v. State, 962 So. 2d 649, 2007 Miss. App. LEXIS 104 (Miss. Ct. App.), cert. denied, 962 So. 2d 38, 2007 Miss. LEXIS 434 (Miss. 2007).

Trial court did not err by refusing to admit the defendant's statement to a woman that the victim had threatened to kill him because the statement would serve defendant's argument at trial that his actions were in self-defense and thus were self-serving and properly excluded by the trial judge pursuant to Miss. R. Evid. 803(3) and Miss. R. Evid. 805. Ward v. State, 935 So. 2d 1047, 2005 Miss. App. LEXIS 996 (Miss. Ct. App. 2005), cert. denied, 936 So. 2d 367, 2006 Miss. LEXIS 414 (Miss. 2006).

## Rule 806. Attacking and supporting the declarant's credibility.

When a hearsay statement – or a statement described in Rule 801 (d)(2)(C), (D), or (E) – has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant' s inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

**HISTORY: Restyled effective July 1, 2016.**

### ADVISORY COMMITTEE NOTE

The language of Rule 806 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 806 permits the impeachment and rehabilitation of a hearsay declarant. The use of inconsistent statements to impeach the declarant is not limited to prior inconsistent statements. Under the rule the inconsistent statements may be statements made subsequent to the out-of-court declaration at hand. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

### JUDICIAL DECISIONS

**Co-defendant's statement admissible.** In a capital murder case, defendant's confrontation rights were not violated by the admission of a co-defendant's statement where the evidence showed that the co-defendant had committed suicide prior to trial because they were offered to rebut defendant's evidence of statements that the co-defendant made to inmates. Le v. State, 913 So. 2d 913, 2005 Miss. LEXIS 151 (Miss.), cert. denied, 546 U.S. 1004, 126 S. Ct. 622, 163 L. Ed. 2d 508, 2005 U.S. LEXIS 8254 (U.S. 2005).

# ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

## Rule 901. Authenticating or identifying evidence.

(a) *In general.* — To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(b) *Examples.* — The following are examples only - not a complete list - of evidence that satisfies the requirement:

(1) *Testimony of a witness with knowledge.* Testimony that an item is what it is claimed to be.

(2) *Nonexpert opinion about handwriting.* A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) *Comparison by an expert witness or the trier of fact.* A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) *Distinctive characteristics and the like.* The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(5) *Opinion about a voice.* An opinion identifying a person's voice – whether heard firsthand or through mechanical or electronic transmission or recording based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) *Evidence about a telephone conversation.* For a telephone conversation, evidence that a call was made to the number assigned at the time to:

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) *Evidence about public records.* Evidence that:

(A) a document was recorded or filed in a public office as authorized by law; or

(B) a purported public record or statement is from the office where items of this kind are kept.

(8) *Evidence about ancient documents or data compilations.* For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.

(9) *Evidence about a process or system.* Evidence describing a process or system and showing that it produces an accurate result.

(10) *Methods provided by the mississippi constitution or court rule.* Any method of authentication or identification allowed by the Mississippi Constitution or a rule prescribed by the Mississippi Supreme Court.

**HISTORY: Restyled effective July 1, 2016.**

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 1998, the Advisory Committee Note regarding Rule 901(b)(6) was amended to delete the reference to and holding of a case. 706-708 So. 2d XLIII (West Miss. Cas. 1998).

## ADVISORY COMMITTEE NOTE

The language of Rule 901 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

**(a)** The authentication and identification aspects of evidence are central to the concept of relevancy. Unless it be satisfactorily shown that an item of evidence is "genuine," the item is irrelevant and should be excluded.

**(b)** This subdivision illustrates some of the possibilities under Rule 901. It is only illustrative; it does not serve as a limitation. Some of the illustrations are discussed below:

(2) *Nonexpert Opinion on Handwriting.* This authentication method has been traditionally allowed in the Mississippi courts. The rule does not set forth what the necessary criteria are for the nonexpert opinion. However, from common law practice it appears that the opinion may be based on several different standards including the witness's familiarity with the person's handwriting or the witness's corresponding with the person. *See Western Union Telegraph Co v. Goodman,*166 Miss. 782, 146 So. 128 (1933); *Wiggins v. State,*224 Miss. 414, 80 So. 2d 17 (1955); *McCarty v. Love,* 145 Miss. 330, 110 So. 795 (1927).

(3) *Comparison by Trier or Expert Witness.* The judge need not rule that the exemplars are genuine before the expert compares them. The standard for comparison is no different, therefore, from the standard used in other situations, e.g., ballistics comparison. *See*FRE 901 Advisory Committee Note.

(4) *Distinctive Characteristics and the Like.* The possibilities under the rule are myriad. Letters or phone conversations disclosing knowledge peculiar to an individual may qualify, as well as distinctive language patterns. See FRE 901 Advisory Committee Note.

(5) *Voice Identification.* This authentication method has been utilized in Mississippi practice. Familiarity may be acquired either before or after the speaking which is the subject of the identification.

(6) *Telephone Conversations.* One may authenticate a conversation when he calls the number listed for a person or a business and the answering party either identified himself as that individual or conducted a transaction on behalf of the business called.

(7) *Public Records or Reports.* This represents the existing law in Mississippi and extends the common law principle to include electronically-stored information. Proving a record is public and that it is in the custody of a public official is sufficient.

(8) *Ancient Documents or Data Compilation.* The twenty-year rule for ancient documents under Rule 803(16) is repeated here. The illustration extends the authentication to electronically-stored information as in Rule 901(7). Except for the reduction of the years required for ancient documents, this illustration is consistent with Mississippi practice.

(9) *Process or System.* This illustration covers systems such as x-rays, some chemical tests, and computers. Example (9) does not foreclose taking judicial notice of the accuracy of a process or system.

(10) *Other Methods.* This illustration is given as notice that other methods are not superseded. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

In general.
Audiotapes.
Biological evidence.
Chain of custody.
E-mails.
Handwriting.
Lack of foundational witness.
Letters.
Medical records.
Photographs.
Process or system.
Public records.
Radar.
Receipt.
Social media.
Telephone conversations.
Testimony of witness with knowledge.
Transcript of police interview.
Videotape.
Illustrative cases.

**In general.**

Under Miss. R. Evid. 901 and Miss. R. Civ. P. 56(c), the unauthenticated documents provided by the workers should not have been considered because, in his deposition, one worker stated that there were two pumps made by the company in the plant, but he did not state that asbestos was present; the unauthenticated letter only established that a company pump was sold to the plant at some point, not that it contained asbestos components, and did not place asbestos-containing products attributable to the company in the plant. Gorman-Rupp Co. v. Hall, 908 So. 2d 749, 2005 Miss. LEXIS 489 (Miss. 2005).

Defendant argued that the trial court's admission of the flashlight into evidence constituted reversible error; however, the admission of the flashlight was not necessary to establish the charge of simple assault and was not offered as the flashlight actually used, such that any error in its admission was harmless. Burnside v. State, 882 So. 2d 212, 2004 Miss. LEXIS 1160 (Miss. 2004).

Trial court did not err in admitting a videotape that was a copy of the small tape used to film the drug sale; the confidential informant involved in the sale testified that what was seen on the tape accurately depicted what occurred at the sale. Seals v. State, 869 So. 2d 429, 2004 Miss. App. LEXIS 248 (Miss. Ct. App. 2004).

There is no requirement of authentication as a condition precedent to admissibility where the evidence supports what the proponent claims. Gatlin v. State, 724 So. 2d 359, 1998 Miss. LEXIS 591 (Miss. 1998).

**Audiotapes.**

Although defendant challenged the authentication of an audiotape of his transaction with a confidential informant, the State never attempted to admit the audiotape into evidence. Therefore, Miss. R. Evid 901 was not violated. Hopkins v. State, 141 So. 3d 384, 2014 Miss. LEXIS 224 (Miss. 2014).

Recording was properly authenticated through the agent's testimony that he was able to identify defendant's voice, as the agent had known defendant for over 20 years. Riley v. State, 126 So. 3d 1007, 2013 Miss. App. LEXIS 832 (Miss. Ct. App. 2013).

Agent testified that he had exclusive control of the electronic recording at all times during the transaction and that the recording represented what he overheard while conducting surveillance, and that the recording had not been altered or modified, and thus his testimony was sufficient to lay a proper foundation that the recording was what the State purported it to be. Riley v. State, 126 So. 3d 1007, 2013 Miss. App. LEXIS 832 (Miss. Ct. App. 2013).

In a case involving the sale of cocaine, trial counsel was not ineffective for allowing an agent to testify that defendant's voice was on an audio recording because the agent's testimony was not subject to the authentication requirements under Miss. R. Evid. 901, and the failure of the State to lay a predicate for the testimony was harmless error since the agent testified on cross-examination that he had personal knowledge of defendant's voice. Moreover, even assuming that trial counsel's elicitation of the agent's previous dealings with defendant was so deficient as to meet the first prong of the test for ineffective assistance of counsel, plenty of other evidence existed to support the jury's verdict. Liddell v. State, 7 So. 3d 217, 2009 Miss. LEXIS 107 (Miss. 2009).

Admission of audiotapes of sexually explicit telephone conversations between defendant and a 13-year-old victim was relevant to show defendant's disposition toward the child in a statutory rape case, and the recordings were authenticated when defendant admitted having made the statements in order to raise the child's self-confidence. Walker v. State, 878 So. 2d 913, 2004 Miss. LEXIS 589 (Miss. 2004).

Defendant's conviction for the sale of cocaine was proper where the audiotape recording of the transaction was properly admitted into evidence pursuant to Miss. R. Evid. 901 because it was properly identified and authenticated; there was ample testimony by the officers and informants that they all had had previous contacts with defendant and were thus in a position to recognize his voice. Wilburn v. State, 856 So. 2d 686, 2003 Miss. App. LEXIS 873 (Miss. Ct. App. 2003).

Officer's testimony that he heard a call made by the informant setting up the drug sale and that the tape reflected the conversation he heard, and defendant's testimony that he had admitted to talking with the informant before the sale, provided the foundation for the tape recording's authentication. Von Brock v. State, 795 So. 2d 566, 2001 Miss. App. LEXIS 282 (Miss. Ct. App. 2001).

Audiotapes of two drug transactions were properly admitted into evidence where (1) defense counsel conceded on a motion that the tapes were relevant evidence, (2) three witnesses having first hand knowledge of the transactions were presented by the state and all testified that they had listened to the tapes prior to trial and that the tapes were accurate depictions of the drug transaction, and (3) the fact that portions of the recording were inaudible did not render it inadmissible. Lawrence v. State, 780 So. 2d 652, 2001 Miss. App. LEXIS 4 (Miss. Ct. App. 2001).

An audiotape was properly authenticated where a police officer specifically identified two statements from the tape as what the defendant said during a drug transaction and testified that he heard the voice during the transaction itself and that the recording played for the jury accurately represented the transaction that occurred between himself and the defendant. Feazell v. State, 800 So. 2d 1175, 2001 Miss. App. LEXIS 193 (Miss. Ct. App. 2001).

An audiotape of a drug transaction was properly authenticated where there were two principal players on the audiotape, a police officer identified one voice as that of his informant, and the informant supplied the "missing link" by testifying that the defendant was the person who sold him crack cocaine that day. White v. State, 761 So. 2d 221, 2000 Miss. App. LEXIS 97 (Miss. Ct. App. 2000).

Tape of phone conversation was properly authenticated where narcotics agent described how the tapes were made, and testified (1) that the tapes accurately reflected what he heard over the telephone during the drug transaction, (2) that the voice was that of defendant, (3) that he had dialed defendant's telephone number, and (4) that the tapes had been kept in his custody or in a vualt after the incident until trial. Hogan v. State, 755 So. 2d 57, 1999 Miss. App. LEXIS 700 (Miss. Ct. App. 1999).

Where an undercover agent who wore a body wire listened to the tape and testified that what was contained on the tape was an accurate reflection of the drug transaction between himself, the confidential informant, and the defendant, the agent's testimony was sufficient for the trial court to make a finding that the tape was in fact what the State claimed it was. Ratliff v. State, 752 So. 2d 416, 1999 Miss. App. LEXIS 690 (Miss. Ct. App. 1999).

An audiotape of a drug transaction was properly authenticated where an informant identified the four people on the tape, including himself, the defendant, and the defendant's wife, and two police officers identified the voices of the informant and the defendant. Jones v. State, 740 So. 2d 904, 1999 Miss. LEXIS 247 (Miss. 1999).

An audiotape of a drug transaction was properly authenticated where a police officer testified as to the authenticity of the tape and was able to distinguish the voices on the tape. White v. State, 1999 Miss. App. LEXIS 535 (Miss. Ct. App. Aug. 17, 1999), op. withdrawn, sub. op., 761 So. 2d 221, 2000 Miss. App. LEXIS 97 (Miss. Ct. App. 2000).

In a prosecution for sale of cocaine within 1,500 feet of a church, the trial court abused its discretion in admitting an audiotape into evidence to prove the defendant's involvement in the drug transaction at issue where the prosecution failed to ask the witness/police officer to identify the speakers on the tape and it was of no doubt that the witness could not have identified the defendant as one of the persons talking on the tape as he was not party to the conversation. White v. State, 755 So. 2d 1148, 1999 Miss. App. LEXIS 310 (Miss. Ct. App. 1999).

An audiotape of a drug transaction was properly authenticated where a narcotics agent described the manner in which the recording was made, testified that he had listened to the tape and that the tape accurately reflected what he had heard over the body wire on the day of the transaction, and that the tape had been kept in his custody or in a vault after the incident up until trial. Summerall v. State, 734 So. 2d 242, 1999 Miss. App. LEXIS 29 (Miss. Ct. App. 1999).

An audiotape of a drug transaction was proven authentic where the surveillance agent who operated the recording equipment testified that the audiotape accurately depicted what occurred at the time, that he personally participated in the preparation of the accompanying transcript, and that the audiotapes had been in his custody since that time. Ragin v. State, 724 So. 2d 901, 1998 Miss. LEXIS 618 (Miss. 1998).

**Biological evidence.**

Admission of a towel allegedly stained with defendant's semen was improper in a statutory rape case because, although the evidence was admissible under Miss. R. Evid. 404(b), it was not authenticated or conclusively linked to defendant through biological testing. Walker v. State, 878 So. 2d 913, 2004 Miss. LEXIS 589 (Miss. 2004).

**Chain of custody.**

Trial court did not abuse its discretion by admitting the pills into evidence because this rule was satisfied, as a deputy testified that after defendant gave the pills to the confidential informant, he held them until an agent took them. The agent put the pills in a bag that he initialed and sealed, and the analyst testified that the bag's barcode showed that they were received by the crime lab and resealed after they were tested. Hingle v. State, 153 So. 3d 659, 2014 Miss. LEXIS 500 (Miss.

2014), cert. denied, 575 U.S. 1042, 135 S. Ct. 2388, 192 L. Ed. 2d 173, 2015 U.S. LEXIS 3610 (U.S. 2015).

Police sergeant provided adequate and sensible reasons in explaining why defendant's blood sample carried two different evidence numbers, and the explanation was sufficient evidence of a chain of custody. Whitaker v. State, 146 So. 3d 333, 2014 Miss. LEXIS 321 (Miss. 2014), cert. denied, 574 U.S. 1123, 135 S. Ct. 1165, 190 L. Ed. 2d 915, 2015 U.S. LEXIS 707 (U.S. 2015).

Trial court did not abuse its discretion in admitting into evidence bullets taken from the decedents' bodies during the autopsies because an investigator provided the trial court with an explanation of the transfer of the bullets from the medical examiner's office to the crime lab. Corrothers v. State, 148 So. 3d 278, 2014 Miss. LEXIS 311 (Miss. 2014), cert. denied, 576 U.S. 1023, 135 S. Ct. 2835, 192 L. Ed. 2d 877, 2015 U.S. LEXIS 3926 (U.S. 2015).

There was no error, much less a miscarriage of justice, in admitting a bag of cocaine into evidence because a reasonable jury could have found that the bag of cocaine introduced at trial was the same bag defendant sold to a confidential informant the State satisfied the requirements of Miss. R. Evid. 901(a) because an officer testified that the moment the informant handed over the plastic bag, the officer sealed it in an evidence bag with a distinct identification number, and the officer identified the evidence bag as the same one he sealed right after the sale. Pearson v. State, 64 So. 3d 569, 2011 Miss. App. LEXIS 261 (Miss. Ct. App. 2011).

Results of defendant's blood test were admissible under Miss. R. Evid. 901(a); the trial court found no indication or reasonable inference of tampering with evidence or substitution of evidence, and the appeals court found sufficient evidence, under an abuse of discretion standard, to support the trial court's finding that the blood sample was what it was claimed to be. Deeds v. State, 27 So. 3d 1135, 2009 Miss. LEXIS 588 (Miss. 2009), cert. denied, 562 U.S. 836, 131 S. Ct. 150, 178 L. Ed. 2d 37, 2010 U.S. LEXIS 5807 (U.S. 2010).

Evidence was legally sufficient to support the conviction of the sale of cocaine, Miss. Code Ann. § 41-29-139(a), and the State sufficiently established chain of custody, Miss. R. Evid. 901(a), and, therefore, properly included the cocaine and lab report into evidence; defendant failed to put forth any evidence of probable tampering or substitution of evidence, and the trial court did not err in admitting evidence of the cocaine. Turner v. State, 3 So. 3d 742, 2009 Miss. LEXIS 71 (Miss. 2009).

Where a witness testified that defendant was parked on his property, he saw a shotgun underneath the car seat and threw it into a ditch; a deputy testified that he retrieved the shotgun from the ditch and locked in it his trunk until he turned it over to the sheriff. The shotgun was then placed in the evidence locker where it remained until an employee of the sheriff's office brought it to court on the morning of the trial; the testimony was sufficient to establish the chain of custody so that the shotgun was properly admitted into evidence during defendant's trial for possession of a firearm by a convicted felon in violation of Miss. Code Ann. § 97-37-5(1). Cooley v. State, 14 So. 3d 63, 2008 Miss. App. LEXIS 701 (Miss. Ct. App. 2008).

Defendant argued unsuccessfully on appeal that an exhibit of cocaine should not have been admitted at trial because an agent's confusion rendered his testimony unreliable and the fact that he made multiple buys on the same day supported a conclusion that the cocaine was not the substance that he purchased from defendant. The trial court acted within its discretion in admitting the bag of cocaine because there was sufficient evidence to enable a reasonable jury to conclude beyond a reasonable doubt that the bag of cocaine was the substance sold by defendant- -the "buying" agent properly identified the bag of cocaine, by pointing out his initials on the bag, the case number, and his seal, the evidence established who it was that carried the substance to the lab, the substance was tracked at the lab via bar code and initialed by employees, and the lab's policies and procedures were followed. Downing v. State, 981 So. 2d 334, 2008 Miss. App. LEXIS 203 (Miss. Ct. App. 2008).

Defendant authenticated the shirt and gun admitted into evidence as his items seized from his car one hour after the carjacking; thus, chain of custody was established. Jackson v. State, 969 So. 2d 124, 2007 Miss. App. LEXIS 472 (Miss. Ct. App. 2007).

Trial court did not abuse its discretion in admitting the state's DNA evidence, where, pursuant to Miss. R. Evid. 901(a), defendant offered no proof that the blood sample tubes were substituted, and the state did not have to call every witness who handled the blood to establish the chain of custody. Ellis v. State, 934 So. 2d 1000, 2006 Miss. LEXIS 377 (Miss. 2006).

Defendant's conviction for the sale of cocaine within 1,500 feet of a church in violation of Miss. Code Ann. §§ 41-29-139 and 41-29-142 was proper where the State offered sufficient testimony from two officers and an employee of the Mississippi Crime Lab to satisfy the requirement of Miss. R. Evid. 901(a) for establishing a proper chain of custody for admission of the cocaine at trial. Johnson v. State, 904 So. 2d 162, 2005 Miss. LEXIS 380 (Miss. 2005).

Court did not err in admitting evidence under Miss. R. Evid. 901(a) of marijuana sold to a special agent at defendant's trial for the sale of marijuana because the State presented sufficient evidence to support the finding that the marijuana admitted into evidence was the same marijuana that the special agent purchased from defendant, and that the evidence had not been tampered with or substituted. Anderson v. State, 904 So. 2d 973, 2004 Miss. LEXIS 1378 (Miss. 2004).

State met the requirement of Miss. R. Evid. 901(a) with substantial proof that the material tested at the crime laboratory was the same material obtained by the undercover agent and detective; defendant's claim that the physical evidence or the test results should have been excluded was without merit. Chambers v. State, 878 So. 2d 153, 2004 Miss. App. LEXIS 42 (Miss. Ct. App.), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 915 (Miss. 2004).

Test for chain of custody was whether there was any indication of tampering or substitution of evidence, the State also did not have to produce every person who handled the evidence, nor did the State have to account for every minute of every day. Muscolino v. State, 803 So. 2d 1240, 2002 Miss. App. LEXIS 4 (Miss. Ct. App. 2002).

The trial court properly allowed the introduction of rocks of cocaine in a prosecution for sale or transfer of a Schedule II controlled substance even though a crime laboratory employee who signed for receipt of the the cocaine did not testify where there was evidence of delivery to her in a sealed condition and testimony that it was the standard custom and practice of the crime laboratory to receive such material only if it was properly sealed and to securely preserve the material in its sealed condition until an appropriate official of the laboratory was prepared to unseal the material for chemical analysis. Peyton v. State, 796 So. 2d 243, 2001 Miss. App. LEXIS 218 (Miss. Ct. App. 2001).

In a prosecution for the sale of cocaine within 1500 feet of a church, trial court did not abuse its discretion in admitting evidence over a chain of custody objection where there was no indication of tampering or substitution of evidence. Robinson v. State, 733 So. 2d 333, 1998 Miss. App. LEXIS 1113 (Miss. Ct. App. 1998).

The trial court did not abuse its discretion when it carried over proof of a chain of custody from a suppression hearing to a trial. Haley v. State, 737 So. 2d 371, 1998 Miss. App. LEXIS 976 (Miss. Ct. App. 1998).

**E-mails.**

Trial judge properly determined that the e-mails and letters were admissible and had been adequately authenticated under Miss. R. Evid. 1001 and Miss. R. Evid. 1003; the trial judge found that the witness had vouched for the accuracy of the e-mail printouts and the document that was hand-delivered to the witness, and the officer testified that defendant admitted that he sent the e-mails to witness as well. Kearley v. State, 843 So. 2d 66, 2002 Miss. App. LEXIS 560 (Miss. Ct. App. 2002), cert. denied, 842 So. 2d 578, 2003 Miss. App. LEXIS 410 (Miss. Ct. App. 2003).

**Handwriting.**

While codefendants' Fifth Amendment

rights would not have been violated by having handwriting exemplars examined by an expert to authenticate a statement allegedly written by the codefendant because the evidence would not have been used as testimonial evidence at trial, there was not a substantial need for expert assistance shown in that nothing in the record indicated that defendant ever attempted to have these statements authenticated by locating someone familiar with the handwriting of the codefendants under Miss. R. Evid. 901(b)(2). Therefore, the trial court did not err in denying defendant's motion to compel handwriting exemplars. Flora v. State, 925 So. 2d 797, 2006 Miss. LEXIS 49 (Miss.), cert. denied, 549 U.S. 912, 127 S. Ct. 253, 166 L. Ed. 2d 197, 2006 U.S. LEXIS 6127 (U.S. 2006).

Defendant, tried for embezzlement, was employed by the owner for approximately nine months and the owner testified that he had become familiar with defendant's handwriting during said period. By virtue of his familiarity with defendant's handwriting, the owner was fully qualified to offer his opinion as to whether or not the writing was in fact defendant's signature; such testimony was rationally based upon his perception, was helpful in making a determination of a fact in issue, was not based on scientific, technical, or other specialized knowledge within the scope of Miss. R. Evid. 702, and it therefore met the requirements for both Miss. R. Evid. 701 and 901(b)(2). Bell v. State, 910 So. 2d 640, 2005 Miss. App. LEXIS 159 (Miss. Ct. App. 2005).

Defendant's journal in which she wrote of her intention to murder her husband was admissible at trial because defendant's handwriting in the journal was authenticated by her son, her son testified he had seen her writing in journals, the inside cover of the journal indicated that the journal was the property of defendant, and the journal was found in defendant's house next to her chair. Black v. State, 823 So. 2d 543, 2002 Miss. App. LEXIS 135 (Miss. Ct. App. 2002).

Trial court did not abuse its discretion in refusing to admit into evidence a letter in which the minor victim of an alleged sexual assault allegedly recanted her accusations since the child denied writing the letter and the only evidence defendant offered in support of the letter was the testimony of a handwriting expert who had compared the handwriting in the letter to photocopies of the child's handwriting and the testimony of a witness who had received letters from the child earlier. Todd v. State, 806 So. 2d 1086, 2001 Miss. LEXIS 305 (Miss. 2001).

A witness was properly permitted to testify that signatures on two checks were neither hers nor the one other person authorized to sign the checks where she was able to testify that the handwriting and signatures were not those of the other authorized person based on the past five and one-half years of her daily business routine and contact with him and where she testified that she saw the signature of the other authorized person "one hundred times a day." Robinson v. State, 1999 Miss. App. LEXIS 320 (Miss. Ct. App. June 8, 1999).

In a prosecution for voter fraud, the court properly permitted the introduction into evidence of an exhibit which was composed of various documents apparently signed by the defendant since (1) the documents were compared with other writings by the defendant that were properly authenticated, (2) the jury was permitted to compare specimens with authenticated specimens for determination of their authenticity, and (3) there is a liberal preference for admission of evidence as the approach for authentication and identification. Sewell v. State, 721 So. 2d 129, 1998 Miss. LEXIS 521 (Miss. 1998).

A person's handwriting may be authenticated by a handwriting expert or by a lay witness with a prior familiarity with that person's handwriting. Hentz v. State, 542 So. 2d 914, 1989 Miss. LEXIS 223 (Miss. 1989).

**Lack of foundational witness.**

Trial court erred when it allowed appraisals to be admitted in a probate case because the appraiser failed to appear as a foundational witness under Miss. R. Evid. 901; the appraiser's evaluations were relevant, thus meeting the first prong of the modified Daubert standard, but the decedent's son offered no proof of the appraiser's methods or procedures for appraising either property, and none of applicable reliability factors were considered prior to admitting the appraisals. Additionally, the widow never had the ability to cross-examine the appraiser on his methods or procedures. Hodges v. Hodges (In re Estate of Hodges), 109 So. 3d 150, 2013 Miss. App. LEXIS 106 (Miss. Ct. App. 2013).

**Letters.**

Circuit court properly convicted defendant of the statutory rape of his 13-year-old cousin and sentenced him as a habitual offender because, inter alia, a handwritten letter given by defendant to a jailmate to be delivered to a friend–asking the friend to testify in his defense and corroborate his account–was properly admitted into evidence, the trial court was under no obligation to remove a juror for sleeping, a recording of a police interview with the victim was properly admitted as a prior consistent statement, and various documents establishing that defendant was a habitual offender were made a part of the record, without objection, during a pretrial hearing. Henderson v. State, 185 So. 3d 1038, 2015 Miss. App. LEXIS 347 (Miss. Ct. App. 2015), cert. denied, 186 So. 3d 854, 2016 Miss. LEXIS 101 (Miss. 2016).

Finding in favor of a psychiatrist in a negligence action after the decedent killed herself was proper, in part because letters that the decedent wrote to her children and to the personal representative while hospitalized were sufficiently authenticated by the representative's testimony. Likewise, during her trial testimony, the decedent's best friend sufficiently authenticated a letter that the decedent wrote to her and the trial court appropriately allowed the jury to compare the letters with the unauthenticated suicide notes, Miss. R. Evid. 901(b)(3). Young v. Guild, 7 So. 3d 251, 2009 Miss. LEXIS 193 (Miss. 2009).

In a suicide wrongful death case against a doctor, the letters the decedent wrote to plaintiff and her children while hospitalized were properly admitted because they were sufficiently authenticated by plaintiff's testimony. The trial court appropriately allowed the jury to compare the letters with the unauthenticated suicide notes. Young v. Guild, 2008 Miss. LEXIS 548 (Miss. Oct. 30, 2008), sub. op., op. withdrawn, 7 So. 3d 251, 2009 Miss. LEXIS 193 (Miss. 2009).

In defendant's murder case, the trial court did not err in admitting the letter defendant allegedly wrote to a witness while in prison because defendant acknowledged that he wrote the letter, the letter presented in court was an exact duplicate of the original which was in his attorney's possession during trial, and the witness testified that the jail trustee specifically noted that the letter came from defendant. Brown v. State, 965 So. 2d 1023, 2007 Miss. LEXIS 430 (Miss. 2007).

Where defendant sought to admit letter purportedly written by child victim recanting the charges, the trial court did not abuse its discretion in disregarding the testimony of defendant's handwriting expert, particularly in light of concerns about the expert's qualifications, nor did the trial court abuse its discretion in disregarding the testimony of a witness who admitted not having seen the child victim's handwriting in two years. The victim had testified that the victim did not write the letter, and the Mississippi Crime Lab examiner's report indicated that the letter showed tracings and simulations, thus defendant did not meet the burden of proving authenticity. Todd v. State, 873 So. 2d 1040, 2004 Miss. App. LEXIS 453 (Miss. Ct. App. 2004).

The state properly authenticated letters alleged to have been written by the defendant where (1) the state's handwriting expert properly authenticated the letters by comparing them to a known writing example obtained from the defendant, and (2) a fingerprint expert testified that the defendant's fingerprints were found on the letters. Burns v. State, 729 So. 2d 203, 1998 Miss. LEXIS 567 (Miss. 1998), cert. denied, 527 U.S. 1041, 119 S. Ct. 2406, 144 L. Ed. 2d 804, 1999 U.S. LEXIS 4526 (U.S. 1999).

Court at trial for possession of drugs erred in admitting handwritten note into evidence; State failed to establish who wrote the note and when it was written, and without adequate authentication and identification the note was irrelevant and should have been excluded. Frierson v. State, 606 So. 2d 604, 1992 Miss. LEXIS 568 (Miss. 1992).

**Medical records.**

As plaintiff was present when her doctor made each record, determined the information that went into the medical records, and testified to the accuracy of the records, the records were properly authenticated and their admission into evidence was not error. Cassibry v. Schlautman, 816 So. 2d 398, 2001 Miss. App. LEXIS 444 (Miss. Ct. App. 2001).

In a civil action arising from a motor vehicle accident, the plaintiff was not entitled to have her own medical records excluded because of the defendants's failure to call sponsoring witnesses, including the technician who drew her blood, the laboratory representative who performed blood tests, and a witness capable of interpreting the results of the tests; the plaintiff's blood test was no different from the results of an x-ray, a myelogram, or many other medical tests that are routinely admitted into evidence as part of a party's medical records, and there was no abuse of discretion in admitting the test results. Buel v. Sims, 798 So. 2d 425, 2001 Miss. LEXIS 63 (Miss. 2001).

**Photographs.**

Chancellor erred in not admitting photographs into evidence when a party testified that the party started taking the photographs from the time that their spouse filed for divorce that the photographs depicted the condition of the marital home during a time that the spouse was living there because the party's testimony was sufficient to authenticate the photographs. However, the error was deemed harmless because the appellate court did not find that the exclusion of the photographs would have affected the chancellor's custody determination. Vandenbrook v. Vandenbrook, 292 So. 3d 991, 2019 Miss. App. LEXIS 119 (Miss. Ct. App.), cert. denied, 279 So. 3d 1087, 2019 Miss. LEXIS 418 (Miss. 2019).

It was no error to exclude photographs offered to show a witness's "lifestyle" because (1) the photographs were not authenticated, and (2) defendant did not attempt a proffer to authenticate the photographs. Johnson v. State, 268 So. 3d 534, 2019 Miss. LEXIS 78 (Miss. 2019).

Trial court properly did not enter photographs of a casino floor into evidence in a slip and fall personal injury case because they were not properly authenticated, as there was no evidence or testimony as to who took the photographs, when the photographs were taken, or where the photographs were taken. Estate of Luster v. Mardi Gras Casino Corp., 121 So. 3d 962, 2013 Miss. App. LEXIS 608 (Miss. Ct. App. 2013).

Circuit court did not abuse its discretion in allowing a photocopy of the photographic lineup to be admitted as exhibit four where, regardless of the conflicting testimony concerning the form of the original photographic lineup, the testimony at trial and during the suppression hearing established that exhibit four did, indeed, contain copies of the photographs shown to the witnesses. Anderson v. State, 25 So. 3d 1074, 2009 Miss. App. LEXIS 280 (Miss. Ct. App. 2009), cert. denied, 24 So. 3d 1038, 2010 Miss. LEXIS 19 (Miss. 2010).

In an aggravated assault case where defendant claimed that her boyfriend witnessed the incident from the front of the hotel, because the detective testified that the photographs accurately represented the hotel doors at the time of his investigation, the photographs were properly authenticated and the trial court did not err by overruling defenadant's objection. Ford v. State, 975 So. 2d 859, 2008 Miss. LEXIS 102 (Miss. 2008).

**Process or system.**

State clearly met authentication requirement for admission of certificate of accuracy for intoxilyzer machine, and therefore State did not fail to lay proper predicate for admission of intoxilyzer test results. McIlwain v. State, 700 So. 2d 586, 1997 Miss. LEXIS 310 (Miss. 1997).

Trial court erred in admitting results of intoxilyzer test, where State failed to lay a sufficient predicate to support accuracy of the results. Johnston v. State, 567 So. 2d 237, 1990 Miss. LEXIS 562 (Miss. 1990).

**Public records.**

Trial court erred in admitting passports of defendant's son and defendant's daughter-in-law because, while the passports themselves were admissible, the notations made by an agent were inadmissible to show arrival and departure times without a certificate. Kea v. State, 986 So. 2d 358, 2008 Miss. App. LEXIS 396 (Miss. Ct. App. 2008).

Certificates of intoxilyzer calibration were an example of a public record, the authentication of which was contemplated by Miss. R. Evid. 901(b)(7); because defendant did not contest that the certificates came from the county jail, they satisfied the authentication requirements of Rule 901(b)(7) and were properly admissible. Pulliam v. State, 856 So. 2d 461, 2003 Miss. App. LEXIS 299 (Miss. Ct. App.), cert. denied, 859 So. 2d 1017, 2003 Miss. LEXIS 595 (Miss. 2003).

Trial court erred in admitting intoxilyzer test results because the State failed to properly authenticate copies of a page from the intoxilyzer log book and the calibration certificate; the State was required to offer either the testimony of the calibrating officer, the original certificate of calibration, or a certified copy of the certificate as evidence of the machine's accuracy. Jones v. State, 798 So. 2d 592, 2001 Miss. App. LEXIS 265 (Miss. Ct. App. 2001).

Indictment charging defendant with aggravated assault was properly certified where it bore signature of county clerk and clerk attested to its origins, and thus indictment was a proper substitute for the actual judgment of conviction. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 19 (Miss.), op. withdrawn, sub. op., 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss. 1996).

Prior convictions should not have been admitted, where they were merely notarized by a notary public and were thus improperly authenticated. Cox v. State, 586 So. 2d 761, 1991 Miss. LEXIS 588 (Miss. 1991).

**Radar.**

A radar device reading should be deemed admissible only upon a showing of the radar device's accuracy, and the showing of that accuracy is a prerequisite to the admissibility of evidence of speed obtained by use of the device. Stidham v. State, 750 So. 2d 1238, 1999 Miss. LEXIS 372 (Miss. 1999).

Although the radar evidence of defendant's speed was admitted before the proper foundation was laid, adequate evidence of the device's accuracy was subsequently introduced. Stidham v. State, 750 So. 2d 1238, 1999 Miss. LEXIS 372 (Miss. 1999).

**Receipt.**

Trial court did not commit reversible error by admitting a receipt for the rental of a pornographic movie in a sexual battery case because there were sufficient indicia of trustworthiness to show that the receipt was what it purported to be; a police officer obtained the receipt after presenting a properly executed subpoena duces tecum. Seigfried v. State, 869 So. 2d 1040, 2003 Miss. App. LEXIS 958 (Miss. Ct. App. 2003), cert. denied, 870 So. 2d 666, 2004 Miss. LEXIS 352 (Miss. 2004).

**Social media.**

Even though the trial court improperly admitted the social media evidence that allegedly connected defendant to the weapon through the use of a photograph and a video because the State failed to properly authenticate the evidence through modern or traditional means, as it did not have an authenticating witness, the error was harmless given the overwhelming evidence of defendant's guilt of possession of a firearm by a felon. Greene v. State, 282 So. 3d 645, 2019 Miss. App. LEXIS 339 (Miss. Ct. App. 2019).

Because defendant did not object to the admission into evidence of the Snapchat video, he was procedurally barred from raising the issue on appeal, but in any event, the video was properly authenticated; a witness reviewed the video prior to taking the stand and testified that the video fairly and accurately represented what he received from co-defendant one, and defendant and co-defendant two admitted that they received the video from co-defendant one shortly after the incident occurred. Pugh v. State, 270 So. 3d 949, 2018 Miss. App. LEXIS 455 (Miss. Ct. App. 2018).

In a statutory rape case, a trial court erred when it denied defendant the opportunity to authenticate evidence of electronic communications on social media in an attempt to establish the defense theory regarding a victim's motive to fabricate allegations; evidence supporting the victim's motive to lie was relevant since it involved circumstantial and word of mouth evidence. White v. State, 228 So. 3d 893, 2017 Miss. App. LEXIS 81 (Miss. Ct. App.), cert. denied, 229 So. 3d 118, 2017 Miss. LEXIS 389 (Miss. 2017).

In a prosecution of defendant for exploitation of a child, defendant was procedurally barred from arguing that the trial court abused its discretion by admitting social media and text messages into evidence that the State failed to properly authenticate pursuant to Miss. R. 901, as defendant failed to object to the items' admission at trial. Notwithstanding the bar, defendant's contentions were meritless. Boyd v. State, 175 So. 3d 1, 2015 Miss. LEXIS 204 (Miss. 2015).

Even though Facebook messages allegedly from defendant should not have been admitted because they were not authenticated, the admission of such evidence was harmless because of the evidence of defendant's guilt. There was no testimony that the photograph in the Facebook profile was that of defendant, no personal information regarding defendant was elicited to determine whether the profile was hers, defendant did not admit authorship of these postings, and there was no testimony that defendant was seen composing these comments. Clay v. State, 151 So. 3d 1018, 2014 Miss. App. LEXIS 422 (Miss. Ct. App. 2014).

**Telephone conversations.**

Testimony of the sheriff's department employee was sufficient to authenticate the telephone-call recordings from the jail because the employee testified in detail about the operation of the jail's telephone system; she provided a detailed description of the process employed to assign each inmate an identification number and to record the inmate telephone calls, and of her training on how to retrieve the recordings from the telephone system's online database; and she testified that she was familiar with defendant's voice and identified him as the inmate voice on the telephone calls. Chase v. State, — So. 3d —, 2020 Miss. App. LEXIS 47 (Miss. Ct. App. Feb. 18, 2020), cert. denied, — So. 3d —, 2020 Miss. LEXIS 432 (Miss. 2020).

Officer's testimony that he was familiar with defendant's voice on a recording and identifying the voice as defendant's was sufficient to authenticate the recording. Jackson v. State, 263 So. 3d 1003, 2018 Miss. App. LEXIS 329 (Miss. Ct. App. 2018), cert. denied, 263 So. 3d 665, 2019 Miss. LEXIS 65 (Miss. 2019), cert. denied, — So. 3d —, 2019 Miss. LEXIS 71 (Miss. 2019).

Trial court did not err in admitting a screenshot of a single text message found on a phone in defendant's possession at the time of his arrest because the State made a prima facie showing through a police officer's testimony that the screenshot from the phone was authentic; defendant did not offer any testimony to rebut the authenticity of the message on the screenshot or the owner of the phone. Saunders v. State, 241 So. 3d 645, 2018 Miss. App. LEXIS 166 (Miss. Ct. App. 2018).

Trial court did not err in permitting the jury to hear a 911 call because the person who made the call testified that the call fairly and accurately represented her conversation with the 911 operator. Corrothers v. State, 148 So. 3d 278, 2014 Miss. LEXIS 311 (Miss. 2014), cert. denied, 576 U.S. 1023, 135 S. Ct. 2835, 192 L. Ed. 2d 877, 2015 U.S. LEXIS 3926 (U.S. 2015).

In defendant's trial for capital murder of defendant's five-year-old child, a recording of defendant's phone call made from the jail in which defendant admitted to killing the child was admissible because the recording was sufficiently authenticated under Miss. R. Evid. 901 when a detective testified that he recognized defendant's voice and defendant identified herself during the phone call. Even if there were any error on the trial court's part in admitting the tape, that error would be harmless because it was debatable whether the audio recording in question contained any more incriminating information than what defendant gave in her statement to police and on the stand at trial. Broadhead v. State, 981 So. 2d 320, 2007 Miss. App. LEXIS 809 (Miss. Ct.

App. 2007), cert. denied, 981 So. 2d 298, 2008 Miss. LEXIS 210 (Miss. 2008).

In a child custody case, the mother waived an authentication objection concerning the admissibility of tape recordings made secretly by the husband, where the only objection made at trial concerned the chain of custody. Copeland v. Copeland, 904 So. 2d 1066, 2004 Miss. LEXIS 1490 (Miss. 2004).

Telephone conversations are authenticated when the evidence shows that a call was made to a number assigned at the time by the telephone company to a particular person and self-identification shows that the person answering is the person who was called. Gatlin v. State, 724 So. 2d 359, 1998 Miss. LEXIS 591 (Miss. 1998).

**Testimony of witness with knowledge.**

At trial, the director of medical records for a center, stated that she served as the custodian of all center records, and testified as to the authenticity of the husband's center records; she also testified as to the center's regular practice of maintaining their medical records. The chancellor and the parties were already aware of the records since the guardian ad litem used the records to compile her report for the court, and since the husband's records were available to both parties; therefore, there was no abuse of discretion in the chancellor's admission of the records, as they fell within Miss. R. Evid. 803(6) and were properly authenticated. Jones v. Jones, 43 So. 3d 465, 2009 Miss. App. LEXIS 946 (Miss. Ct. App. 2009), cert. denied, 49 So. 3d 106, 2010 Miss. LEXIS 463 (Miss. 2010).

In defendant's murder trial, trial court did not abuse its discretion in admitting ATF Gun Trace and Trace Return document into evidence because the documents were properly authenticated where a police officer testified that he was familiar with the document and that it was the document that he received from the ATF in response to his ATF gun trace request for defendant; this testimony, paired with the information on the face of the document, was evidence sufficient to suport a finding that the document was what the prosecution claimed. Jordan v. State, 995 So. 2d 94, 2008 Miss. LEXIS 489 (Miss. 2008).

In defendant's murder trial, trial court properly overruled defense objections to the testimony of a pawnshop owner concerning defendant's purchase of a gun and the documents related to defendant's purchase because the record reflected that the pawnshop owner was familiar with the documents and, as a federal firearms holder, was responsible for maintaining the documents. Jordan v. State, 995 So. 2d 94, 2008 Miss. LEXIS 489 (Miss. 2008).

In an action concerning underinsured motorist benefits, the witness testified she was an employee of the insurer with the knowledge of the contents of the computer-generated document, its preparation, and how to access the documents from storage on her computer. The witness testified to the contents of the document in question, which recorded every transaction on the insurance policy, and to exactly how each number on the page came to be, and she further testified as to how the computer system functioned; the record reflected that each of the subject entries were done in the course of regular business with the insurer and all the requirements for admission of said document under Miss. R. Evid. 803(6) and 901(b) were met. Ferguson v. Snell, 905 So. 2d 516, 2004 Miss. LEXIS 1488 (Miss. 2004).

Where police officer testified that photographs accurately represented the appearance of the victim on the night of the assault, the photographs were relevant and properly authenticated; it was immaterial that the officer was not the person who took them. Smith v. State, 792 So. 2d 343, 2001 Miss. App. LEXIS 326 (Miss. Ct. App. 2001).

A videotape of an alleged drug transfer admitted at trial was properly authenticated where a police officer testified that he set up the video equipment, was present when the events on the videotape transpired, and that the video was an accurate depiction of the events as they transpired that day. Trull v. State, 811 So. 2d 243, 2000 Miss. App. LEXIS 430 (Miss. Ct. App. 2000).

In a divorce proceeding in which the wife's use of the Internet to meet men was at issue, the husband was not qualified to authenticate America Online (AOL) documents which showed the household usage of the parties' AOL account as he was not involved in the preparation of the documents, he did not work directly for AOL, and he could not testify to the accuracy of the documents. Bower v. Bower, 758 So. 2d 405, 2000 Miss. LEXIS 80 (Miss. 2000).

Summary of retail store's business transactions was properly admitted at trial for embezzlement, where underlying bank deposits, cash register tapes and daily accounting sheets were prepared and utilized in the regular conduct of business, and summary was properly authenticated by store owner who prepared it with help of his bookkeeper, and owner was a witness with knowledge that the summary was what it was claimed to be. Wells v. State, 604 So. 2d 271, 1992 Miss. LEXIS 379 (Miss. 1992).

**Transcript of police interview.**

Transcript of defendant's interview with the police was admissible into evidence as it was properly authenticated by a police officer who was present while the interview was conducted. Black v. State, 823 So. 2d 543, 2002 Miss. App. LEXIS 135 (Miss. Ct. App. 2002).

**Videotape.**

Because an officer was present for both interviews with defendant, he testified as to how the recordings were made and burned to discs, and he testified that the videos were fair and accurate recordings of the interviews, the trial court did not abuse its discretion in finding that the videos of defendant's statements to law enforcement were properly authenticated. McCammon v. State, 299 So. 3d 873, 2020 Miss. App. LEXIS 28 (Miss. Ct. App.), cert. denied, 299 So. 3d 794, 2020 Miss. LEXIS 297 (Miss. 2020).

Defendant's interview with law enforcement was sufficiently authenticated and admissible into evidence as an investigator testified that he personally conducted the interview with defendant; he testified about the events immediately preceding defendant's statement involving his waiver of Miranda rights; and he provided testimony supporting the trial court's finding that the video interview was what the State claimed it was. Wilson v. State, 267 So. 3d 264, 2019 Miss. LEXIS 152 (Miss. 2019).

Officer had sufficient knowledge to authenticate that the video was what the State claimed it to be – a video published on YouTube featuring defendant and another person. Jordan v. State, 212 So. 3d 836, 2015 Miss. App. LEXIS 655 (Miss. Ct. App. 2015), aff'd, 212 So. 3d 817, 2016 Miss. LEXIS 542 (Miss. 2016).

State of Mississippi adequately provided a proper chain of custody for the admission of parking lot surveillance videos into evidence because the State provided the testimony of a retail store assistant manager and a hospital information technology officer, who both acted as the custodians of their employers' surveillance-video equipment, that the copies of the surveillance footage accurately depicted the contents of the original surveillance footage. Bunch v. State, 123 So. 3d 484, 2013 Miss. App. LEXIS 602 (Miss. Ct. App. 2013).

Defendant's conviction for selling cocaine was affirmed as the State properly authenticated a videotape of a drug transaction under Miss. R. Evid. 901; two officers testified that it accurately depicted the transaction as it occurred and defendant presented no evidence or reasonable inference to support defendant's claim that there was a break in the chain of custody of cocaine. Crutcher v. State, 68 So. 3d 724, 2011 Miss. App. LEXIS 205 (Miss. Ct. App.), cert. denied, 69 So. 3d 767, 2011 Miss. LEXIS 415 (Miss. 2011).

Denial of appellant's, an inmate's, motion for postconviction relief was proper because he failed to show that he received the ineffective assistance of counsel. The admission of a videotape was erroneous not based upon any substantive flaw in the videotape itself that could have been objected to prior to the videotape's admission into evidence, but upon a violation of Miss. R. Evid. 901; the inmate's trial counsel did object to the admission of the videotape for that precise reason and therefore, the inmate was unable to show that his trial counsel's failure to renew his motion for a continuance satisfied either prong of Strickland. Conway v. State, 48

So. 3d 588, 2010 Miss. App. LEXIS 270 (Miss. Ct. App.), cert. denied, 49 So. 3d 1139, 2010 Miss. LEXIS 627 (Miss. 2010).

State satisfied its burden under Miss. R. Evid. 901(b)(1) in laying a foundation for admission of the videotape of the cocaine sale because: (1) the audio and video equipment was set up in the confidential informant's trailer; (2) the informant possessed suffidient knowledge of the transaction that occurred on the recording; (3) the informant described the location of both the audio and video recording and acknowledged that she was being recorded; and (4) the informant stated that the video recording was a true and accurate description of the transaction that took place on February 15, 2006 between herself and defendant. Thames v. State, 5 So. 3d 1178, 2009 Miss. App. LEXIS 170 (Miss. Ct. App. 2009).

Trial court did not abuse its discretion when it admitted a videotape of a drug transaction between defendant and an informant into evidence because the videotape was authenticated through the testimony of an officer and the informant stating that it accurately showed the transaction and that it had not been altered. Hoye v. State, 1 So. 3d 946, 2009 Miss. App. LEXIS 33 (Miss. Ct. App. 2009).

Appellate court held that the admission of a videotape depicting the drug transaction was proper as it was properly authenticated under Miss. R. Evid. 901 by the confidential informant (CI) who bought the drugs from defendant, as the CI had reviewed the tape and testified that it accurately depicted the transaction. Griffin v. State, 918 So. 2d 882, 2006 Miss. App. LEXIS 12 (Miss. Ct. App. 2006).

Where defendant was tried for grand larceny, the court did not err in admitting into evidence video surveillance footage showing defendant throwing the stolen wallet into a trash can. A security supervisor's testimony that the tape was in the same condition as when he viewed it provided authentication. Moore v. State, 911 So. 2d 1037, 2005 Miss. App. LEXIS 694 (Miss. Ct. App. 2005).

In defendant's murder trial, the State failed to prove the detective had sufficient knowledge of the crime scene to have been able to testify that the edited videotape accurately depicted the events on the day in question. However, because the evidence against defendant was overwhelming, such error was harmless. Conway v. State, 915 So. 2d 521, 2005 Miss. App. LEXIS 979 (Miss. Ct. App. 2005), cert. denied, 927 So. 2d 750, 2006 Miss. LEXIS 217 (Miss. 2006).

Because defendant did not object to the surveillance video authentication procedure, he was barred from raising the issue on appeal. McDonald v. State, 881 So. 2d 895, 2004 Miss. App. LEXIS 398 (Miss. Ct. App. 2004).

Plaintiff's witness testified to setting up the video equipment and to being present when the events on the videotape transpired, and could identify the videotape through the witness's observation of it; and since the witness was familiar with the scene, and testified sufficiently to the accuracy of the recording, the authenticity of the videotape was proven. Chapman v. Williams, 860 So. 2d 837, 2003 Miss. App. LEXIS 1138 (Miss. Ct. App. 2003).

**Illustrative cases.**

Witness testified about the documents and their authenticity in accordance with the rule; the witness drafted the documents and witnessed the execution and signatures of the originals. Quinn v. Quinn, 278 So. 3d 1160, 2019 Miss. App. LEXIS 57 (Miss. Ct. App. 2019).

Trial court erred in granting a principal and a surety summary judgment because the discrepancy among the affidavit of a subcontractor's employee and daily logs created a genuine issue of material fact as to whether the employee had personal knowledge that material supplied to the subcontractor was incorporated into the project; the daily work logs were unauthenticated, and the record was void of any sworn testimony that they identified the only persons who were on the project site. Mathes Elec. Supply Co. v. Can't Be Beat Fence Co., 267 So. 3d 788, 2018 Miss. App. LEXIS 424 (Miss. Ct. App. 2018), cert. denied, 267 So. 3d 281, 2019 Miss. LEXIS 167 (Miss. 2019).

Trial court did not err in admitting Google Earth images of defendant's property, because the State made a prima facie showing that the photographs accurately depicted his property on the dates at issue. Walters v. State, 206 So. 3d 524, 2016 Miss. LEXIS 503 (Miss. 2016).

Admission of an uncertified Radar Unit Certification as a business record, with the arresting officer as the custodian, violated defendant's right to confront the person who performed the radar calibration since the officer did not have knowledge of the contents of the Radar Unit Certification and was unable to testify as to its accuracy. Freeman v. State, 121 So. 3d 888, 2013 Miss. LEXIS 312 (Miss. 2013).

Murder victim's mother sufficiently authenticated printouts of Facebook messages by her testimony that the documents were the Facebook messages between her and defendant. Smith v. State, 168 So. 3d 992, 2013 Miss. App. LEXIS 318 (Miss. Ct. App. 2013), aff'd in part, vacated in part, 136 So. 3d 424, 2014 Miss. LEXIS 209 (Miss. 2014).

Reading of a stipulation to the jury effectively placed the stipulation in evidence because defendant's counsel did not object to the stipulation for any reason, including the issue of authentication; both parties agreed to the stipulation, and the circuit judge read the words contained on an exhibit and referred to the stipulation as a "fact" agreed to by both parties. Peterson v. State, 37 So. 3d 669, 2010 Miss. App. LEXIS 58 (Miss. Ct. App. 2010).

Trial judge did not abuse his discretion in allowing three "pen packs" into evidence; the pen packs were appropriate evidence of prior convictions in order to enhance sentencing and were properly authenticated by defendant's probation and parole officer, who testified that the prior convictions were part of a file he received on defendant when he became his parole officer. Grant v. State, 8 So. 3d 213, 2008 Miss. App. LEXIS 495 (Miss. Ct. App. 2008), cert. denied, 12 So. 3d 531, 2009 Miss. LEXIS 207 (Miss. 2009).

To convict a defendant of trafficking in stolen firearms, the State did not need to enter the actual firearms into evidence as (1) there was no best evidence rule with regard to physical evidence that was not writings, recordings, or photographs; (2) requiring the State to offer actual firearms into evidence would impose a high burden on prosecutors and the courts in cases where there were large quantities of physical evidence; and (3) the State satisfied the relevancy and authentication requirements permitting the photographs of the firearms to be introduced into evidence. Riley v. State, 1 So. 3d 877, 2008 Miss. App. LEXIS 378 (Miss. Ct. App. 2008), cert. denied, 999 So. 2d 1280, 2009 Miss. LEXIS 18 (Miss. 2009).

Husband was properly awarded child custody because it was harmless error to admit a list of prior arrests and charges against the wife's boyfriend that was not properly authenticated since there was other evidence regarding the boyfriend's violent behavior. Weeks v. Weeks (In re Dissolution of Marriage of Weeks), 989 So. 2d 408, 2008 Miss. App. LEXIS 271 (Miss. Ct. App. 2008).

In a child custody modification proceeding, a private investigator's DVD was properly admitted since it was authenticated based on the ex-wife's identification of the ex-wife's home and vehicle, as well as the vehicle of the ex-wife's boyfriend in front of the ex-wife's house. Pruett v. Prinz, 979 So. 2d 745, 2008 Miss. App. LEXIS 231 (Miss. Ct. App. 2008).

Certificate of title and a bill of sale that were produced to the State during discovery were admissible into evidence because they were relevant under Miss. R. Evid. 401, as a reasonable juror could conclude that, because defendant produced the fraudulent documents during discovery, he knew the vehicle was stolen. In addition, to authentic the documents, the State had only to show that the documents were what the State claimed them to be, and defendant offered no objection to their authenticity. Hayden v. State, 972 So. 2d 525, 2007 Miss. LEXIS 646 (Miss. 2007).

In a drug case, defendant did not receive ineffective assistance of counsel because (1) he offered no evidence to rebut the presumption that the jury had been properly sworn, so no objection by counsel was required; (2) defense counsel was not required to request an instruction regarding an accomplice because the State's evidence did not rest upon the testimony of two others involved; (3) defense counsel's failure to request an additional instruction when mention was made of defendant's prior incarceration was not deficient where an objection was made immediately and a curative instruction was given; and (4) the failure to object to defendant's criminal record was not deficient since the testimony of a correctional department custodian was permissible to authenticate such under Miss. R. Evid. 901. Vardaman v. State, 966 So. 2d 885, 2007 Miss. App. LEXIS 706 (Miss. Ct. App. 2007).

In an aggravated assault case, the court properly admitted the tire iron into evidence because a witness explained that he had used the very same tire iron for many years during his employment at the automotive shop. Additionally, although the tire iron had been moved frequently at the sheriff's office, testimony showed that it was the only tire iron in storage from the time it was bagged as evidence until the trial. Walker v. State, 2005 Miss. App. LEXIS 728 (Miss. Ct. App. Oct. 11, 2005), op. withdrawn, sub. op., 936 So. 2d 424, 2006 Miss. App. LEXIS 550 (Miss. Ct. App. 2006).

Trial court did not err in admitting into evidence cocaine that allegedly belonged to defendant because the exhibit was properly authenticated by Miss. R. Evid. 901 where two officers testified that the cocaine was what was found in a bag in the car defendant was driving. Magee v. State, 912 So. 2d 1044, 2005 Miss. App. LEXIS 252 (Miss. Ct. App. 2005).

Trial court did not abuse its discretion in excluding a memorandum from the corporation offered by an individual as the individual tried to offer the memo through a witness who neither prepared the memo nor knew who prepared it. Welsh v. Mounger, 883 So. 2d 46, 2004 Miss. LEXIS 781 (Miss. 2004).

Trial court did not err in refusing to admit notes from a decedent that purportedly set out some terms of a trust agreement that would benefit the individuals as there was no substantial proof that the decedent had actually written the notes. Dear v. Boggan (In re Estates of Gates), 876 So. 2d 1059, 2004 Miss. App. LEXIS 621 (Miss. Ct. App. 2004).

In defendant's prosecution for unlawfully filming another person, the victim testified that the victim took the tape to the victim's lawyer's office, a copy was made, and the tapes were then sent to the prosecutor and to defendant's attorney, and the lawyer's paralegal testified that the tape had not been altered and that the copy was the same as the original; even absent a presumption of regularity, there was no evidence of tampering, there was sufficient authentication, and the tape was properly admitted. Moen v. State, 861 So. 2d 1066, 2003 Miss. App. LEXIS 1187 (Miss. Ct. App. 2003).

In a prosecution for timber theft, settlement sheets showing the value of the timber were improperly authenticated by an investigator who had not prepared them; however, as there was also competent testimony on the same issue, the error was harmless. Chisolm v. State, 856 So. 2d 681, 2003 Miss. App. LEXIS 868 (Miss. Ct. App. 2003).

In a kidnapping and rape prosecution, exhibits taken from defendant's home (lotion, samples extracted from his mattress, a laundry bag, a towel, and a sheet) were not erroneously admitted as they were introduced following sufficient foundational testimony by both the victim and a sheriff; there was thus no abuse of discretion, and no substantial right of defendant was adversely affected. Townsend v. State, 847 So. 2d 825, 2003 Miss. LEXIS 273 (Miss. 2003).

Evidence was sufficient to authenticate audiotapes of a drug transaction where (1) one officer testified that he had eight or nine separate conversations with the defendant prior to the transaction at issue and that some of those conversations lasted upwards of 40 minutes and that he spoke to the defendant only hours before the transaction, and (2) another officer testified further that he heard the defendant's voice on several occasions "over the body mic." Wilson v. State, 775 So. 2d 735, 2000 Miss. App. LEXIS 216 (Miss. Ct. App. 2000).

There was sufficient evidence to allow marijuana to be admitted into evidence where there was the officers' testimony and an audiotape of the drug deal, and there was no indication or reasonable inference of probable tampering or substitution of the evidence and no demonstrated prejudicial impact on defendant's case. Cockerham v. State, 752 So. 2d 431, 1999 Miss. App. LEXIS 685 (Miss. Ct. App. 1999).

In a prosecution for defrauding the state government and uttering forgery, the court erroneously permitted a state investigator to testify insurance investigative reports as he was not involved in preparing the insurance files, did not work directly for the insurance companies, and did not even know the adjusters. Logan v. State, 1999 Miss. App. LEXIS 182 (Miss. Ct. App. Apr. 20, 1999), rev'd, 2000 Miss. LEXIS 128 (Miss. May 25, 2000).

Oil change sticker indicating mileage on vehicle was authenticated in the only way relevant to its evidentiary purpose, notice to car dealership, and therefore sticker was properly admitted. Regency Nissan v. Jenkins, 678 So. 2d 95, 1996 Miss. LEXIS 435 (Miss. 1996).

## ATTORNEY GENERAL OPINIONS

The custodian of an intoxilyzer calibration certificate is a proper witness for the introduction of such a certificate. Shands, May 7, 1999, A.G. Op. #99-0210.

## RESEARCH REFERENCES

**ALR.**

Authentication of bullets and other inorganic substances removed from human body for purposes of analysis. 79 A.L.R.5th 237.

Admissibility in Evidence of Aerial Photographs. 85 A.L.R.5th 671.

Construction and application of silent witness theory. 116 A.L.R.5th 373.

Admissibility in Evidence, in Civil Action, of Tachograph or Similar Paper or Tape Recording of Speed of Motor Vehicle, Railroad Locomotive, or the Like. 18 A.L.R. 6th 613.

## Rule 902. Evidence that is self-authenticating.

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(1) *Domestic public documents that are sealed and signed.* A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.

(2) *Domestic public documents that are not sealed but are signed and certified.* A document that bears no seal if:

(A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and

(B) another public officer who has a seal and official duties within that same entity certifies under seal – or its equivalent – that the signer has the official capacity and that the signature is genuine.

(3) *Foreign public documents.* A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester – or of any foreign official whose certificate of genuineness relates to the

signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:

(A) order that it be treated as presumptively authentic without final certification; or

(B) allow it to be evidenced by an attested summary with or without final certification.

(4) *Certified copies of public records.* A copy of an official record – or a copy of a document that was recorded or filed in a public office as authorized by law – if the copy is certified as correct by:

(A) the custodian or another person authorized to make the certification; or

(B) a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Mississippi Supreme Court pursuant to statutory authority.

(5) *Official publications.* A book, pamphlet, or other publication purporting to be issued by a public authority.

(6) *Newspapers and periodicals.* Printed material purporting to be a newspaper or periodical.

(7) *Trade inscriptions and the like.* An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

(8) *Acknowledged documents.* A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.

(9) *Commercial paper and related documents.* Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

(10) *Presumptions under a federal or state statute.* A signature, document, or other matter that a Mississippi or federal statute declares to be presumptively or *prima facie* genuine or authentic.

(11) *Certified records of regularly conducted activities.* A record that meets the requirements of Rule 803(6), if a certificate of the custodian or another qualified witness complies with subparagraph (A).

(A) *Certificate.* The certificate must show:

(i) the custodian's or witness's first hand knowledge of the making, maintenance, and storage of the record; and

(ii) that the record complies with Article X and Rules 803(6)(A)-(C) and 901(a).

A certificate relating to a foreign record must also be accompanied by the final certification required by paragraph (3).

(B) *Notice.* Before the trial or hearing at which the record will be offered, the proponent must give an adverse party notice of the intent to offer the record - and must provide a copy of the record and certificate - so that the party has a fair opportunity to state any objection. Otherwise, the record is not selfauthenticating under this paragraph (11).

(C) *Making objections.* An adverse party waives any objection that is not:

(i) stated specifically in writing; and

(ii) served within 15 days after receiving the notice required by subparagraph (B), or at a later time that the parties agree on or that the court allows.

(D) *Hearing and ruling on objections.* The proponent must schedule a hearing on any objection, and the court should determine admissibility of the record before the trial or hearing at which it may be offered. If the court cannot do so, the record is not self-authenticating under this paragraph (11).

(E) *Sanctions.* In a civil case after the trial or hearing, the proponent may move that the objecting party and attorney pay the expenses of presenting the evidence necessary to have the record admitted. The court must so order, if it determines that the objection raised no genuine question and lacked arguable good cause.

(F) *Definitions.* In this paragraph "certificate" means:

(i) for a domestic record, a written declaration under oath or attestation given under penalty of perjury; and

(ii) for a foreign record, a written declaration signed in a foreign country that, if falsely made, would subject the maker to criminal penalty under that country's laws.

(12) *Certified Records Generated by an Electronic Process or System.* A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification and notice requirements of Rule 902(11).

(13) *Certified Data Copied from an Electronic Device, Storage Medium, or File.* Data copied from an electronic device. storage medium. or file. if authenticated by a process of digital identification. as shown by a certification of a qualified person that complies with the certification and notice requirements of Rule 902(11).

**HISTORY: Amended January 31, 1990; amended effective July 1, 1997; restyled effective July 1, 2016; amended effective July 1, 2020.**

## ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 1997, Rule 902 was amended to add subsection (11) to allow predicates for records of regularly conducted activities to be proven by affidavit. 689-692 So. 2d LXVIII (West Miss. Cas. 1997).

Effective March 20, 1995, the Comment to Rules 902(3), (8) and (9) were amended to note the repeal of statutes and to delete reference to a UCC section. 648-651 So. 2d XXVI (West Miss. Cas. 1995).

Effective January 31, 1990, Rule 902(3) was amended to make a technical change. 553-556 So. 2d XXVII (West Miss. Cas. 1990).

## ADVISORY COMMITTEE NOTE

The language of Rule 902 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. As before, Rule 902 uses numbered paragraphs as first-level formatting, rather than typical lower-case lettered subdivisions, because changing the structure of the Rule would disrupt electronic search results and thus impose transaction costs that outweigh any benefit in strictly consistent formatting. Rule 902(11) has been restructured with additional subparagraphs and items. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 902 lists situations in which authenticity is taken as sufficiently established for purpose of admissibility without extrinsic evidence. However, the opponent of the evidence may always challenge the authenticity. In essence, the rule shifts the burden to the opponent. In 1990 a technical amendment was made. No substantive change was made or intended.

(1) *Domestic Public Documents Under Seal.* The underlying policy rests on the fact that forgery is easily detected, and the possibility of the documents not being genuine is, thus, remote. A wide range of Mississippi public records fall into this category, including acknowledgments and certificates authenticating copies of public records.

(2) *Domestic Public Documents Not Under Seal.* This provision permits the admission in evidence of documents signed by an official whose office has no seal, provided a second official having a seal certifies, under seal, the genuineness of the first signature.

(3) *Foreign Public Documents.* The presumption of authenticity extends to foreign official documents by a procedure of certificate. It is derived from M.R.C.P. 44(a)(2). M.C.A. § 13-1-101 (repealed effective July 1, 1991) formerly governed this procedure.

(4) *Certified Copies of Public Records.* Numerous statutes already exist in Mississippi providing for the authentication of copies of public records by certificate. The certificate itself qualifies as a public document, receivable as authentic when it conforms to Rule 902(1), (2), or (3). See M.R.C.P. 44(a). The certification under Rule 902(4) pertains to public records and not to public documents in general.

(5) *Official Publications.* M.R.C.P. 44(a)(l) has the same effect.

(6) *Newspapers and Periodicals.* This is new practice in Mississippi. The rule is based on the premise that the possibility of forgery in this area is negligible.

(7) *Trade Inscription and the Like.* Curtiss Candy Co. v. Johnson, 163 Miss. 426, 141 So. 762 (1932) early established this rule in Mississippi. The possibility of forgery is too slim for the court to require a more detailed method of authentication.

(8) *Acknowledged Documents.* This extends existing Mississippi law. In Mississippi the self-authentication of acknowledged documents was formerly available through a limited number of statutes, e.g., M.C.A. § 13-1-97, § 13-1-143 (both repealed effective July 1, 1991).

(9) *Commercial Paper and Related Documents.* Mississippi practice already allows for authentication of commercial paper pursuant to U.C.C. § 1-202, § 3-307, and § 8-105. [codified as §§ 75-1-307, 75-3-308 and 75-8-114, respectively]

(11) *Certified Records of Regularly Conducted Activities.* This method of self-authenticating the records of regularly conducted activities is suggested by Rule 902(11) of the Uniform Rules of Evidence. It is intended to allow, in proper cases, the introduction of these records without the expense, trial time consumption and inconvenience to witnesses who are called to provide what is often purely formalistic and undisputed predicate evidence. Subparagraph (A) permits proof by affidavit of the qualifications of the witness and the usual predicates of authenticity, the Best Evidence Rule and the Rule 803(6) hearsay exception and explains the required certification. Subparagraph (B) requires that the proponent have early anticipation of the use of this method so there is time before trial for notice, objections and a hearing. Subparagraph (D) provides that if objections are not decided before the trial, the proponent must plan to call the witness. The sanction under subparagraph (E) for frivolous objections in civil cases is based on the M.R.C.P. 37(c) sanction for failure to admit.

When self-authenticating records are offered against the defendant in criminal cases, the rights of the defendant under the confrontation clauses of Federal and State Constitutions must be considered. ("'Advisory Committee Note" substituted for "Comment," effective June 16, 2016;

amended effective July 1, 2016, to note restyling.)

(12) *Certified Records Generated by an Electronic Process or System.* Rule 902(12) sets forth a procedure by which parties can authenticate certain electronic evidence other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11), the expense and inconvenience of producing a witness to authenticate an item of electronic evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness, and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. Rule 902(12) provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Nothing in Rule 902(12) limits a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule. The Rule specifically allows the authenticity foundation that satisfies Rule 901(b)(9) to be established by a certification rather than the testimony of a live witness.

The reference to the "certification requirements of Rule 902(11)" is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this Rule to prove the requirements of Rule 803(6). Rule 902(12) is solely limited to authentication, and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can establish only that the proffered item has satisfied the admissibility requirements for authenticity. The opponent remains free to object to admissibility of the proffered item on other grounds – including hearsay, relevance, or in criminal cases the right to confrontation. For example, assume that a plaintiff in a defamation case offers what purports to be a printout of a webpage on which a defamatory statement was made. Plaintiff offers a certification under this Rule in which a qualified person describes the process by which the webpage was retrieved. Even if that certification sufficiently establishes that the webpage is authentic, defendant remains free to object that the statement on the webpage was not placed there by defendant. Similarly, a certification authenticating a computer output, such as a spreadsheet, does not preclude an objection that the information produced is unreliable – the authentication establishes only that the output came from the computer.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert. Such factors will affect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

(13) *Certified Data Copied from an Electronic Device, Storage Medium, or File.* Rule 902(13) sets forth a procedure by which parties can authenticate data copied from an electronic device, storage medium, or an electronic file, other than through the testimony of a foundation witness. As with the provisions on business records in Rules 902(11), the expense and inconvenience of producing an authenticating witness for this evidence is often unnecessary. It is often the case that a party goes to the expense of producing an authentication witness, and then the adversary either stipulates authenticity before the witness is called or fails to challenge the authentication testimony once it is presented. The amendment provides a procedure in which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly.

Nothing in Rule 902(13) limits a party from establishing authenticity of electronic evidence on any ground provided in these Rules, including through judicial notice where appropriate.

Today, data copied from electronic devices, storage media, and electronic files are ordinarily authenticated by "hash value." A hash value is a number that is often represented as a sequence of characters and is produced by an algorithm based upon the digital contents of a drive, medium, or file. If the hash values for the original and copy are different, then the copy is not identical to the original. If the hash values for the original and copy are the same, it is highly improbable that the original and copy are not identical. Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates. This amendment allows self-authentication by a certification of a qualified person that the person checked the hash value of the proffered item and that it was identical to the original. The rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology.

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established under this Rule.

The reference to the "certification requirements of Rule 902(11)" is only to the procedural requirements for a valid certification. There is no intent to require, or permit, a certification under this Rule to prove the requirements of Rule 803(6). Rule 902(13) is solely limited to authentication, and any attempt to satisfy a hearsay exception must be made independently.

A certification under this Rule can only establish that the proffered item is authentic. The opponent remains free to object to admissibility of the proffered item on other grounds – including hearsay, relevance, or in criminal cases the right to confrontation. For example, in a criminal case in which data copied from a hard drive is proffered, the defendant can still challenge hearsay found in the hard drive, and can still challenge whether the information on the hard drive was placed there by the defendant.

A challenge to the authenticity of electronic evidence may require technical information about the system or process at issue, including possibly retaining a forensic technical expert. Such factors will affect whether the opponent has a fair opportunity to challenge the evidence given the notice provided.

["Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended July 1, 2016, to note restyling: amended effective July 1, 2020.]

## JUDICIAL DECISIONS

### ANALYSIS

Authenticity.
Certified copies.
Public records or reports.
Receipt.
Illustrative cases.

**Authenticity.**

Chancellor erred in finding that the wills were admissible under the rules, as they were not signed and therefore not originals, nor were they duplicates or copies of the originals, plus the unsigned wills, which were not certified, did not qualify as self-authenticating evidence; the error was harmless based on the testimony given and the fact that the wills were properly authenticated. Quinn v. Quinn, 278 So. 3d 1160, 2019 Miss. App. LEXIS 57 (Miss. Ct. App. 2019).

**Certified copies.**

Trial court did not err in admitting Intoxilyzer results because the calibration certificate at issue met the requirements of the Mississippi Rules of Evidence where it contained both the Mississippi state seal and the calibrating officer's attesting signature. Drabicki v. City of Ridgeland, 130 So. 3d 113, 2013 Miss. App. LEXIS 404 (Miss. Ct. App. 2013).

Calibration certificates were prepared under the seal of the Mississippi Crime Laboratory; the exhibits in defendant's trial bore both the seal of the office as well as the signature of one attesting the truth of their contents, and as such, the certificates could be considered self-authenticating pursuant to Miss. R. Evid. 902(1). Pulliam v. State, 856 So. 2d 461, 2003 Miss. App. LEXIS 299 (Miss. Ct. App.), cert. denied, 859 So. 2d 1017, 2003 Miss. LEXIS 595 (Miss. 2003).

There is nothing in subsection (4) that states the certified copies must come from the level of government or specific agency who issued the document; it is only necessary that the office where an official document is authorized by law to be filed certify as to authenticity; thus, as a municipal clerk's statutory duties included the maintaining of records of the calibration of the city's intoxilyzer machines, a certified copy of such a record was admissible into evidence. Callahan v. State, 811 So. 2d 420, 2001 Miss. App. LEXIS 91 (Miss. Ct. App. 2001).

**Public records or reports.**

Lease was properly admitted and authenticated because as a public document under seal, duly recorded in the county board of supervisors' minutes and registered in the chancery court, the lease was both self-authenticated and non-excluded hearsay. Linde Health Care Staffing v. Claiborne County Hosp., 198 So. 3d 318, 2016 Miss. LEXIS 320 (Miss. 2016).

In a capital murder trial, the introduction of the victim's death certificate into evidence was proper under Miss. R. Evid. 803(9) and the authenticity of the death certificate was established by Miss. R. Evid. 902(4). Any failure to redact the time of injury from the certificate was unimportant in relation to everything else the jury considered on the issue in question. Birkhead v. State, 57 So. 3d 1223, 2011 Miss. LEXIS 99 (Miss. 2011).

Defendant's capital murder conviction was appropriate because his right to confrontation was not violated by the admission of the victim's death certificate into evidence. The death certificate was admissible as a public record under Miss. R. Evid. 902(4) and, while the trial court erred in allowing the death certificate into evidence showing the purported time of injury under Miss. R. Evid. 803(9), the error was harmless because witnesses testified that they could not be positive of the time of injury or the time of death. Birkhead v. State, 2009 Miss. LEXIS 73 (Miss. Feb. 19, 2009), op. withdrawn, sub. op., 57 So. 3d 1223, 2011 Miss. LEXIS 99 (Miss. 2011).

Trial court erred in admitting passports of defendant's son and defendant's daughter-in-law because, while the passports themselves were admissible, the notations made by an agent were inadmissible to show arrival and departure times without a certificate. Kea v. State, 986 So. 2d 358, 2008 Miss. App. LEXIS 396 (Miss. Ct. App. 2008).

Trial court did not abuse its discretion by admitting into evidence during sentencing defendant's prior Texas conviction of second-degree robbery because it was relevant for the sentencing jury, consistent with Miss. Unif. Cir. & Cty. R. 10.04(B)(1), to consider; in addition, the documentation of the prior conviction and sentence was properly certified and authenticated according to the Acts of Congress, and therefore was admissible under Miss. R. Evid. 803(8) as an exception to the hearsay rule. Taggart v. State, 957 So. 2d 981, 2007 Miss. LEXIS 330 (Miss. 2007).

State can use a self-authenticating certificate from a prison records custodian to overcome the presumption that an inmate timely filed a notice of appeal. Jewell v. State, 946 So. 2d 810, 2006 Miss. App. LEXIS 688 (Miss. Ct. App. 2006), cert. denied, 947 So. 2d 960, 2007 Miss. LEXIS 56 (Miss. 2007).

In a child support case, medical evidence presented by a father to show that he was unable to work due to a injuries suffered in a childhood accident was not accepted by a chancery court because it constituted hearsay; a third document was not accepted because there was no testimony of a custodian under Miss. R. Evid. 803(6), and the document was not self-authenticated under Miss. R. Evid. 902(11).Davison v. Miss. Dep't of Human Servs., 938 So. 2d 912, 2006 Miss. App. LEXIS 716 (Miss. Ct. App. 2006).

In a grand larceny case, the self-authenticating pen-packs were not inadmissible as the certificate on the pen-packs indicated that the custodian of records swore that the documents were true and correct copies, not that defendant actually committed any act. Accordingly, the "matter asserted" was that the pen-packs were accurate copies of official records, not that defendant was, in fact, a habitual offender, making the pen-packs admissible. Frazier v. State, 907 So. 2d 985, 2005 Miss. App. LEXIS 158 (Miss. Ct. App. 2005).

Public safety department printout of defendant's driving record was admissible under Miss. R. Evid. 803(8) after having been certified as correct by the signature of the custodian of the records, and because the record was under seal, it was self-authenticated pursuant to Miss. R. Evid. 902(1); this printout met requirement of Miss. Code Ann. § 63-11-30(2)(c) for evidence of two prior driving-under-the-influence convictions of defendant, and no prejudice resulted from the admission of the corroborating justice court record in this regard. Doolie v. State, 856 So. 2d 669, 2003 Miss. App. LEXIS 642 (Miss. Ct. App. 2003).

Certified copies of defendant's criminal history were properly admitted to show that defendant charged with murder was a habitual criminal; issues relating to whether the documents adequately identified defendant as the person who had committed the offense went to the weight of the evidence, not its admissibility. Smith v. State, 835 So. 2d 927, 2002 Miss. LEXIS 298 (Miss. 2002).

Facsimile copy of a prior driving-under-the-influence conviction was properly admitted into evidence, despite the fact that the seal was blurred, because it was self-authenticating under Miss. R. Evid. 902(1), and no genuine question was raised as to the authenticity of the original under Miss. R. Evid. 1003. Lewis v. State, 831 So. 2d 553, 2002 Miss. App. LEXIS 672 (Miss. Ct. App. 2002).

Indictment charging defendant with aggravated assault was properly certified where it bore signature of county clerk and clerk attested to its origins, and thus indictment was a proper substitute for the actual judgment of conviction. Blue v. State, 674 So. 2d 1184, 1996 Miss. LEXIS 19 (Miss.), op. withdrawn, sub. op., 674 So. 2d 1184, 1996 Miss. LEXIS 304 (Miss. 1996).

Prior convictions should not have been admitted, where they were merely notarized by a notary public and were thus improperly authenticated. Cox v. State, 586 So. 2d 761, 1991 Miss. LEXIS 588 (Miss. 1991).

**Receipt.**

Trial court did not commit reversible error in admitting a receipt for the rental of a pornographic movie in a sexual battery case because there were sufficient indicia of trustworthiness to show that the receipt was what it purported to be; a police officer obtained the receipt after presenting a properly executed subpoena duces tecum. Seigfried v. State, 869 So. 2d 1040, 2003 Miss. App. LEXIS 958 (Miss. Ct. App. 2003), cert. denied, 870 So. 2d 666, 2004 Miss. LEXIS 352 (Miss. 2004).

**Illustrative cases.**

Trial court did not err in defendant's trial for embezzlement by allowing a warranty manager for a trucking company to testify about the data the manager used to compile a spreadsheet on defendant's repair orders for the company or by admitting electronic payments and truck stop receipts into evidence. The information and data the manager obtained from an electronic payment service system belonged to the trucking company, while the electronic payments and truck stop receipts were properly authenticated by the general manager for the truck stop. Russell v. State, — So. 3d —, 2021 Miss. App. LEXIS 57 (Miss. Ct. App. Feb. 2, 2021), cert. denied, 321 So. 3d 564, 2021 Miss. LEXIS 205 (Miss. 2021).

Trial court did err in defendant's trial for embezzlement by allowing a warranty manager for a trucking company to testify about the data the manager used to compile a spreadsheet on defendant's repair orders for the company or by admitting electronic payments and truck stop receipts into evidence. The information and data the manager obtained from an electronic payment service system belonged to the trucking company, while the electronic payments and truck stop receipts were properly authenticated by the general manager for the truck stop.

Husband's objection to the admission of a wife's counseling records was properly denied because (1) evidence allegedly supporting the husband's claim that the husband did not timely receive a certificate was not part of the appellate record, (2) the husband did not object to admission of the certificate in writing prior to trial, and (3) any error was harmless, as the records were cumulative of the wife's testimony. Johnson v. Johnson, 282 So. 3d 738, 2019 Miss. App. LEXIS 391 (Miss. Ct. App. 2019).

Chancellor erred in finding that the wills were admissible under the rules, as they were not signed and therefore not originals, nor were they duplicates or copies of the originals; furthermore the unsigned wills, which were not certified, did not qualify as self-authenticating evidence. Quinn v. Quinn, 278 So. 3d 1160, 2019 Miss. App. LEXIS 57 (Miss. Ct. App. 2019).

Trial court did not err in refusing to admit into evidence cell phone records from phones allegedly belonging to or used by various individuals involved in the capital murder case as the cell phone records were not authenticated; and the records were not self-authenticating because notice was not given of the intent to offer the records as self-authenticating as required by this rule. Maggett v. State, 230 So. 3d 722, 2016 Miss. App. LEXIS 799 (Miss. Ct. App. 2016), cert. denied, 2017 Miss. LEXIS 505 (Miss. Nov. 16, 2017), cert. denied, 229 So. 3d 709, 2017 Miss. LEXIS 511 (Miss. 2017), cert. denied, 2017 Miss. LEXIS 512 (Miss. Nov. 16, 2017).

Trial court did not abuse its discretion by excluding the telephone records from evidence when offered through a deputy's testimony where the records were hearsay and to have been admitted as records of regularly conducted activity they would have needed a sponsoring witness or to be self-authenticated. Parvin v. State, 212 So. 3d 863, 2016 Miss. App. LEXIS 101 (Miss. Ct. App. 2016), cert. denied, 2017 Miss. LEXIS 95 (Miss. Mar. 9, 2017), cert. denied, — U.S. —, 138 S. Ct. 140, 199 L. Ed. 2d 36, 2017 U.S. LEXIS 5483 (U.S. 2017).

As appellee did not call a custodian of the record of DNA test results to testify, and did not notify appellant under Miss. R. Evid. 902(11)(C)(i) of her intent to offer the DNA results as a self-authenticating business record under Miss. R. Evid. 803(6), the trial court erred in admitting them. Ivy v. Ivy (In re Estate of Ivy), 121 So. 3d 226, 2012 Miss. App. LEXIS 816 (Miss. Ct. App. 2012), cert. denied, 121 So. 3d 918, 2013 Miss. LEXIS 487 (Miss. 2013).

In the client's tort action against the attorney and law firm, regarding authentication of the transcript, certification by the court reporter was sufficient, Miss. R. Evid. 902(8). Baker Donelson Bearman Caldwell & Berkowitz, P.C. v. Seay, 42 So. 3d 474, 2010 Miss. LEXIS 291 (Miss. 2010).

Car dealership's former business manager's affidavit did not present a meritorious defense to the default judgment since the cancellation worksheet was inadmissible hearsay pursuant to Miss. R. Evid. 802; the manager failed to qualify the cancellation worksheet as an exception to the hearsay rule pursuant to Miss. R. Evid. 803(6), or authenticate the worksheet pursuant to Miss. R. Evid. 902; and because the dealership failed to assert a meritorious defense, its motion to set aside default judgment under Miss. R. Civ. P. 60(b)(6) was properly denied. Greater Canton Ford Mercury, Inc. v. Lane, 997 So. 2d 198, 2008 Miss. LEXIS 517 (Miss. 2008).

Husband was properly awarded child custody because it was harmless error to admit a list of prior arrests and charges against the wife's boyfriend that was not properly authenticated since there was other evidence regarding the boyfriend's violent behavior. Weeks v. Weeks (In re Dissolution of Marriage of Weeks), 989 So. 2d 408, 2008 Miss. App. LEXIS 271 (Miss. Ct. App. 2008).

### Rule 903. Subscribing witness's testimony.

A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

**HISTORY: Restyled effective July 1, 2016.**

#### ADVISORY COMMITTEE NOTE

The language of Rule 903 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Under this rule testimony of subscribing witnesses to a will may nonetheless be necessary to authenticate the will. *See* M.C.A. § 91-7-7 and § 91-7-9. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

### Rule 1001. Definitions that apply to this article.

In this article:

(a) A "writing" consists of letters, words, numbers, or their equivalent set down in any form.

(b) A "recording" consists of letters, words, numbers, or their equivalent recorded in any manner.

(c) A "photograph" means a photographic image or its equivalent stored in any form.

(d) An "original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout – or other output readable by sight – if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it.

(e) A "duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

**HISTORY: Amended effective July 1, 1997; restyled effective July 1, 2016.**

#### ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 1997, Rule 1001(3) was amended to correct what was apparently a printing or typographical error by replacing the word "sign" with the correct word, "sight". – So. 2d – (West Miss. Cases).

#### ADVISORY COMMITTEE NOTE

The language of Rule 1001 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. Lower-case lettered subdivisions have replaced numbered paragraphs as first-level formatting. The definitions of "writing" and "recording" – formerly combined in a single definition – now appear in separate subdivisions. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

(a) and (b) *Writings and Recordings.* This provision recognizes that current techniques of recordation are more complex than what we have traditionally defined as "written" or "recorded." To the extent that the best evidence rule is concerned, the rule is expanded to include modem technological methods of recording.

(c) *Photographs.* Photographs are defined to include an assortment of pictures.

(d) *Original.* This rule covers multiple originals, copies which are executed in multiple numbers. A computer printout under the rule is deemed to be an original.

(e) *Duplicate.* Copies which are produced by such highly accurate methods that the possibility of error is improbable are treated as originals pursuant to Rule 1003. Other copies which are subsequently produced manually are outside the definition. *See* FRE 1001, Advisory Committee Note. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

Duplicate.
Photograph properly admitted.

**Duplicate.**

Photocopy of scratch pad sheet was a duplicate, and since opposing party raised no objection to its authenticity it was admissible to the same extent as an original; moreover, because original was destroyed by a party other than the proponent, the copy, even if not considered a duplicate original, would be admissible under M.R.E. 1004(1). Dixie Ins. Co. v. Mooneyhan, 684 So. 2d 574, 1996 Miss. LEXIS 57 (Miss. 1996).

**Photograph properly admitted.**

Photograph of the victim's exhumed body was properly admitted where the trial court conducted a Miss. R. Evid. 403 balancing on the record, and did not abuse its discretion in finding that the photograph possessed probative value, and that such value outweighed any potential prejudice; defendant's argument that the admission of the photograph through the victim's girlfriend was intended to arouse the passions and sympathies of the jury was rejected as the State had attempted to introduce the photograph through a police investigator, to which defendant had objected, and the girlfriend was a proper witness to identify the distinguishing tattoos depicted in the photograph. Roy v. State, 878 So. 2d 84, 2003 Miss. App. LEXIS 729 (Miss. Ct. App. 2003), cert. denied, 878 So. 2d 67, 2004 Miss. LEXIS 911 (Miss. 2004).

## Rule 1002. Requirement of the original.

An original writing, recording, or photograph is required in order to prove its content unless otherwise provided by law.

**HISTORY: Restyled effective July 1, 2016.**

## ADVISORY COMMITTEE NOTE

The language of Rule 1002 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

This rule is a statement of the so-called best evidence rule. The best evidence rule only applies to writings, recordings, or photographs, as defined in Rule 1001, when a party seeks to prove their contents. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

Recording.
Writing.
Illustrative cases.

**Recording.**

Trial court did not abuse its discretion in allowing the State to play the 911 tape recording of the victim's call to police because it followed the best-evidence rule, rather than deferring to the victim's testimony; the 911 tape was the original recording from the call because the assistant chief of the police department properly authenticated the recording. Jordan v. State, 220 So. 3d 980, 2016 Miss. App. LEXIS 764 (Miss. Ct. App. 2016), cert. denied, 220 So. 3d 978, 2017 Miss. LEXIS 276 (Miss. 2017).

There was no error when the court permitted the playing of an "enhanced" copy of an audiotape made during a drug transaction where a party to the transaction testified that it reflected an accurate recording of the conversation had between himself and the defendant, with the only alteration being the reduction of inconsequential background noise. Cook v. State, 728 So. 2d 117, 1998 Miss. App. LEXIS 1036 (Miss. Ct. App. 1998).

**Writing.**

Trial court incorrectly applied best evidence rule in excluding witness' testimony as to amount of his oral timber bid after his memory had been refreshed with his written bid; property owner was not seeking to introduce contents of the written memo evidencing the bid, but in essence was seeking to have witness testify to the oral agreement, and the best evidence rule was not a basis for exclusion. Kinard v. Morgan, 679 So. 2d 623, 1996 Miss. LEXIS 422 (Miss. 1996).

**Illustrative cases.**

Chancellor erred in finding that the wills were admissible under the rules, as they were not signed and therefore not originals, nor were they duplicates or copies of the originals, plus the unsigned wills, which were not certified, did not qualify as self-authenticating evidence; the error was harmless based on the testimony given and the fact that the wills were properly authenticated. Quinn v. Quinn, 278 So. 3d 1160, 2019 Miss. App. LEXIS 57 (Miss. Ct. App. 2019).

Although the authenticity of contracts was disputed when an alleged buyer of a property introduced duplicates of handwritten documents into evidence, in support of a complaint for specific performance, and claimed that the buyer had the originals, the chancellor did not err in admitting the documents into evidence and in determining the authenticity of the signatures at trial. The chancellor, after hearing all the evidence, also did not err in accepting the buyer's testimony as the most credible and in admitting the duplicates into evidence. Frisby v. Warden, 269 So. 3d 371, 2018 Miss. App. LEXIS 220 (Miss. Ct. App.), cert. denied, 256 So. 3d 595, 2018 Miss. LEXIS 475 (Miss. 2018).

Admission of testimony about lost text messages and photos did not violate the best-evidence rule, as defendant's attempt to fix the victim's phone caused the messages and photos to be deleted from it, defendant failed to provide the proper access code for his phone to access messages and photos, and defendant, the victim, and a detective all testified as to the existence of the photo of the victim's penis. Strickland v. State, 220 So. 3d 1027, 2016 Miss. App. LEXIS 453 (Miss. Ct. App. 2016), cert. denied, 220 So. 3d 980, 2017 Miss. LEXIS 274 (Miss. 2017).

Best-evidence rule did not exclude an officer's testimony relating to the interview with defendant because he participated in the interview and had firsthand knowledge of the facts, and, if defendant had wished to use the video as substantive evidence of his own or for impeachment, he was free to do so; however, the existence of the video in no way operated to exclude the direct testimony of the officer about the interview. Moss v. State, 190 So. 3d 9, 2015 Miss. App. LEXIS 645 (Miss. Ct. App. 2015).

To convict a defendant of trafficking in stolen firearms, the State did not need to enter the actual firearms into evidence as (1) there was no best evidence rule with regard to physical evidence that was not writings, recordings, or photographs; (2) requiring the State to offer actual firearms into evidence would impose a high burden on prosecutors and the courts in cases where there were large quantities of physical evidence; and (3) the State satisfied the relevancy and authentication requirements permitting the photographs of the firearms to be introduced into evidence. Riley v. State, 1 So. 3d 877, 2008 Miss. App. LEXIS 378 (Miss. Ct. App. 2008), cert. denied, 999 So. 2d 1280, 2009 Miss. LEXIS 18 (Miss. 2009).

In a child custody modification proceeding, a private investigator's DVD was properly admitted because it satisfied the best evidence rule since there was no evidence in the record that the DVD was not the original and complete recording of the surveillance of the ex-wife. Pruett v. Prinz, 979 So. 2d 745, 2008 Miss. App. LEXIS 231 (Miss. Ct. App. 2008).

A chancellor erred in accepting a husband's check register as proof of payment of any installments of child support not conceded by the wife where it was uncontroverted that actual copies of the husband's cancelled checks were available from his bank, but the husband testified that he made no effort to obtain such copies because of his understanding that the cost of obtaining such copies would be prohibitive, while offering no evidence to that effect other than his own assertion and giving no clarification of what he considered to be a "prohibitive" cost. Dorr v. Dorr, 797 So. 2d 1008, 2001 Miss. App. LEXIS 141 (Miss. Ct. App. 2001).

**Cited.** Willis v. State, 911 So. 2d 947, 2005 Miss. LEXIS 608 (Miss. 2005).

## Rule 1003. Admissibility of duplicates.

A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

**HISTORY: Restyled effective July 1, 2016.**

### ADVISORY COMMITTEE NOTE

The language of Rule 1003 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

This rule is a change from existing Mississippi law. The Mississippi practice has been to exclude duplicates except in cases where the original was unavailable and there was a legitimate basis for the unavailability. *See Turner v. Thomas,* 77 Miss 864, 28 So. 803 (1900). A body of case law has developed to define "unavailability" and legitimate reasons for it. *See* Ellis and Williams, *Mississippi Evidence,* § 11-3. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

Authenticity.
E-mails.
Videotapes.

**Authenticity.**

Chancellor erred in finding that the wills were admissible under the rules, as they were not signed and therefore not originals, nor were they duplicates or copies of the originals, plus the unsigned wills, which were not certified, did not qualify as self-authenticating evidence; the error was harmless based on the testimony given and the fact that the wills were properly authenticated. Quinn v. Quinn, 278 So. 3d 1160, 2019 Miss. App. LEXIS 57 (Miss. Ct. App. 2019).

Although the authenticity of contracts was disputed when an alleged buyer of a property introduced duplicates of handwritten documents into evidence, in support of a complaint for specific performance, and claimed that the buyer had the originals, the chancellor did not err in admitting the documents into evidence and in determining the authenticity of the signatures at trial. The chancellor, after hearing all the evidence, also did not err in accepting the buyer's testimony as the most credible and in admitting the duplicates into evidence. Frisby v. Warden, 269 So. 3d 371, 2018 Miss. App. LEXIS 220 (Miss. Ct. App.), cert. denied, 256 So. 3d 595, 2018 Miss. LEXIS 475 (Miss. 2018).

Chancery court correctly declined to exercise its equitable powers to determine that a partial copy of a reconveyance deed without an acknowledgment could be substituted for the original because the party seeking reconveyance had transferred his assets in order to conceal them from Medicaid and thus had unclean hands. Ellzey v. James, 970 So. 2d 193, 2007 Miss. App. LEXIS 764 (Miss. Ct. App. 2007).

In defendant's murder case, the trial court did not err in admitting the letter defendant allegedly wrote to a witness while in prison because defendant acknowledged that he wrote the letter, the letter presented in court was an exact duplicate of the original which was in his attorney's possession during trial, and the witness testified that the jail trustee specifically noted that the letter came from defendant. Brown v. State, 965 So. 2d 1023, 2007 Miss. LEXIS 430 (Miss. 2007).

Facsimile copy of a prior driving-under-the-influence conviction was properly admitted into evidence, despite the fact that the seal was blurred, because it was self-authenticating under Miss. R. Evid. 902(1), and no genuine question was raised as to the authenticity of the original under Miss. R. Evid. 1003. Lewis v. State, 831 So. 2d 553, 2002 Miss. App. LEXIS 672 (Miss. Ct. App. 2002).

Photocopy of scratch pad sheet was a duplicate, and since opposing party raised no objection to its authenticity it was admissible to the same extent as an original; moreover, because original was destroyed by a party other than the proponent, the copy, even if not considered a duplicate original, would be admissible under M.R.E. 1004(1). Dixie Ins. Co. v. Mooneyhan, 684 So. 2d 574, 1996 Miss. LEXIS 57 (Miss. 1996).

**E-mails.**

Trial judge properly determined that the e-mails and letters were admissible and had been adequately authenticated under Miss. R. Evid. 1001 and Miss. R. Evid. 1003; the trial judge found that the witness had vouched for the accuracy of the e-mail printouts and the document that was hand-delivered to the witness, and the officer testified that defendant admitted that he sent the e-mails to witness as well. Kearley v. State, 843 So. 2d 66, 2002 Miss. App. LEXIS 560 (Miss. Ct. App. 2002), cert. denied, 842 So. 2d 578, 2003 Miss. App. LEXIS 410 (Miss. Ct. App. 2003).

**Videotapes.**

Appellate court held that the admission of a videotape depicting the drug transaction was proper even though it was a copy, as the best evidence rule under Miss. R. Evid. 1003 did not preclude the use a copy of the tape. Griffin v. State, 918 So. 2d 882, 2006 Miss. App. LEXIS 12 (Miss. Ct. App. 2006).

Trial court did not err in admitting a videotape that was a copy of the small tape used to film the drug sale; the confidential informant involved in the sale testified that what was seen on the tape accurately depicted what occurred at the sale. Seals v. State, 869 So. 2d 429, 2004 Miss. App. LEXIS 248 (Miss. Ct. App. 2004).

A copy of a videotape of a drug transaction was properly introduced into evidence where the prosecution explained that the original was in their possession, but that taping of other drug transactions was contained on the original and that, therefore, the copy of only the defendant's transaction was made from the original and offered into evidence. Trull v. State, 811 So. 2d 243, 2000 Miss. App. LEXIS 430 (Miss. Ct. App. 2000).

## Rule 1004. Admissibility of other evidence of content.

An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:

(a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;

(b) an original cannot be obtained by any available judicial process;

(c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or

(d) the writing, recording, or photograph is not closely related to a controlling issue.

**HISTORY: Restyled effective July 1, 2016.**

### ADVISORY COMMITTEE NOTE

The language of Rule 1004 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. Lower-case lettered subdivisions have replaced numbered paragraphs as first-level formatting. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Secondary evidence is admissible in lieu of the original in certain instances. Subdivisions (a), (b), and (c) conform to existing Mississippi case law. Subdivision (d) dispenses with the best evidence rule in collateral matters. The rule follows the "English Rule" which holds that there are no degrees of secondary evidence. Secondary evidence is not ranked, and, thus, no principle of preference is established. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

### JUDICIAL DECISIONS

#### ANALYSIS

Originals lost or destroyed.
Illustrative cases.

**Originals lost or destroyed.**

Photocopy of scratch pad sheet was a duplicate, and since opposing party raised no objection to its authenticity it was admissible to the same extent as an original; moreover, because original was destroyed by a party other than the proponent, the copy, even if not considered a duplicate original, would be admissible under M.R.E. 1004(1). Dixie Ins. Co. v.

Mooneyhan, 684 So. 2d 574, 1996 Miss. LEXIS 57 (Miss. 1996).

**Illustrative cases.**

Although the authenticity of contracts was disputed when an alleged buyer of a property introduced duplicates of handwritten documents into evidence, in support of a complaint for specific performance, and claimed that the buyer had the originals, the chancellor did not err in admitting the documents into evidence and in determining the authenticity of the signatures at trial. The chancellor, after hearing all the evidence, also did not err in accepting the buyer's testimony as the most credible and in admitting the duplicates into evidence. Frisby v. Warden, 269 So. 3d 371, 2018 Miss. App. LEXIS 220 (Miss. Ct. App.), cert. denied, 256 So. 3d 595, 2018 Miss. LEXIS 475 (Miss. 2018).

### Rule 1005. Copies of public records to prove content.

The proponent may use a copy to prove the content of an official record – or of a document that was recorded or filed in a public office as authorized by law – if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

**HISTORY: Restyled effective July 1, 2016.**

#### ADVISORY COMMITTEE NOTE

The language of Rule 1005 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

This rule is similar to Mississippi practice. It recognizes that it is improbable that one could utilize an original public record in court. Therefore, certified copies are admissible, as well as oral testimony of a witness who has compared the original with the copy. Rule 1005 differs from 1004 by recognizing "degrees" of secondary evidence in regard to the admission of public records. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

#### JUDICIAL DECISIONS

**Criminal convictions.**

Abstracts of court records, when properly certified, are clearly allowed to prove prior convictions. McIlwain v. State, 700 So. 2d 586, 1997 Miss. LEXIS 310 (Miss. 1997).

### Rule 1006. Summaries to prove content.

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

**HISTORY: Restyled effective July 1, 2016.**

## ADVISORY COMMITTEE NOTE

The language of Rule 1006 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

This rule represents a change in Mississippi practice. Rule 1006 refers to voluminous writings, as well as recordings and photographs. Under the rule, a summary of the voluminous material is sufficient as admissible evidence. The underlying material need not be introduced simultaneously into evidence as had been the practice in Mississippi. *See Crawford v. State,* 162 Miss. 158, 138 So. 589 (1932). This Mississippi court has treated the summaries as demonstrative tools rather than as evidence. Rule 1006 provides that the summaries are clearly admissible as evidence, but requires that the underlying material be made available to the other parties for their examination. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

Business transactions.
Exclusion.
Inclusion.
Stipulations.

**Business transactions.**

In a prosecution for embezzlement, summary charts were properly admitted into evidence where the charts reflected some of the transactions at issue, the maker of the charts explained each chart in her testimony indicating that the charts reflected only some of the transactions, and the jury was provided the bank statements and checks that were reflected in the charts. Gulley v. State, 779 So. 2d 1140, 2001 Miss. App. LEXIS 6 (Miss. Ct. App. 2001).

Summary of retail store's business transactions was properly admitted at trial for embezzlement, where underlying bank deposits, cash register tapes and daily accounting sheets were prepared and utilized in the regular conduct of business, and summary was properly authenticated by store owner who prepared it with help of his bookkeeper, and owner was a witness with knowledge that the summary was what it was claimed to be. Wells v. State, 604 So. 2d 271, 1992 Miss. LEXIS 379 (Miss. 1992).

**Exclusion.**

In an injured party's negligence suit against a driver regarding an automobile accident, it was not an abuse of discretion to refuse to admit into evidence a summary of entries from the injured party's business time book, because the injured party's medical records were admitted into evidence and these items also detailed the times the injured party missed work for doctor visits. Dobbins v. Vann, 981 So. 2d 1041, 2008 Miss. App. LEXIS 273 (Miss. Ct. App. 2008).

**Inclusion.**

Chancellor did not abuse the chancellor's discretion by allowing a summary of one spouse's bank records into evidence in a divorce proceeding. Gardner v. Gardner, 130 So. 3d 1162, 2013 Miss. App. LEXIS 624 (Miss. Ct. App. 2013).

Defendant could not object to the introduction of a document prepared by a police investigator purporting to be a list of the incoming and outgoing phone calls from defendant's cell phone based on the summary allegedly being inaccurate because defense counsel could have reviewed the cell phone's call log at any time prior to trial and if there was any inconsistency between the actual call log and the investigator's summary, defense counsel could have cross-examined the investigator regarding those inconsistencies. Esco v. State, 9 So. 3d 1156, 2008 Miss. App. LEXIS 592 (Miss. Ct. App. 2008), cert. denied, 12 So. 3d 531, 2009 Miss. LEXIS 228 (Miss. 2009).

**Stipulations.**

Where objections were raised about a compilation of calls to police for which there were no underlying reports of the calls, a stipulation was entered on the record and the effect of this stipulation was to remove the purpose of Rule 1006's requirement of providing the documents supporting a summary, to limit the impact of the compilations, and to inform the jury fully of the relevance of the exhibit. American Nat'l Ins. Co. v. Hogue, 749 So. 2d 1254, 2000 Miss. App. LEXIS 15 (Miss. Ct. App. 2000).

### RESEARCH REFERENCES

**ALR.**

Admissibility of summaries or charts of writings, recordings, or photographs under Rule 1006 of Federal Rules of Evidence. 198 A.L.R. Fed. 427.

## Rule 1007. Testimony or statement of a party to prove content.

The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

**HISTORY: Restyled effective July 1, 2016.**

### ADVISORY COMMITTEE NOTE

The language of Rule 1007 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The original of a writing, recording, or photograph is not required to be produced if the party against whom it is offered testifies about, or admits in writing, the contents of such original. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## Rule 1008. Functions of the court and jury.

Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines – in accordance with Rule 104(b) – any issue about whether:

(a) an asserted writing, recording, or photograph ever existed;
(b) another one produced at the trial or hearing is the original; or
(c) other evidence of content accurately reflects the content.

**HISTORY: Restyled effective July 1, 2016.**

### ADVISORY COMMITTEE NOTE

The language of Rule 1008 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Most preliminary questions of fact regarding the best evidence rule will be decided by the judge pursuant to Rule

104. For example, the judge must decide whether the loss of the original has been established. On the other hand, questions which go to the merits of the case are properly jury questions, subject, however, to the control vested in the trial judge by Rule 104(b), *supra.*("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

# ARTICLE XI. MISCELLANEOUS RULES

## Rule 1101. Applicability of the rules.

(a) *To Courts and proceedings.* — These rules apply to all cases and proceedings in Mississippi courts, except as provided in subdivision (b).

(b) *Exceptions.* — These rules – except for those on privilege – do not apply to the following:

(1) the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility;
(2) grand-jury proceedings;
(3) contempt proceedings in which the court may act summarily; and
(4) these miscellaneous proceedings:
- extradition or rendition;
- issuing an arrest warrant, criminal summons, or search warrant;
- probable cause hearings in criminal cases and youth court cases;
- sentencing;
- disposition hearings;
- granting or revoking probation; and
- considering whether to release on bail or otherwise.

**HISTORY: Restyled effective July 1, 2016.**

### ADVISORY COMMITTEE NOTE

The language of Rule 1101 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. Rule 1 101(b) has been restructured slightly, reordering paragraphs (3) and (4). These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Subdivision (a) provides for the applicability of the rules in all actions in courts in the state with enumerated exceptions which are set forth in Subdivision (b). ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

### JUDICIAL DECISIONS

**Applicability.**

Specific rules have been promulgated by the supreme court to govern youth-court proceedings, and where those specific provisions depart from the Mississippi Rules of Evidence, the specific youth-court rule applies; but where no specific youth-court rule supersedes the Mississippi Rules of Evidence, the Rules apply with full force and effect, and neither the Rules of Evidence, nor the Uniform Youth Court Rules allow ad hoc amendment by trial judges. D.T. v. Hinds Cnty. Youth Court (In re J.T.), 188 So. 3d 1192, 2016 Miss. LEXIS 165 (Miss. 2016).

Hearsay and opinion evidence may be

considered in disposition hearings, the youth-court equivalent of adult sentencing hearings; this comports with subsection (b), which includes sentencing and disposition hearings in its exceptions to the Mississippi Evidence Rules' applicability. D.T. v. Hinds Cnty. Youth Court (In re J.T.), 188 So. 3d 1192, 2016 Miss. LEXIS 165 (Miss. 2016).

To the extent that the supreme court or the court of appeals has held that the Mississippi Rules of Evidence have some diminished force in youth-court adjudications, the supreme court overrules the cases. When the youth court adjudicates the ultimate issue of abuse, the Rules must be given full effect. D.T. v. Hinds Cnty. Youth Court (In re J.T.), 188 So. 3d 1192, 2016 Miss. LEXIS 165 (Miss. 2016).

Youth court erred in disregarding the Mississippi Rules of Evidence because subsection (a) applied the Rules to all proceedings unless otherwise provided, and subsection (b) did not except youth-court adjudication hearings; both the rules of court and the Mississippi Code dictate that the Mississippi Rules of Evidence apply to abuse adjudications in youth court. D.T. v. Hinds Cnty. Youth Court (In re J.T.), 188 So. 3d 1192, 2016 Miss. LEXIS 165 (Miss. 2016).

As a trial court, on remand, failed to give defendant a meaningful opportunity to present evidence of prejudice with respect to the Barker factors for his speedy trial claim, arising from a forfeiture action initiated by the county, the remand order was not complied with and the evidence could not be properly weighed. One 1970 Mercury Cougar v. Tunica County, 115 So. 3d 792, 2013 Miss. LEXIS 349 (Miss. 2013).

National Crime Information Center report on defendant was admissible during sentencing proceedings as the rules of evidence were inapplicable during sentencing hearings. Armstrong v. State, 828 So. 2d 239, 2002 Miss. App. LEXIS 523 (Miss. Ct. App. 2002).

## Rule 1102. Title.

These rules are the Mississippi Rules of Evidence and may be cited as MRE.

**HISTORY: Restyled effective July 1, 2016.**

### ADVISORY COMMITTEE NOTE

The language of Rule 1102 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. As with other recent sets of procedural rules, the suggested citation form omits the use of periods; thus "MRE" replaces "M.R.E." These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## Rule 1103. Inconsistent rules repealed.

Any evidentiary rule in a statute, court decision, or court rule that is inconsistent with the Mississippi Rules of Evidence is hereby repealed.

**HISTORY: Restyled effective July 1, 2016.**

### ADVISORY COMMITTEE NOTE

The language of Rule 1103 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility. ("Advisory Committee Note" substituted for "Comment," effective June 16, 2016; amended effective July 1, 2016, to note restyling.)

## JUDICIAL DECISIONS

### ANALYSIS

Blood alcohol test.
Harmless error.

**Blood alcohol test.**
Trial court did not err in admitting into evidence results of blood alcohol test performed on defendant without his consent while he was unconscious; statutory exclusion was inconsistent with and required to yield to Mississippi Rules of Evidence, since it attempted to prohibit use of evidence which would otherwise be admissible under evidentiary rules. Whitehurst v. State, 540 So. 2d 1319, 1989 Miss. LEXIS 136 (Miss. 1989).

**Harmless error.**
Although it was arguable that the statute making treating family therapists' testimony inadmissible in family proceedings was repealed by Miss. R. Evid. 1103 because it conflicted with Miss. R. Evid. 601, any error was harmless because the excluded evidence in question was cumulative of other evidence provided by expert witnesses. Mabus v. Mabus, 890 So. 2d 806, 2003 Miss. LEXIS 62 (Miss. 2003).

## RESEARCH REFERENCES

**Law Reviews.**
McCormick, The Repealer: Conflicts in Evidence Created by Misapplication of Mississippi Rule of Evidence 1103. 67 Miss. L. J. 547, Winter, 1997.

# ORDER ADOPTING THE MISSISSIPPI RULES OF EVIDENCE

SUPREME COURT OF MISSISSIPPI

On May 15, 1985, this Court entered an Order effecting preliminary actions with regard to the adoption of The Mississippi Rules of Evidence. That Order was published in the Southern Reporter, Mississippi Edition, on June 6, 1985, and provided for a ninety (90) day period of time within which interested persons could submit to the Court and to the Advisory Committee On Rules views with respect to The Mississippi Rules of Evidence, or any of them. That ninety (90) day period of time has now elapsed, and the Court has received from a number of interested persons written suggestions as well as other less formal suggestions.

The Court now having heard and considered in their entirety The Mississippi Rules of Evidence, and each of them, and having received the comments and suggestions of interested persons and having carefully and deliberately considered the same, and being of the opinion that the fair and efficient administration of justice in the courts of this state will be promoted hereby, it is

ORDERED:

That The Mississippi Rules of Evidence in the form attached hereto shall be, and the same hereby are adopted as rules of evidence governing proceedings in the courts of the State of Mississippi to the extent and with the exceptions provided in said rules;

that the comments appended to each rule in The Mississippi Rules of Evidence shall be, and they hereby are, adopted as the Official Comments of the Court and these Comments shall be used by all courts as authoritative guides to the interpretation of these Rules;

that The Mississippi Rules of Evidence shall govern all proceedings in any action had on or after January 1, 1986;

that the Clerk of this Court shall be, and [s]he hereby is, authorized and directed to spread this order at large on the minutes of the Court and to forward a certified copy of this order and the rules attached hereto to West Publishing Company for publication as soon as is reasonably practicable in a forthcoming edition of the advance sheets of the Southern Reporter, Mississippi cases, the official reporter of decisions of this Court;

that the Advisory Committee on Rules and each member thereof shall be, and they hereby are, commended for their outstanding, competent and diligent work in preparing and submitting to the Court The Mississippi Rules of Evidence together with the official comments thereto;

that the Court expresses its appreciation to the Mississippi State Bar and the Mississippi Trial Lawyers Association and the members of each such organization for having filed with the Court petitions for the adoption of proposed Rules of Evidence and their having furnished to the Court insightful comments and critique and other assistance in the development of The Mississippi Rules of Evidence.

ORDERED this 24th day of September, 1985.

FOR THE COURT

Neville Patterson

Chief Justice

## ORDER SUBSTITUTING ADVISORY COMMITTEE NOTES FOR COMMENTS

Effective June 16, 2016
SUPREME COURT OF MISSISSIPPI

This matter is now before the en banc Court on the Court's own motion.

When the Court adopted the Mississippi Rules of Evidence effective January 1, 1986, it also adopted the comments appended to each rule as the "Official Comments of the Court." Those comments were to serve as "authoritative guides" for interpreting the Mississippi Rules of Evidence.

After due consideration, we find that the comments should not represent the "Official Comments of the Court" or serve as "authoritative guides" for interpreting the Mississippi Rules of Evidence. Instead, we find that the comments should be renamed Advisory Committee Notes and represent commentary from the Advisory Committee on Rules, whose members represent the bench, bar, and the law schools of this state.

The Advisory Committee has agreed, for now, to adopt the current comments as its Advisory Committee Notes. In due time, the Advisory Committee will draft and submit new, revised notes for publication.

IT IS THEREFORE ORDERED that the title "Advisory Committee Note" must be substituted for the title "Comment" for each comment to the Mississippi Rules of Evidence.

IT IS FURTHER ORDERED that the Advisory Committee Notes represent commentary from the Advisory Committee and are neither the "Official Comments of the Court" nor "authoritative guides" for interpreting the Mississippi Rules of Evidence.

IT IS FURTHER ORDERED that this order is effective upon the date of entry.

SO ORDERED, this the 13th day of June, 2016.

MICHAEL K. RANDOLPH,

PRESIDING JUSTICE

FOR THE COURT

ALL JUSTICES AGREE.

## ORDER RESTYLING THE MISSISSIPPI RULES OF EVIDENCE

Effective July 1, 2016
SUPREME COURT OF MISSISSIPPI

Now before the en banc Court is the Motion to Restyle the Mississippi Rules of Evidence filed by the Advisory Committee on Rules. A letter motion filed by the Committee is also before us.

In 2011, the Supreme Court of the United States approved amendments to restyle the Federal Rules of Evidence. The purpose of the restyle was to make the rules clearer and easier to use, without changing substantive meaning. The restyled Federal Rules of Evidence became effective December 1, 2011.

In late 2012, the Committee began restyling the Mississippi Rules of Evidence consistent with the restyled Federal Rules of Evidence. The Committee completed the restyling in early 2016, and on May 19, 2016, it moved the Court to adopt its proposed restyled Mississippi Rules of Evidence. The Court expresses its sincere appreciation for the Committee's commitment, diligence, and hard work.

The Committee's Motion to Restyle the Mississippi Rules of Evidence was published for comment on May 23, 2016. Rule 27(f) of the Mississippi Rules of Appellate Procedure prohibits this Court from taking any action on a proposal for 30 days once the proposal has been published for comment. After due consideration, we find that that prohibition should be suspended. M.R.A.P. 2(c).

Having carefully considered the motion and its attachments, we find that the Committee's restyled Mississippi Rules of Evidence will benefit the bench and bar, and promote the fair and efficient administration of justice. We thus find that the restyled rules should be adopted with the following revisions.

First, on June 16, 2016, the Court entered an order substituting the title "Advisory Committee Note" for the title "Comment" for each comment to the Mississippi Rules of Evidence. As a result, we find that the restyled Mississippi Rules of Evidence should incorporate that change.

Second, on May 26, 2016 – after the Committee had filed its Motion to Restyle the Mississippi Rules of Evidence – the Court entered an order amending Rule 103 of the Mississippi Rules of Evidence. As a result, the Committee has filed a letter motion to amend its restyling of Rule 103 to incorporate the May 26 amendment and to enlarge the accompanying Advisory Committee Note. We find that the letter motion should be granted.

IT IS THEREFORE ORDERED that the Advisory Committee on Rules' Motion to Restyle the Mississippi Rules of Evidence and letter motion are granted. Effective July 1, 2016, the Mississippi Rules of Evidence will be restyled as set forth in Exhibit A.

IT IS FURTHER ORDERED that the Clerk of this Court must spread this order upon the minutes of the Court and must forward a certified copy to West Publishing Company for publication as soon as practical in the advance sheets of Southern Reporter, Third Series (Mississippi Edition), and in the next edition of the Mississippi Rules of Court.

SO ORDERED, this the 16th day of June, 2016.

JOSIAH DENNIS COLEMAN, JUSTICE

FOR THE COURT

TO GRANT BOTH MOTIONS: WALLER, C.J., DICKINSON, P.J., LAMAR,

KITCHENS, KING, COLEMAN, MAXWELL AND BEAM, JJ.

RANDOLPH, P.J., NOT PARTICIPATING.

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